APPEAL NO. 94039
FILED FEBRUARY 9, 1994

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (formerly V.A.C.S., Article 8308-1.01 *et seq*.) (1909 Act). A contested case hearing was held in (City), Texas on December 9, 1993, with (Hearing Officer) presiding. The hearing officer determined that the appellant, hereinafter claimant, was not injured in the course and scope of her employment on (date of injury); that she did not report an on-the-job injury to her employer within 30 days of (date of injury); that she did not file a notice of claim with the Texas Workers' Compensation Commission (Commission) within one year of (date of injury), nor did she have good cause for failure to timely file such claim; and that the claimant does not have disability. The claimant appeals, pointing out evidence in the record which supports her position. She also asks for an extension of time in which to secure an attorney and to allow her to provide a statement from a witness; she appeals the exclusion of such statement by the hearing officer. By three additional filings, the claimant attaches correspondence and records, and she contends that the respondent, hereinafter carrier, failed to introduce into evidence claimant's complete file from the Texas Employment Commission (TEC). In its response the carrier objects to claimant's request for an extension of time, and it contends that the hearing officer's decision is supported by the evidence.

The claimant's request for further time to assert her appeal is denied, as the Appeals Panel lacks authority to grant such extension. Texas Workers' Compensation Commission Appeal No. 91070, decided December 19, 1991. This is not changed by the fact that claimant seeks additional time in which to secure an attorney, where the record below shows claimant was informed by the hearing officer of her right to legal representation. In addition, claimant's letter which was postmarked January 18, 1994, and date stamped as received by the Commission on January 20th, is not timely as an appeal under the statute and rules of the Commission and will not be considered. *See* Section 410.202(a); Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 143.3(a)(3) (Rule 143.3.(a)(3));Texas Workers' Compensation Commission Appeal No. 92036, decided March 11, 1992. In addition, to the extent that any of claimant's filings contain new information which was not offered into evidence at the contested case hearing, such will not be considered for the first time on appeal. Texas Workers' Compensation Commission Appeal No. 91132, decided February 14, 1992.

DECISION

We affirm the decision of the hearing officer.

The claimant had been employed as an insurance claims examiner with (employer), a job which required her to perform data entry work on a computer. In April of 1992 she was given a temporary assignment to process claims at a (temporary employer) in (State); the agreement she had with employer was that she and her coworker, (Ms. B), would be allowed to return home to (City) for a long weekend every three weeks. It was claimant's

testimony that in late April she began having problems with her neck, shoulders, and arms, and that she called her employer and requested a rotation home so she could see a doctor. The claimant said she talked to (Ms. L) and (Ms. M) and told them she could not work overtime because of the pain; she also said her fiance, who was in Dallas at the time, telephoned employer and left messages concerning the problems claimant was having.

On (date of injury), claimant returned to (City) and was seen at the (Hospital), because she said she was aware she had not purchased health insurance coverage with her employer. Records from the (Hospital) show that claimant presented with right neck pain and shoulder to arm pain and that her job involved data entry. The impression was muscle strain, although overuse versus malingering and depression were questioned; the form noted that "Pt uses R arm/hand normally while gesticulating to emphasize the pain & its severity." However, the (Hospital) doctor prescribed medication and referred the claimant for a neurology consult.

Claimant said she called Ms. M to say she had seen a doctor and gotten medication, and that Ms. M encouraged her to return to her work assignment, which was completed May 28th. After that, claimant said, Ms. M suggested claimant take time off work to rest. The claimant said in the ensuing months she went to school and collected unemployment benefits. In July or August of 1992 she said employer laid her off due to lack of work.

The claimant next saw a doctor in January of 1993. On January 5th and 6th, (Dr. E) noted claimant's bilateral wrist pain, as well as hypertension; he also stated that "radiographic C-Spine did not reveal any fractures or dislocations, bony architecture appears to be within normal limits, no lytic lesions were noted, essentially negative C-Spine, there is however noted to be some cervical straightening; remainder of physical exam was noncontributory." In a letter dated January 6th, Dr. E wrote the Commission that due to claimant's high blood pressure "and somatic dysfunction in the cervical, thoracic area of the spine, any type of work causing her to lean forward or use her hands (i.e. typing) would exacerbate her condition."

The claimant said she started working again (although not for employer) in April of 1993, explaining that she had a neck problem but could do short term data entry assignments. When she continued to have physical problems, she went to see (Dr. M). On May 24, 1993, Dr. M summarized claimant's examination and diagnosed neuralgia, neuritis, and radiculitis and cervicobrachial syndrome. However, claimant said she could not pursue treatment with Dr. M because medical benefits were denied. On December 7, 1993, Dr. M wrote that the (Hospital) doctor's evaluation appeared to dispute the claimant's complaints, despite the fact that that doctor prescribed pain medication, recommended referral to a neurologist, and diagnosed muscle strain which, Dr. M said, was "confusing at best."

In March of 1993 the claimant said she called the Commission and was told that employer had workers' compensation insurance; she indicated that the employer had told

her she was not covered. The claimant said she completed and mailed to the Commission a claim form, but that when she called back in April she was told it had not been received so she had to re-send it. An Employee's Notice of Injury or Occupational Disease and Claim for Compensation (Form TWCC-41), dated May 12, 1993, was introduced into evidence by the claimant; it gave a date of injury as "_____ to _____" The claimant said she first noticed physical symptoms during her first work assignment for employer, which was January to October 1991.

