APPEAL NO. 94129

This appeal is brought pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On December 17, 1993, a contested case hearing (CCH) was held in (city), Texas, with (hearing officer) presiding as hearing officer. The issues presented and agreed upon for resolution were:

1.Did the Claimant sustain a compensable injury on (date of injury);

2.Did the Claimant report an injury to the Employer on or before the 30th day after the injury, and if not, does good cause exist for failing to report the injury timely;

3.Did the Claimant timely file a claim for compensation with the Commission within one year of the injury, as required by Section 409.003 of the Texas Labor Code, and if not, does good cause exist for failing to timely file a claim; and,

4.Did the Claimant have disability resulting from the injury sustained on (date of injury), entitling her to temporary income benefits, and if so, for what periods?

The hearing officer determined that the appellant, claimant herein, did not sustain a compensable injury in the course and scope of her employment on (date of injury), that claimant did not report her alleged injury timely, that claimant did not have good cause for failing to timely report her alleged injury, that claimant did not file a claim for compensation within one year of (date of injury), and that claimant did not have disability.

Claimant, in a timely appeal, contends that the hearing officer erred in certain findings of fact and conclusions of law, and that the decision is against the great weight and preponderance of the credible evidence, and emphasizes evidence claimant believes supports her claim. Claimant subsequently, more than 15 days after having been deemed to have received the hearing officer's decision, submitted a packet of documents as "Supporting Evidence for more weight of credibility to bring up to the hearing officer. This evidence enclosed is and could have been made available at the contested case hearing . . . ." Respondent, carrier herein, responds that the decision is supported by the evidence, that claimant's additional "Supporting Evidence . . ." was untimely filed and should not be considered and requests that we affirm the decision.

DECISION

The decision and order of the hearing officer are affirmed.

First, addressing the status of the packet of "supporting evidence" filed by the claimant, we note the deemed date of receipt of the hearing officer's decision pursuant to the Tex. W.C. Comm'n, TEX. ADMIN. CODE § 102.5(h) (Rule 102.5(h)) to be January 24,

1994. As Section 410.202(a) requires a party to file a written request for review "not later than the 15th day after the date on which the decision of the hearing officer is received . . . , " the last day on which an appeal could be filed was Tuesday, February 8, 1994. Claimant's appeal, filed February 3, 1994, was timely, but the "supporting evidence" packet filed February 10, 1994, was untimely as having been filed after February 8, 1994. We would further note that pursuant to Section 410.203(a) the Appeals Panel review is limited to the record developed at the contested case hearing and consequently evidence available at the contested case hearing, but not made part of the record, will not be considered for the first time on appeal. *See* Texas Workers' Compensation Commission Appeal No. 92123, decided May 11, 1992. We do note, however, that most of the "supporting evidence" was also admitted as various exhibits at the CCH.

As to the merits of the case, claimant testified, and it was stipulated, that claimant was diagnosed and had been treated for diabetes since August 1988. Claimant testified she began working for (employer) of Texas, employer herein, in May 1991, as a payroll clerk, doing a variety of secretarial, and clerical tasks using different types of office equipment. Claimant testified she was given ever-increasing duties which put "stress and strain" on her hands. Claimant testified, on both cross and direct examination, that in September 1991, she began having difficulties with her hands which she knew were related to her work. She testified that her hands would become tired in the afternoon and that the "repeated wear and tear" was work related but that she did not believe it to be a serious condition, and that it did not require medical attention and did not interfere with her work. Claimant testified that on (date of injury), as she was moving a box of papers for the employer she hurt her hands and dropped the box. Claimant testified she mentioned this to (Ms. M), employer's president, but admitted that Ms. M was busy on the phone at the time. Ms. M testified she had no knowledge of this incident until she received a letter from claimant on July 20, 1993. Claimant testified after the box incident on (date of injury), she "just shook her hands a lot" and continued work. Claimant testified the next day, (date), she called in and told (Ms. B) about a pain in her thigh. Ms. B, in a written statement, denied claimant reported a work related injury. Ms. M further testified Ms. B was only a co-employee and not the office manager as claimant alleged. However, we note that in Ms. M's termination letter dated July 22, 1992, to claimant, she refers to Ms. B as "officer manager." Claimant testified that on June 25th, she told Ms. M that she was going to see a doctor. On June 26th, claimant consulted a diabetes specialist who subsequently hospitalized her for other health problems. Claimant testified she informed Ms. M "and the officer manager" of her hospitalization but that she was terminated on July 22, 1992, for failure to keep the employer informed of her medical status. Claimant testified she sought work and filed for unemployment benefits in August 1992 but has not worked since her termination. Claimant testified she did not know employer had workers' compensation coverage or that her condition might be covered until she spoke with a friend (not clear from the record exactly when, but probably June 1993). She then went to the Texas Workers' Compensation Commission (Commission) field office and filed a claim and Employee's Notice of Injury (TWCC-41) on June 23, 1993. It was stipulated that the original TWCC-41 "was inadvertently misplaced" and claimant filed a second TWCC-41 which was not in evidence.

