APPEAL NO. 950088
FILED FEBRUARY 28, 1995

Following a contested case hearing held on December 13, 1994, the hearing officer resolved the four disputed issues by making certain findings of fact and concluding that the respondent (claimant) sustained a compensable injury on or about _____, that her injury included her neck and upper back and is not limited to the low back, that she reported the injury to her employer within 30 days of the date of injury, and that she has had disability from June 16, 1994, through the date of the hearing and continuing. Pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 410.202(a) (1989 Act), the appellant (self-insured) appeals from two of the hearing officer's determinations asserting that the evidence is insufficient to support the conclusions that claimant sustained a compensable injury on _____, and that she reported the injury within 30 days thereafter. Claimant's response urges our affirmance and also asserts that the carrier's appeal was not timely filed.

DECISION

Affirmed.

The Texas Workers' Compensation Commission (Commission) records show that the hearing officer's decision was mailed to the self-insured on January 3, 1995. Since the self-insured does not state the date it was received we apply Tex. W.C. Comm'n, 28 TEX. ADMIN CODE § 102.5(h) (Rule 102.5(h)) and deem it to have been received five days later, that is, on January 8, 1995. Section 410.202(a) (1989 Act) provides parties with 15 days from the date of receipt of the hearing officer's decision to file an appeal. Since the 15 day period would have ended on January 23, 1995, and since the self-insured's appeal was filed on January 19, 1995, it was timely filed.

Claimant testified that she worked for the (employer) as an accounting clerk in the cash receiving department for the past three and one-half years, and before that as a mail clerk for four years, and that her work involved various repetitious movements such as getting up and down frequently, lifting loads of paperwork from a table and taking it to a desk, extending her arms forward and backward, and other repetitious arm movements which she estimated at several thousand such movements per day. She said she regarded the repetitive motions of the lifting as the cause of her back injury. Claimant further testified that her section had a heavy workload and her back began to hurt on _____, that it got worse as the week progressed and she was carrying baskets of mail, that she noticed that her pain was worse when working and better when not working, and that she mentioned it to her supervisor (Ms. H) that first week in September but was not sure she then said it was work related. However, claimant further indicated that she came to realize that it was the work that was causing her back pain and that on either September 7 or 8, 1993, she again told Ms. H that her back was hurting and that she

believed it be related to her work. Ms. H, who was present for claimant's testimony, testified that in September 1993 the section was short of personnel and had an unusually heavy workload, that claimant's work was of a repetitious nature and that it could aggravate a sore back and muscles, and that claimant did complain to her of back pain throughout the period of her supervision (September 1993 to March 1994). However, Ms. H denied that claimant ever told her she regarded her back pain as work related.

Ms. H testified that in November 1993 claimant asked her for a change of chairs to accommodate her back problems, that she, Ms. H, was told by her supervisor that a doctor's letter would be required, and that she, in turn, so advised claimant and also that a doctor's letter was required to change sections at the job. Ms. H also stated that claimant had told her she felt she could lose her job if she turned in a doctor's letter. Claimant said she decided against filing a doctor's letter because she had been told by her doctor and others that she risked losing her job if she did so. Claimant also stated that she obtained medical treatment through her health insurance plan and that no one advised her to file under workers' compensation. Claimant testified that she continued working and sought treatment in September 1993 from her family doctor, (Dr. PG), who advised her she had fibromyalgia and who referred her to (Dr. RC) for verification. Dr. RC's November 15, 1993, report stated that claimant had fibromyositis of her cervical and thoracic musculature and that in her job "she does repetitive hand motion which might be aggravating her symptoms." Claimant also said that Dr. PG told her that her injury was job related and claimant could not account for why that information was not recorded by Dr. PG. Dr. PG's notes of September 22, 1993, stated a history of continued pain in claimant's upper back and along the spinal column with occasional numbness in the right arm "with carrying heavy bags." Dr. PG's diagnosis included upper back and thoracolumbar strain and questionable fibromyalgia. Dr. PG's diagnosis on June 16, 1994, was "fibromyalgia - worsened with work" and on July 19, 1994, was "chronic back pain."

