APPEAL NO. 94047

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A contested case hearing was held in (city), Texas, on December 2, 1993, (hearing officer) presiding as hearing officer, to determine the following issues: whether appellant (hereinafter claimant) suffered a compensable injury on (date of injury); whether claimant reported an on-the-job injury to her employer within 30 days; whether claimant suffered disability as a result of a compensable injury on (date of injury); and whether the impairment rating assigned by (Dr. K) was final and correct. The latter two issues were added at the hearing, by agreement of the parties; with regard to a final issue, maximum medical improvement (MMI), the parties stipulated that, if a compensable injury occurred, the claimant reached MMI on October 23, 1991.

The claimant appeals the determination of the hearing officer that she was not injured in the course and scope of her employment on (date of injury), that she did not timely report any injury, and that she did not suffer any disability as a result of a compensable injury. The respondent, hereinafter carrier, contends that the evidence in the record is sufficient to support the hearing officer's decision.

DECISION

We affirm the hearing officer's decision and order.

The claimant testified that she had been employed by (employer) as a district sales manager. At some time in 1990 she and employer agreed that she would resign her position; this was due, among other things, to the fact that claimant did not want to relocate. Her last day of employment was March 22, 1991, although she said she "strung out" her leave time so that she remained on the payroll until May. During this time she was answering the telephone and relaying messages for her employer. Her testimony was that on (date of injury), as she was moving one of employer's computers in her garage, she experienced severe pain in her right arm. She said that she cried out and that two individuals who were in her house at the time, (Ms. M) and (Ms. W), heard her. Shortly thereafter, claimant said she telephoned (Ms. D), employer's company nurse who was located in (city), and told her she had hurt her arm. Claimant said she had been told to notify Ms. D in the event of a job-related injury, but that Ms. D told her she had just two more days and that she should file on her own personal health insurance, which claimant did. Claimant also said she tried to telephone her supervisor, (Ms. E), and that she left several messages for her, but that Ms. E never returned her calls.

Claimant had suffered a compensable injury to the same arm on (date), when she picked up a heavy basket filled with employer's products. Her claim for this injury was filed with the Texas Workers' Compensation Commission (Commission) on June 20, 1991, and she said she received a lump sum settlement totalling approximately $1,100.00 (she also said she did not receive any payment for medicals for this claim). Medical records reflect that the claimant saw (Dr. B) for this injury. Notes from Dr. B dated July 17, 1990, record claimant's complaints of elbow pain and state she has signs and symptoms of

lateral epicondylitis. References were made to claimant's tennis elbow on July 31st, August 27th, and September 11th. In October claimant was given injections into the elbow; Dr. B also prescribed physical therapy which claimant attended in July and August. The claimant also wore her arm in a sling during some of this period of time. The claimant said she did not see Dr. B after October 1990, and that she was basically pain-free at the time of the incident in (month) of (year).

Claimant began treating with Dr. K on May 13, 1991 (she said she did not see a doctor prior to that time because she thought she had merely pulled her arm). On that date Dr. K wrote that claimant had a history of tennis elbow and had experienced recent recurring pain. On June 17th Dr. K referred to claimant's "multiple injections in the past 1½ years." On June 24th claimant underwent surgery (fasciotomy with stripping). Dr. K completed a Report of Medical Evaluation (Form TWCC-69) in which he determined the claimant had reached MMI on October 23, 1991, with a zero percent impairment rating.

The claimant said Dr. K referred her to another doctor, (Dr. T), in October 1992. On October 16th Dr. T stated his impression as chronic extensor tendinitis, right elbow, and said there was nothing more to offer claimant except an exercise program.

Both Ms. M and Ms. W, who were in claimant's house on the day the alleged injury occurred, testified that claimant was in the garage and that they heard her cry out, and that she told them she had hurt her elbow. Both also testified they heard claimant attempt to call her supervisor. In a signed and notarized transcription of a telephone conversation between Ms. E and carrier's representative, Ms. E said she remembered claimant's having had her arm in a sling due to an earlier injury, but she did not know whether it was work related. She said she would have filed a report of injury if claimant had told her she had injured her arm at work; she said she also would have contacted Ms. D, as it was employer's policy for Ms. D to talk to claimant's doctor to verify the injury and claimant's ability to perform her job.

