APPEAL NO. 941029
FILED SEPTEMBER 16, 1994

This appeal arises under the Texas Workers' Compensation Act of 1989, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On July 1, 1994, a contested case hearing (CCH) was. In his decision signed July 8, 1994, he determined that the respondent (claimant) sustained compensable injuries on (date of injury) (back injury), and on _____ (date of repetitive trauma injury to claimant's back). The hearing officer determined that the claimant did timely report both injuries within 30 days of the date of injury. The hearing officer also determined that "[e]ach injury was a producing cause" of the claimant's disability from _____, through April 17, 1994. The carrier, in its request for appeal, asserts that the claimant did not establish a specific date of injury and that the claimant did not even allege a repetitive trauma injury as found by the hearing officer. The carrier further argues that there was "absolutely no evidence to justify" the hearing officer's finding of a repetitive trauma injury. The carrier requests the Appeals Panel to reverse the hearing officer and render a decision in its favor.

DECISION

We affirm the hearing officer's decision and order, with modifications.

The claimant worked as an auto mechanic for (employer). Sometime between (date of injury), and January 4, 1994, the claimant repaired a 250 pound transmission, which he was required to remove from a car and then replace. The claimant introduced a work order to show that he had taken the transmission out of the car on (date of injury) and put it back in on January 4th; the carrier did not dispute that this occurred. Around the middle of January 1994, the claimant testified that he began to experience back pain, but figured he had a muscle strain which would go away. With employer's concurrence, the claimant did only lighter work and did not do any heavy lifting after the pain started bothering him. The pain did not go away and, on (day after claimant's alleged date of injury) the claimant went to see (Dr. B). Notes made by Dr. B on (day after claimant's alleged date of injury), indicate that the claimant related "no sp. injury" and that his work as a mechanic was "obviously aggravating back pain . . . get MRI." The evidence does not indicate that Dr. B had an MRI of the claimant performed immediately.

The claimant testified that Dr. B took x-rays and determined that there appeared to be "some sort of disc problem," and that Dr. B gave him medication and sent the claimant to go back to work to see if the medication would cause the problem to go away. The claimant said about three weeks later he returned to Dr. B and told the doctor that the medication was not doing any good so Dr. B increased the medication to see if that would help. The claimant said that the increased medication did not help and that on _____ he called Dr. B and said he was in so much pain that he could not sit, stand, or do anything physically. Dr. B took the claimant off work on _____ and referred

the claimant to (Dr. Y), a neurologist, for further testing. Dr. Y examined the claimant the following day and ordered an MRI, a CT scan, and a myelogram, which showed that the claimant had two herniated discs. The claimant had surgery on April 4, 1994, and was able to return to work a couple of weeks later. Dr. Y released the claimant to light duty work as of April 18, 1994.

It was claimant's testimony that within one or two weeks after the incident with the transmission, he began noticing back pain; at the same time, however, he did not relate the pain to any specific incident. At that time he spoke with his supervisor, (Mr. M), and told him "that I thought I had hurt my back at work and was not exactly sure how it happened [b]ut that I felt that it had happened while I was at work." About the third week in January, when he became aware that the pain was not going away, he said he again spoke with Mr. M, telling that he felt he had injured his back at work but was not sure exactly how it had happened. (It was about this time that claimant made the appointment with Dr. B.) Mr. M testified that he recalled claimant talking to him about back pain on a date which he gave as either _____ or (date). However, he also said that prior to that time, on more than one occasion and on dates he could not recall, he and claimant discussed claimant's back pain, although he said claimant could not relate the pain to a specific incident. In the statement he gave to carrier's representative, Mr. M stated he first knew of claimant's back pain in February, when claimant asked to see a doctor. He acknowledged that employer's shop foreman and others had, since January, accommodated claimant's back problems by not giving him certain types of work.

Employer's personnel manager, (Ms. K), testified that on March 15th claimant came to her office and asked for a medical claim form for his back; she said she asked him whether he had injured himself on the job and he replied that he did not know how or when he had done it. He also asked about signing up for supplemental disability insurance in case he had to be off work due to surgery. The following week, she said, claimant contacted her about filing a workers' compensation claim.

Claimant's testimony at the hearing was that while he believed he had injured his back at work he was not aware of a specific producing incident until Dr. Y diagnosed two herniated disks and told him the injury had occurred from lifting at work. At that point, the claimant said, he remembered lifting the transmission and went back through employer's work orders to identify the date he had done this work. Prior to that time, he had given (claimant’s alleged date of injury) (the day before he saw Dr. B), as the date of injury; this date is reflected in the Employer's First Report of Injury and in the patient questionnaire claimant completed for Dr. Y; in the statement claimant gave to carrier's adjuster, he placed the date of injury as " . . . the best I can figure . . . about (claimant’s alleged date of injury)."

The medical evidence and the claimant's testimony clearly support his claim that he suffered a back injury (two herniated discs). An "injury" is defined as "damage or harm to

the physical structure of the body" (Section 401.011(26)), and a "compensable injury" is defined as "an injury that arises out of and in the course and scope of employment for which compensation is payable under this subtitle." Section 401.011(10). The medical evidence presented supported the claimant's testimony that he did suffer a back injury for which the pain worsened over time.

