APPEAL NO. 94287

Pursuant to 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 February 16, 1994. The hearing officer, (hearing officer), determined that the appellant and cross-respondent (claimant) did not establish that she sustained a repetitive trauma injury while in the employ of a bank (employer) as a teller. He further determined that had she sustained such an injury on (date of injury), however, her notice to her employer of such injury was timely. Claimant's appeal challenges the sufficiency of the evidence to support the hearing officer's adverse factual findings and legal conclusion relating to the injury issue. The respondent/cross-appellant (carrier) appeals the finding and conclusion relating to the timely notice issue. The carrier also filed a response to claimant's appeal asserting the sufficiency of the evidence to support the challenged findings and conclusion on the injury issue.

DECISION

Affirmed.

According to the claimant's evidence, she worked for the employer from 1977 to January 1992 in a variety of positions, including that of teller, for approximately seven years, and experienced no hand pain. She worked for another employer as data control clerk, a job requiring some use of a computer, commencing in January 1992 until November of that year when she stopped working. Claimant denied having carpal tunnel symptoms while working for the other employer but did acknowledge having hand pain at home when using her hands in certain ways such as folding clothes. She also acknowledged having hand pain problems during her pregnancy in 1993 and said her obstetrician indicated such condition was not uncommon. (Mr. H), one of claimant's supervisors, testified that claimant told him her hands had bothered her in the hospital and had been bothering her since she had the baby. Employer's personnel manager, (Ms. H), testified that claimant "first said she had hurt it at home," then said she hurt it working for the prior employer and even initialed a statement to that effect. Such statement was not in evidence however. Claimant maintained she had said it was her right wrist that hurt at her previous place of employment and she further maintained that her pregnancy-related hand pain had resolved before she started working as a "floating teller" for the employer on July 19, 1993. Her teller position required her to carry sacks of coins to teller stations and to frequently count stacks of paper money, a process she said involved the very rapid use of her hands. Claimant, who is right hand dominant, described her money counting procedure as holding the paper money stack in her left hand, removing the bills with her right hand, and simultaneously using her left thumb in an up and down motion to pinch or clamp down on the stack of bills. Claimant testified that in August 1993, she began to experience sharp pain shooting up her left thumb from its base when pinching stacks of money while counting.

Claimant maintained at the hearing that it was the rapid hand movements in counting paper money that caused her left thumb pain. However, she acknowledged that on her initial Notice of Injury or Occupational Disease and Claim for Compensation (TWCC-41), signed on "10/26/93," she stated that her left thumb injury was due to "lifting heavy coins [in

cans]," and on a TWCC-41, signed on "11/17/93," stated the injury was due to "lifting heavy coin & teller machine." Also, the first TWCC-41 stated that claimant first became aware the disease was work related "by doctor statement," and on the second TWCC-41, "when I went to see [Dr. P]." Claimant testified that moving her station and using a teller machine was all part of the job. She then conceded her uncertainty as to the cause of the pain indicating it could have been something at home or at work.

Claimant said she went to Dr. P on August 20, 1993, for the problem. The record of that visit stated that both wrists had been hurting intermittently for a year, were worse since having the baby and when lifting the baby, that claimant had numbness and tingling of her hands with the pregnancy which resolved, and that she then had some pain with rapid repetitive motions. Claimant testified that when she saw Dr. P again on (date of injury), he advised her to give her hand a rest for two to four weeks. Dr. P's note of "8-2-93" (which the parties indicated should read "(date of injury)") instructed claimant to "avoid overuse of hands/wrists with rapid repetitive movements for two to four weeks." Claimant said she gave this note to Ms. H who then arranged temporary receptionist duties for her. Claimant indicated she also gave Dr. P's note to her supervisor, (Ms. R). Claimant stated that her pain remained the same after assuming her new duties and that even at the hearing it was about "a five" but better than it was in September. Claimant asserted that at that time ((date of injury)), she did not realize she had a work-related injury, did not regard it as serious, and thought it would resolve in two to four weeks with rest. However, she also acknowledged that Dr. P's (date of injury) note could be the statement she referred to in her TWCC-41 to the effect that she knew her injury was work related when she got Dr. P's statement. Further in this regard, claimant testified that when she saw Dr. P on (date of injury) she thought she was using her hands at work too much.