The medical evidence includes reports from (Dr. S) who saw claimant on June 26, 1992, took a health history and in a report dated June 26th, discussed claimant's diabetes mellitus, and claimant's treatment by another doctor in 1988, and complaints of "left lower quadrant abdominal pain." The report noted that claimant had complained of pain in the back of her leg and "heaviness of her feet" in an illness two weeks before. No mention is made of hand or wrist pain. Dr. S's impression was " . . . that the patient could have some type of gynecologic more than GI problem." Dr. S arranged for claimant's hospitalization. Claimant testified she complained of hand pain while in the hospital but that is not evident in legible medical records in evidence. A progress note of July 8, 1992, notes "negative sepsis" but no mention of hand complaints. Claimant was released to return to work "plus limited activity" on July 24, 1992. A progress note dated August 7, 1992, addresses only claimant's diabetes. A November 10, 1992, progress note mentions an E. coli infection and diabetes related problems. In a note dated January 15, 1993, Dr. S asks claimant be considered for the "Indigent Patient Program," and discusses diabetes control. In a letter dated May 24, 1993, to claimant, Dr. S withdraws as claimant's physician because of claimant's failure "to follow my medical advice and treatment."

Claimant next saw (Dr. Z) who on a note dated July 16, 1993, stated claimant came in for evaluation of bilateral carpal tunnel syndrome (CTS). Dr. Z noted claimant's complaints and opined that: "This patient clearly has numbness and paresthesia of the hands of undetermined etiology at this time. The most likely diagnosis is probably bilateral carpal tunnel syndromes [sic], though cervical radiculopathic disease can mimic this." A handwritten note states: "Pain in the hands--referred to work--Started Aug 1991." (Emphasis in the original.) X-rays of the wrists showed "[n]ormal right and left wrist." Dr. Z, in a record dated August 2, 1993, stated that electromyogram studies ". . . probably indicate an early sensory neuropathy, though bilateral [CTS] can certainly produce similar symptoms." In a September 13, 1993, note, Dr. Z stated claimant "was diagnosed as having posttraumatic bilateral [CTS] with normal sensory latencies and a possible early sensory diabetic peripheral neuropathy." Dr. Z's diagnosis was:

1.Underlying predisposing factor includes diabetes mellitus.

2.Possible very early rheumatoid arthritis with a positive rheumatoid factor and an elevated titer.

3.Symptomatic bilateral carpal tunnel syndromes possibly work-related and predisposed as above.

In an October 22, 1993, report, Dr. Z stated:

It is worth noting that the patient states that her symptoms developed while on the job. She states that the persistent use of her hands for operation of a keyboard, and at times lifting and manipulating objects, produced her symptoms. These activities occurred at the work place.

IMPRESSION: This patient clearly has a distal sensory neuropathy which is either an early manifestation of her diabetic or rheumatoid peripheral neuropathy, or associated with a distal nerve entrapment syndrome (medial nerve syndrome). The patient was advised not to use her hands excessively. She was advised against any heavy bending, stretching or lifting. It was felt that the patient most likely had bilateral carpal tunnel syndromes in a predisposed individual who through excessive hand use became symptomatic.