The carrier argues, however, that Texas Workers' Compensation Commission Appeal No. 92337, decided August 22, 1992, requires the claimant to pinpoint a specific date of injury. We disagree with the carrier's interpretation; Appeal No. 92337, which involved a claimant's rather vague allegations that a variety of complaints were stress-induced, merely restates the language used in the courts that a claimant's injury must be "an undesigned, untoward event traceable to a definite time, place, and cause." *See* Olson v. Hartford Accident and Indemnity Co., 477 S.W.2d 859 (Tex. 1972). The claimant here clearly presented evidence of his lifting a transmission at work between (date of injury), and January 4, 1994. This evidence would point to a definite period of time, a definite place (at work), and definite cause (lifting a transmission). A claimant need not identify only one specific day and date when there is sufficient evidence to show a specific act on or about a specific day or period of time which can support a finding. Texas Workers' Compensation Commission Appeal No. 92078, decided April 2, 1992. To the extent the claimant had earlier given different dates of injury, he testified that he was unable to relate his injury to a specific event until after he saw Dr. Y and then researched employer's records to determine the date he had lifted the transmission. The hearing officer had the responsibility to resolve conflicting dates of injury as reported by a claimant. Texas Workers' Compensation Commission Appeal No. 92358, decided September 9, 1992.

The hearing officer found as fact that the claimant reported a back injury to his supervisor in mid January 1994 and on _____ (the latter date relates to the hearing officer's finding of a repetitive trauma injury on that date, which is discussed further herein). Based upon the hearing officer's finding that the injury occurred (date of injury), notice given "mid January" would be within 30 days and thus timely. The carrier, contends, however, that the evidence shows that around (day after claimant's alleged date of injury) was the earliest time the claimant reported an injury to Mr. M. Our review of the testimony of both claimant and Mr. M, however, shows there is sufficient evidence to support the hearing officer's finding. The claimant testified that his back pain arose approximately one to two weeks after the lifting incident and that he first told Mr. M at that time that he had back pain which he attributed to work. According to Mr. M's testimony, he recalled claimant talking about a work-related problem in March, and said that he had had similar conversations with claimant on earlier dates he could not remember. Both claimant and Mr. M acknowledge that this conversation also occurred in February and March, outside the 30-day notice period. Based upon the evidence, the hearing officer could credit claimant's testimony that he timely informed Mr. M that he had a back problem arising out

of work, and he could infer from Mr. M's testimony that one or more of these conversations occurred within 30 days of the date that has been determined to be the date of injury.

This determination is supportable despite the fact, as Mr. M testified, and claimant acknowledges that claimant initially could not pinpoint an exact incident or date. However, as the Supreme Court has stated, to fulfill the statutory purpose of allowing an opportunity to investigate the facts, the employer need only know the general nature of the injury and the fact that it is job related; more details of the occurrence will be supplied by the claim. DeAnda v. Home Insurance Co., 618 S.W.2d 529 (Tex. 1980). In this case the claimant's testimony indicates that he supplied the employer with these two essential elements of notice.

Under the 1989 Act, the hearing officer is the trier of fact at the CCH and is the sole judge of the relevance and materiality of the evidence offered and of the weight and credibility to be given the evidence. Section 410.165(a). The trier of fact can believe all or part or none of any witness's testimony because the finder of fact judges the credibility of each and every witness, the weight to assign their testimony, and then resolves the conflicts and inconsistencies in the testimony. Taylor v. Lewis, 553 S.W.2d 153, 161 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.); Texas Workers' Compensation Commission Appeal No. 93426, decided July 5, 1993; Texas Workers' Compensation Commission Appeals No. 93155, decided April 14, 1993. As the fact finder, the hearing officer has the responsibility and the authority to resolve conflicts and inconsistencies in the evidence, to assess the testimony of the witnesses, and to make findings of fact. Texas Workers' Compensation Commission Appeal No. 92657, decided January 15, 1993. Where sufficient evidence supports a fact finder's conclusions and his findings are not against the overwhelming weight of the evidence as to be clearly wrong and unjust, then the decision should not be disturbed. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); *citing* Dyson v. Olin Corp., 692 S.W.2d 456, 457 (Tex. 1985); In Re King's Estate, 150 Tex. 662, 664-665, 244 S.W.2d 660-661 (1951).

Finally, the carrier also argues that there is no evidence to raise any issue regarding a repetitive trauma injury, and the claimant never alleged that his injury was a repetitive trauma injury suffered in the course and scope of his employment. Section 401.011(36) defines "repetitive trauma injury" to mean "damage or harm to the physical structure of the body occurring as the result of repetitious, physically traumatic activities that occur over time and arise out of and in the course and scope of employment." To recover for an occupational disease involving a repetitive trauma injury, the claimant must prove that the repetitive trauma activities occurred on the job and must prove the causal connection existed between these job activities and the claimant's incapacity. Davis v. Employers Insurance of Wausau, 694 S.W.2d 105, 107 (Tex. App.-Houston [14th Dist.] 1985, writ ref'd n.r.e.). The causation should show that the disease is inherent in the claimant's particular type of employment as compared with employment generally. Id. In the present case,

the claimant clearly testified that after the transmission incident he was assigned to lighter lifting and that the pain did not go away but increased from the time of lifting the transmission until he was forced to seek medical attention. However, he never alleged that his herniated discs were caused by anything other than the discrete lifting incident. We therefore regard as unnecessary to the decision any findings and conclusions regarding a repetitive trauma injury and notice thereof, and we strike as surplusage all references to an injury date of _____. *See* Texas Workers' Compensation Commission Appeal No. 94375, decided May 15, 1994.

The decision and order of the hearing officer are affirmed as modified to delete all findings and conclusions with regard to a _____, date of injury.

Lynda H. Nesenholtz
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Tommy Lueders
Appeals Panel