A signed and notarized statement from Ms. D stated that she completed an accident report on April 3, 1992, the same day as she completed the employer's first report of injury and that "both of these documents were completed by me on the same day that [claimant] reported the incident. I verify this incident was never reported until after her resignation from [employer]."

Claimant testified at the hearing that she did not follow up on notifying anyone at employer because of other physical problems she was experiencing; these included lupus, transient ischemic attacks, and "bipolar," which she characterized as a chemical imbalance in the brain which caused manic episodes. These were apparently diagnosed in September 1992. The claimant also testified that she has not returned to work and has not looked for a job; she said that the problem with her arm is the "biggest part of the reason" she is unable to work.

The hearing officer wrote in his discussion of the evidence that "[t]he chronology and documentary evidence in this case argue against the fact of a compensable injury occurring on (date of injury)." He also notes that claimant was operated on for tennis elbow and her prior medical records are replete with references to this condition, and that the notes from Dr. K's initial examination state that this was the recurrence of a persistent problem which was in remission until shortly before the visit. The hearing officer also stated that if it is assumed that claimant's tennis elbow was the result of an incident in July of 1990, the 1991 incident "was but a continuance of the first incident."

To the extent that the hearing officer appears to indicate that any subsequent re injury following a diagnosed condition is part of the original injury, we would point out that an aggravation of an injury is an injury in its own right. *See* Texas Workers' Compensation Commission Appeal No. 93577, decided August 18, 1993. However, the hearing officer also expressed doubts as to the credibility of claimant's testimony, based upon Dr. K's May 13, 1991, report which records recurrent pain starting "about a week ago." The hearing officer also notes that the claimant did not file this claim until January 15, 1992; while the claim was timely pursuant to the 1989 Act, he also notes that the claim for her first injury was filed on June 20, 1991. There is further an absence of any mention in Dr. K's patient notes of any connection to work, although Dr. K began filing Commission forms in September of 1991.

Recognizing that different inferences could reasonably have been drawn from the evidence, the 1989 Act nevertheless 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). We will not overturn his decision where it is supported by sufficient evidence and is not so against the great weight and preponderance of the evidence as to be manifestly unfair and unjust. Cain v. Bain, 709 S.W.2d 175 (Tex. 1986).

We likewise find supported by the evidence the hearing officer's determinations on the issues of timely notice and disability. The 1989 Act requires an employee or a person acting on his or her behalf to notify the employer of an injury not later than the 30th day after the date on which the injury occurs; such notice may be given to an employee who holds a supervisory or management position. Section 409.001. Such failure to timely notify relieves the employer and its insurance carrier of liability unless, among other things, the Commission determines good cause exists. Section 409.002.

Here, the claimant testified that she informed Ms. D, although this was denied by the written statement of that individual. The evidence does not show Ms. D was an employee in a management or supervisory position. Claimant acknowledged she tried to notify her supervisor, Ms. E, but was unable to talk to her. The hearing officer's finding of no good cause for failure to timely report is supportable given the fact that claimant was doing telephone work for employer at the time, and the fact that claimant's replacement as district sales manager had been hired and was in place at the time in question. Thus the hearing officer did not err in implicitly determining that the claimant did not act with the degree of diligence which a reasonably prudent person would have exercised under the same or

similar circumstances. Travelers Insurance Co. v. Warren, 447 S.W.2d 698 (Tex. Civ. App.-Tyler 1969, writ ref'd n.r.e.).

With regard to the issue of disability--defined as the inability because of a compensable injury to obtain and retain employment at wages equivalent to the pre-injury wage, Section 401.011(16)--the evidence shows that the claimant had been discussing her resignation with employer since 1990, that her injury did not change her plans, and that she has suffered from other, arguably debilitating conditions during the time she has not worked. Further, a finding of compensable injury is a prerequisite to a determination of disability. Texas Workers' Compensation Commission Appeal No. 92217, decided July 13, 1992. We thus find no error in the hearing officer's determination of this issue.

Based upon the foregoing, the decision and order of the hearing officer are affirmed.

Lynda H. Nesenholtz
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Alan C. Ernst
Appeals Judgen