Claimant testified that in June 1994 she changed treating doctors to (Dr. AJ), who was treating her daughter, because Dr. PG was only treating her symptoms, and that Dr. AJ told her it was her "right" to file under workers' compensation. There was no disputed issue concerning an untimely claim. In reports dated July 20, 1994, Dr. AJ referred to claimant's visit on June 27, 1994, stated a history of "lifted basket containing a large volume of paper work/weight that she carried" and diagnosed lumbosacral sprain/strain, lumbar disc syndrome, lumbar neuritis/radiculitis, lumbar facet syndrome, and osseous dysrelationship of multiple lumbar vertebrae and reflected the date the condition commenced as _____. Dr. AJ testified that claimant's back pain was due to her injury at work and he appeared to be referring to her low back pain and to her lifting a basket of paper work on _____. Dr. AJ further testified that while he is treating her lower back, there is "a possibility" she also injured her cervical and thoracic spine and that radiculopathy in both her upper and lower extremities prevents her from being able to work at this time.

In a September 21, 1994, response to a Texas Workers' Compensation Commission (Commission) benefit review officer received by the Commission on September 23, 1994, Dr. RC stated, in contrast to his statement of November 15, 1993, that based on reasonable medical probability claimant's work activities were not a producing cause of her cervical and thoracic fibromyositis and that her work activities did not cause damage or harm to the physical structure of her body. (*See* Section 401.011(26) for the definition of injury.) In his September 29, 1994, response to the same inquiries, Dr. AJ answered them in the affirmative and also stated in a narrative report that it was his opinion that "based on the circumstances involved and past medical history and current diagnostic findings that [claimant's] condition and diagnosis is causally related to the accident in question." He went on to state that his diagnosis was a lumbosacral diagnosis. Also in evidence was a CT scan report obtained by Dr. PG on July 13, 1994, which revealed "mild generalized disc bulges at the L3-4 and L4-5 levels without evidence of herniation or significant neural foraminal narrowing to explain the patient's symptoms."

Claimant said she has been unable to work since June 15, 1994, because she cannot stand, walk, or sit for long periods of time nor can she lift or bend. A slip from Dr. AJ dated June 28, 1994, took claimant off work "until further notice," and claimant testified that Dr. AJ has not yet released her to return to work. The self-insured has not appealed from the hearing officer's determination of the disability issue.

The factual findings supporting the conclusion that claimant sustained a compensable injury on or about _____, state that for over seven years claimant was employed by the employer in clerical positions which required her to perform repetitive arm motions, repeatedly lift batches of work, "and walk," that on or about _____, claimant sustained an injury to the lumbar area of her back and sustained an injury in the form of an aggravation in the cervical and thoracic areas of her back, and that her testimony was corroborated by medical evidence. We are satisfied there is sufficient evidence to support these findings and that they sufficiently support the challenged conclusion. True, the evidence was in conflict. Claimant appeared to attributed all her back pain to the repetitive trauma activities of her job, primarily the lifting and other arm movements to which she testified, while Dr. AJ appeared to attribute at least her lower back injury to an incident of lifting a basket of paperwork on _____. Claimant's supervisor agreed that the repetitive motions of the job could aggravate back and shoulder muscle pain, a view apparently also shared by Dr. AJ and, on November 15, 1993, by Dr RC. That claimant may have experienced both a specific injury as well as an occupational disease injury on _____, while clearly uncommon, does not appear to us to be either a legal or medical impossibility. The hearing officer stated in a finding that walking was one of the activities required of claimant in her job. However, we emphasize that in finding the evidence as sufficiently supporting the determination that claimant sustained a compensable injury, we do not mean to be seen to be affirming that claimant sustained such compensable injury from walking. There was no evidence that would support such a determination.

The evidence is also sufficient to support the timely notice determination. Claimant testified that she told Ms. H on September 7th or 8th that her back pain was work related while Ms. H testified to the contrary. The hearing officer is the sole judge of the credibility of the evidence (Section 410.165(a)) and it is for the hearing officer to resolve the conflicts and inconsistencies in the evidence, including the medical evidence. Garza v. Commercial Insurance Co. of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ); Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). We will not disturb the challenged 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, 150 Tex. 662, 244 S.W.2d 660 (1951). We do not find them to be so in this case.

The decision and order of the hearing officer are affirmed,

Philip F. O'Neill
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Gary L. Kilgore
Appeals Judge