On December 10, 1993, Dr. Z gave claimant a "Disability Slip" which noted that claimant has been under his care since July 16, 1993, was unable to work and was "to refrain from use of hands due to a diagnosis of [CTS]."

The hearing officer noted in her statement of evidence that:

. . . the parties agreed that the Claimant's injury was an occupational disease, as defined in § 401.011(34) of the Texas Labor Code; § 409.001(a)(2) of the Texas Labor Code requires that an employee notify someone in a supervisory capacity of the disease no later that (sic) thirty (30) days after the employee knew or should have known that the injury may be related to the employment. The Claimant testified that she had pain and problems with her hands as early as September 1991 and she affirmatively stated that her difficulties and pain were the result of the performance of her duties at work. . . . She presented no medical evidence to support a determination that she sustained an injury on this date [(date of injury)] or that her alleged carpal tunnel problems were diagnosed on this date or soon thereafter.

We find this recitation more or less accurate noting only that claimant also, at various times, claimed a specific discreet injury on (date), and at various times claimed good cause for not timely filing because she had trivialized her hand injury. In claimant's appeal, she specifically stated she ". . . did not understand the serious nature of the injury until 7/16/93 [a date we note is three weeks after she filed her original TWCC-41]. Prior to (date) I had thought my injury was minor and would heal." Although not as succinctly stated, the quoted comments in the appeal can be inferred from claimant's testimony at the CCH.

The hearing officer determined that claimant had not sustained a compensable injury in the course and scope of employment on (date of injury) (Findings of Fact No. 10, 14 and 15, and Conclusion of Law No. 3), that claimant did not timely report her injury to her employer and did not have good cause for failing to do so (Finding of Fact No. 13 and Conclusions of Law No. 4, 5 and 6), and that claimant did not file a claim for compensation with the Commission within one year of the injury as required by Section 409.003 (the date claimant knew or should have known that the disease was work related) and no good cause existed for failing to do so (Finding of Fact No. 5 and Conclusion of Law No. 7). Claimant disagreed and contended the enumerated determinations were "against the great weight

and preponderance of the evidence" and recited evidence she believes supports her position.

We would note that claimant, in her testimony and evidence, appears to advance at least two different somewhat conflicting theories. Initially, it appeared claimant was claiming a specific discreet injury to her hands and wrists while moving boxes for the employer on (date of injury), and that she subsequently trivialized the injury "thought it would go away" until Dr. Z informed her of the seriousness of her injury on July 16, 1993. A problem with this theory is that claimant, by her testimony and stipulation, stated she filed her notice of injury (TWCC-41) and claim for compensation, on June 23, 1993, (three weeks before she said she knew her injury was serious) which was also 366 days after the date of injury.

Claimant's alternate theory appears to be that she suffered an occupational disease, which includes a repetitive trauma injury (Sections 401.011(34) and (36)) and that claimant's constant use of hands filing and operating office machines was a repetitive trauma which caused her CTS (assuming that claimant has CTS). Dr. Z's report of October 22, 1993, where he noted "persistent use of her hands for operation of a keyboard, and at times lifting and manipulating objects" would tend to support this theory as does claimant's representation to the hearing officer that she was proceeding on the injury being an occupational disease. However, the date of injury of an occupational disease, pursuant to Section 409.001(a)(2) is the date that the claimant knew or should have known the disease was work related. Claimant clearly testified she was aware that her job was causing her hand problems as early as September 1991.

Regarding whether the injury was timely reported to the employer, clearly the occupational disease was known in September 1991 and was not reported at the earliest, according to claimant's testimony, until June 23, 1993. Consequently, claimant has apparently elected to link the (date of injury), incident of dropping the box to the pain she had been having since September 1991. As the hearing officer notes, there is no medical evidence to support a determination of an injury on (date of injury). However, the case law states that a claimant's testimony alone is sufficient to establish that an injury occurred. Gee v. Liberty Mutual Fire Insurance Co., 765 S.W.2d 394 (Tex. 1989) .