Also introduced into evidence as a carrier's exhibit were claimant's time cards for the period April 13 to May 28, 1993. Claimant said, however, that the time cards show her missing some time from work or not working overtime as her employer wished her to.

Ms. L, employer's branch manager, denied that claimant asked to return to (City) for medical treatment or told her about an on-the-job injury; she said the (day of injury) trip was part of claimant's regular rotation. She also said she had no indication until May of 1993 that claimant was alleging a work-related injury. She remembered speaking with claimant and her fiance, but said the conversations concerned claimant's problems with her coworker, Ms. B.

In a written statement Ms. M also stated she did not know of claimant's workers' compensation claim until carrier contacted the employer in May, 1993. She said that while claimant was working for employer she did not inform her directly or indirectly of an injury; that she had spoken with claimant's fiance, but he had asked only why employer was not placing claimant on other assignments. Likewise, written statements of Ms. B and of (Mr. H), who was employer's contact person at the (Temporary Employer) store in (State), said those individuals had had no knowledge that claimant had suffered a job related injury.

Documents from the TEC indicate that claimant was able to work and available for work, and show that she applied for jobs at several places, including employer. The claimant contended that TEC was aware that she had work limitations.

In her appeal the claimant points to certain evidence in the record which she says supports her position that she suffered an injury and timely reported it; she also states that the preponderance of the evidence does not support the employer's position. We would note at the outset that the burden of proof on all issues in this case was upon the claimant. *See* Texas Workers' Compensation Commission Appeal No. 92044, decided March 23, 1992 (*citing* Traders & General Insurance Co. v. Stubbs, 91 S.W.2d 407 (Tex. Civ. App.-Texarkana 1936, writ ref'd), wherein the court stated the "well-settled proposition of law . . . that the burden of proof is on the compensation claimant to prove his case in all its parts by a preponderance of the evidence.").

Clearly, this was a case that turned on the credibility of the evidence. The 1989 Act provides that the hearing officer is the sole judge of the relevance and materiality of the evidence and of its weight and credibility. Section 410.165(a). As finder of fact, the hearing officer is entitled to believe all or part or none of the testimony of any witness.

Taylor v. Lewis, 553 S.W.2d 153 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.). The hearing officer is also entitled to resolve conflicts in the testimony, including medical testimony. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ).

Given the limited medical evidence, the hearing officer was entitled to give more weight to the report by the doctor at the (Hospital), which raised some questions about the nature of claimant's complaints, than the opinions of Drs. M and E, who saw claimant many months after she had stopped working. (The fact that the hearing officer did not discuss the reports of the other doctors in his statement of evidence does not by any means indicate that he did not consider them. The failure to mention such reports in the decision is not reversible error. Texas Workers' Compensation Commission Appeal No. 92140, decided May 20, 1992.) The hearing officer may further have found diminished credibility based on claimant's varying accounts of the date of onset of her symptoms. Likewise, as to the issues of timely notice and filing of a claim,[1] there was evidence in the form of Ms. L's testimony, as well as documentary evidence, to support the hearing officer's determination, and with regard to disability, the claimant testified that she was laid off due to lack of work by employer. To the extent the claimant maintains that she was only able to accept limited types of work, and that the TEC was aware of this, we would note that the mere inability to work in the pre-injury occupation does not compel a finding of disability. Texas Workers' Compensation Commission Appeal No. 92083, decided April 16, 1992. Thus it is immaterial, as claimant states, that the TEC documents carrier introduced did not include anything regarding her work restrictions; in addition, the hearing officer informed the claimant at the hearing that she was responsible for ensuring that the record contained all evidence she wanted to introduce. We note as well that a finding of compensable injury is a necessary prerequisite to a determination of disability. Texas Workers' Compensation Commission Appeal No. 92217, decided July 13, 1992. In short, we do not find the hearing officer's determination on the contested issues to be so against the great weight and preponderance of the evidence as to be manifestly unfair and unjust. Pool v. Ford Motor Co., 715 S.W.2d 629 (Tex. 1986).

[1]While courts have found good cause for failure to timely file a claim where an employee relied upon his employer's representations that it did not carry workers' compensation insurance, Morris v. Transport Insurance Co., 487 S.W.2d 780 (Tex. Civ. App.-Beaumont 1972, writ ref'd n.r.e.), the hearing officer in finding no good cause may have relied on Ms. L's testimony that the required notices of coverage were posted at employer's work place.

Finally, the claimant questions why a signed statement from her fiance was excluded by the hearing officer, based upon her failure to timely exchange such document with the carrier. The claimant notes that he was listed as a witness in her answer to the carrier's interrogatories; however, we have held that exchanging witnesses' names is not good cause for not exchanging the same witnesses' statements. Texas Workers' Compensation Commission Appeal No. 92108, decided May 8, 1992.

The decision and order of the hearing officer are affirmed.

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Lynda H. Nesenholtz
Appeals Judge

CONCUR:

_____
Joe Sebesta
Appeals Judge

_____
Robert W. Potts
Appeals Judge