Claimant saw Dr. P again on September 27, 1993, at which time he advised her she had a permanent impairment and to change her work duties to avoid the repetitive movements of her thumb. Dr. P's note of that date stated: "Recommend no rapid repetitive mvt of thumbs as such is associated as teller position. This is a permanent recommendation." Claimant said she gave this note to Ms. H also. According to Ms. H, claimant reported that she had a work-related injury "from lifting coin bags" and Ms. H could not recall claimant's mentioning rapid hand movements. Claimant maintained that it was at this time, given such information from Dr. P, that she realized her injury was serious and work related, and therefore that the date of her repetitive trauma injury was September 27, 1993. Section 408.007 provides that the date of injury for an occupational disease, which includes repetitive trauma injury (Section 401.011(34) for definition), is the date on which the employee "knew or should have known that the disease may be related to the employment." Claimant further testified that she gave her employer notice of the injury on October 21, 1993, when she gave Dr. P's September 27th note to her supervisor, Ms. R, and to Ms. H. Both Ms. R and Ms. H testified and did not contradict claimant's testimony in this regard.

Dr. P's note of "11-24-93" stated that claimant had degenerative arthritis and tenosynovitis of the left thumb, that her rapid, repetitive money counting as a teller "aggravated the pain & condition & created the impairment." On December 29, 1993, Dr. P diagnosed bilateral deQuervain's syndrome and degenerative arthritis of the thumb.

Claimant's position at the hearing was that her injury date was September 27, 1993, and that her October 21, 1993, notice of injury to her employer, having been given within 30 days of her injury date, was therefore timely under Section 409.001. Alternatively, asserted the claimant, if her injury date were determined to be (date of injury), then she had good cause for not reporting it until October 21st because she "trivialized" her injury until September 27th when Dr. P advised her she had a permanent impairment. Thus, her October 21st notice was still timely. The carrier's position was that claimant's injury date was (date of injury) and that her October 21st notice was not timely. The hearing officer found that claimant did not establish that she was exposed to repetitious physical traumatic activities in her work place after July 19, 1993, that the cause and effect relationship claimant tried to establish was based primarily on speculation and conjecture, and that claimant did not sustain a left thumb injury while counting money for her employer.

Claimant had the burden to prove by a preponderance of the evidence that she sustained the compensable injury she alleged and that she gave her employer timely notice of such injury. The burden was not on the carrier to prove the injury did not occur as the claimant contended. Johnson v. Employers Reinsurance Corporation, 351 S.W.2d 936, 939 (Tex. Civ. App.-Texarkana 1961, no writ). The carrier did not assert nor seek to prove a sole cause defense for which it would have had the burden of proof. These issues presented questions of fact and it is the hearing officer who is the sole judge of the weight and credibility to be given the evidence (Section 410.165(a)) and who, as the trier of fact, must resolve the conflicts and inconsistencies 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 an interested party, the claimant's testimony only raises issues of fact for the fact finder (Escamilla v. Liberty Mutual Insurance Co., 499 S.W.2d 758 (Tex. Civ. App.-Amarillo 1973, no writ)), and the hearing officer is not bound to accept the testimony of the claimant at face value. Garza, *supra*. Concerning occupational disease injuries, the Appeals Panel has recognized that lay testimony concerning a claimant's working conditions may be considered along with the medical testimony connecting the condition to the injury. Texas Workers' Compensation Commission Appeal No. 91002, decided August 27, 1991. The opinion of medical experts is evidentiary but not binding on the hearing officer. Texas Workers' Compensation Commission Appeal No. 92533, decided November 30, 1992. The Texas courts have recognized that repetitive trauma injuries require "probative evidence" of a causal connection between the claimant's work and the disease. *See* Home Insurance Company v. Davis, 642 S.W.2d 268, 269 (Tex. App.-Texarkana 1982, no writ). In Davis v. Employers Insurance of Wausau, 694 S.W.2d 105 (Tex. App.-Houston [14th Dist.] 1985, writ ref'd n.r.e.) the court indicated that to recover for a repetitive trauma injury, it must be proven not only that the activities occurred on the job, but also that there is a

causal link existing between the job activities and the incapacity, that is, the disease must be inherent in that type of employment generally.

The Appeals Panel will not disturb the hearing officer's factual findings unless they are so against the great weight and preponderance of the evidence as to be manifestly unjust. Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986); In re King's Estate, 244 S.W.2d 660 (Tex. 1951). We do not find them to be so in this case. The hearing officer could conclude from the inconsistencies in the evidence regarding the cause of claimant's left hand pain that she failed to meet her burden to prove by a preponderance of the evidence that she sustained a repetitious trauma injury caused by her money counting activities at work between July 19 and (date of injury), when she transferred to other duties. The hearing officer could also have concluded from the evidence that claimant did not sustain a new injury in that period by having aggravated a pre-existing condition. Similarly with respect to the notice issue, the hearing officer could determine, as he did, that assuming claimant proved a compensable repetitious trauma injury, her injury date was (date of injury) and the information she provided employer on that date was sufficient to constitute notice of a work-related injury. We are satisfied the evidence of record sufficiently supports all the challenged findings and conclusions and that neither appeal is meritorious.

The decision and order of the hearing officer are affirmed.

Philip F. O'Neill
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Gary L. Kilgore
Appeals Judge