However, the question of whether an accident occurred and whether it caused the complained of injury is generally a question of fact. *See* Texas Workers' Compensation Commission Appeal No. 93854, decided November 9, 1993; Texas Workers' Compensation Commission Appeal No. 93449, decided July 21, 1993. Section 410.165(a) provides that the contested case hearing officer, as finder of fact, is the sole judge of the relevance and materiality of the evidence as well as of the weight and credibility that is to be given the evidence. It was for the hearing officer, as trier of fact, to resolve the inconsistencies and conflicts in the evidence. Garza v. Commercial Insurance Co. of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). As discussed previously, there was conflicting evidence of when claimant knew or should have known of the injury as well as conflicting evidence whether claimant told Ms. M of her injury on (date of injury). In addition,

the hearing officer not only resolves conflicts in the testimony as to who told whom what and when but also resolves conflicts regarding medical evidence. *See* Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). The trier of fact may believe all, 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.); Aetna Insurance Co. v. English, 204 S.W.2d 850 (Tex. Civ. App.-Fort Worth 1947, no writ). The hearing officer clearly found Ms. M's testimony more credible as to whether an injury had been reported and similarly was not convinced by Dr. Z's reports that claimant did in fact have bilateral CTS rather than diabetic or rheumatoid peripheral neuropathy. We are mindful that Dr. Z, in his December 10th "Disability Slip" did state claimant had bilateral CTS but we note that earlier Dr. Z had indicated claimant's condition might be something else. It is for the hearing officer, as the sole judge of the weight and credibility of the evidence, to make that determination rather than the Appeals Panel. An appeals level body is not a fact finder, and does not normally pass upon the credibility of witnesses or substitute its own judgment for that of the trier of fact, even if the evidence would support a different result. National Union Fire Insurance Company of Pittsburgh, Pennsylvania v. Soto, 819 S.W.2d 619, 620 (Tex. App.-El Paso 1991, writ denied). When reviewing a hearing officer's decision for factual sufficiency of the evidence we should reverse such decision only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986). We find that the hearing officer's determinations are supported by sufficient evidence.

In Texas Workers' Compensation Commission Appeal No. 93102, decided March 22, 1993, the injured employee was told by a friend that her occupational disease could be compensable under workers' compensation more than a year after the injury. The Appeals Panel reversed a hearing officer who found that belief that an injury is not compensable constitutes good cause for delay in timely filing a claim or giving notice. The Appeals Panel recognized that a claimant's bona fide belief that his injuries are not serious is sufficient to constitute good cause for delay in giving notice. Texas Casualty Insurance Company v. Crawford, 340 S.W.2d 110 (Tex. Civ. App.-Amarillo 1960, no writ). In the instant case, claimant, in filing her initial TWCC-41, apparently claimed an occupational disease of repetitive trauma and subsequently has claimed that she was unaware, either that a repetitive trauma was compensable or that the employer carried workers' compensation coverage. In Appeal No. 93102, *supra*, the Appeals Panel noted that a belief that compensation is not payable for a particular injury does not constitute good cause for delay in filing, *citing* Allstate Insurance Co. v. King, 444 S.W.2d 602 (Tex. 1969).

Claimant's problem with the theory of trivialization of a (date of injury), injury is that she filed a TWCC-41 and her claim for compensation, alleging an occupational disease on (date of injury), three weeks before she was told she might have CTS by Dr. Z on July 16, 1993. Regardless of what theory claimant is pursuing, she has the burden to prove by a preponderance of the evidence that she sustained a compensable injury. Johnson v. Employers Reinsurance Corporation, 351 S.W.2d 936 (Tex. Civ. App.-Texarkana 1961, no writ). We find that the hearing officer's decision is supported by sufficient evidence.

Having affirmed the hearing officer's decision that claimant has not sustained a compensable injury, she did not have disability, which is defined in Section 401.011(16) as the inability because of a compensable injury to obtain and retain employment.

Having reviewed the record, we conclude that the hearing officer's findings, conclusions and decision and order are supported by sufficient evidence and are not against the great weight of the evidence.

The hearing officer's decision and order are affirmed.

Thomas A. Knapp
Appeals Judge

CONCUR:

Lynda H. Nesenholtz
Appeals Judge

Alan C. Ernst
Appeals Judge