APPEAL NO. 950096
FILED MARCH 3, 1995

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 on November 23, 1994, to determine the following issues: did the carrier contest compensability timely; what is the date of the claimant's injury; did the claimant sustain a compensable injury; and did the claimant timely report an injury to her employer. The hearing officer held that the claimant was not injured in the course and scope of her employment, that she did not timely report an injury to her employer, and that the carrier properly and timely disputed the claim. The claimant appeals the hearing officer's decision, pointing to evidence which supports her case. The carrier basically responds that the hearing officer's decision is supportable and should be affirmed.

DECISION

Affirmed, as reformed.

The claimant, whose job involved doing order entries for (employer) contended that she suffered from a repetitive trauma injury to her wrists. She stated that she began experiencing wrist pain and swelling off and on at work during 1993; on _____she said her wrist gave way while she was in the bathtub at home and she fell, injuring her elbow and shoulder. However, she said that at the time she believed her wrist problems were due to arthritis, which she had in her knees and ankles. She went to an emergency room (ER) after the bathroom fall, where her arm was put in a sling, but said the doctor spent little time examining her wrist. The diagnosis given on the ER report was acute left shoulder, elbow and wrist sprain, although her wrist was found to be nontender, nonswollen, with full range of motion and x-rays of the wrist were negative.

Claimant said her wrist problems worsened in December of 1993, the same month and year that she ceased working for employer, and in January of 1994. On (date of injury) she said the intensity of the pain caused her to return to an emergency room. She said that the ER doctor suspected she had carpal tunnel syndrome and referred her to a specialist, (Dr. F). She also said the ER doctor asked what she did for a living and told her this problem was common in her profession; claimant said this was the first time she knew her problems were related to her work. The following day, _____claimant telephoned the Texas Workers' Compensation Commission (Commission) to ask about filing a claim; she also said she called her former supervisor, (Ms. M), to report her injury and to inquire whether the latter remembered a petition claimant had signed that had been circulated at work during the summer of 1993 in an attempt to get wrist pads for the employees. Ms. M testified, however, that she did not talk at all to claimant after she left employer, and said that she knew nothing about a petition. (Ms. T), employer's administrative assistant who had responsibility for workers' compensation claims, also

testified that she knew nothing about a petition, although she said it would have been her responsibility to purchase the pads. Ms. M stated that while wrist pads were purchased and made available to employees in 1994, she knew of no actual complaints of wrist problems from any employee. She acknowledged that claimant had come to work with her arm in a sling in 1993, but said she had been told that that was a result of the fall in the bathtub. Both Ms. M and Ms. T said they found out about claimant's injury when they were notified by the insurance carrier in March of 1994.

Dr. F's March 2, 1994, report says that claimant had experienced pain, numbness and tingling in her arms and that the claimant quit her job in December of 1993 "because of the problems she was having." Dr. F diagnosed bilateral carpal tunnel syndrome and left DeQuervain's tendinitis. He also recommended electrodiagnostic studies, although claimant said the EMG was not performed until after the benefit review conference because the carrier would not pay. On July 18th claimant saw (Dr. M) for evaluation and electrodiagnostic studies. He wrote that claimant's EMG failed to demonstrate any neural basis for her symptoms and that, in his opinion, she had "a definite DeQuervains tenosynovitis on the left side, and it is my impression that it is tendinitis rather than any neural pathology that accounts for her symptoms." In a subsequent letter Dr. M clarified that an EMG can only identify whether a problem was one of nerve entrapment (which was not the case with the claimant), but that tenosynovitis or tendinitis were clinical diagnoses which frequently are produced by the same type of trauma which produces nerve entrapment.

Claimant's notice of injury and claim for compensation, which she said she prepared after she saw Dr. F, gave an _____, date of injury; at the hearing the claimant said she used this date after being advised by a Commission employee to put down the date she first noticed the problem. In addition, in the recorded statement taken by a carrier representative the claimant said the first time she "started having trouble" was _____, and that she reported it to the employer the same day. She also said she periodically mentioned her wrist pain to coworkers. At the hearing, the claimant said that she did not understand until the benefit review conference that the date of injury for a repetitive trauma injury was the date she knew or should have known the injury was job related, and she said that on _____, she still believed her problems were caused by arthritis. Several of claimant's coworkers gave written statements that they did not remember her complaining of wrist pain, although claimant said there were other employees who had not given statements. Apparently the coworkers who gave statements, including Ms. M, did so with regard to an _____, date of injury. Ms. M stated at the hearing that her statement would not change if the date of injury were (date of injury).

Also in evidence was a Notice of Refused/Disputed Claim (Form TWCC-21) filed by the carrier on April 4, 1994. That form reflects that claimant's date of injury was _____, and that carrier first received written notice of the injury on March 24, 1994. Payment to the claimant was refused on the following stated grounds: "1. 30 day

defense (no injury reported to employer) 2. She did not seek medical for this complaint until _____ days after her alleged date of injury and ____days after her resignation. 3. Per claimant, she is receiving unemployment benefits through TEC." The evidence does not reflect that any other TWCC-21 was filed.

Key findings and conclusions made by the hearing officer are as follows:

FINDINGS OF FACT

4. The claimant started having left wrist problems after a fall at home in April 1993.

5. The claimant said she did not know the left wrist problems were job related until told by the doctor of [sic] (date of injury).

6. The claimant signed a petition in June of 1993 requesting wrist supports.

7. The claimant was having wrist problems at the time she signed the petition.

8. The claimant knew, or should have known her condition was job related when she signed the petition.

9. The claimant gave a statement saying her problems started in April, 1993.

10. The claimant reported the injury to her employer in February, 1994.

11. The claimant did not report her injury to her employer within 30 days of the date she knew, or should have known, her condition was job related.

12. The carrier filed a TWCC-21 disputing compensability of the injury on April 4, 1994.

13. The carrier received notice of the injury from the Commission on March 30, 1994.

14. The claimant was not injured at work.

15. There is no causal relationship between the claimant's wrist injury and her employment.

16. The claimant does not have a good reason for failure to timely report her injury to her employer.

CONCLUSIONS OF LAW

3. The carrier timely contested compensability of the claim.

4. The date of injury is April, 1993.

5. The claimant did not sustain a compensable injury.

6. The claimant did not timely report an injury to her employer.

7. The claimant does not have good cause for failure to timely report the injury to her employer.

In her appeal the claimant disputes that the carrier's TWCC-21 was timely filed, and contends that the carrier never contested compensability of her claim. Regarding the correct date of injury, the claimant argues that she originally put down an incorrect date and that until (date of injury), she believed her problems were caused by arthritis and that the wrist pads would give her relief from that condition. With regard to the issue of whether she sustained a compensable injury, the claimant argues that the ER report states she was to avoid repetitive motion, and that the ER physician told her the condition was work related; she notes also the diagnoses of Drs. F and M. As to timely notice, the claimant points out that carrier's TWCC-21 shows it received written notice of her claim on March 24, 1994, which is within 30 days of a (date of injury), date of injury; she also points out that she notified her employer in February 1994 and that Commission logs show the first letter was sent to the employer on March 5, 1994. Finally, the claimant contends that the hearing officer would not allow her to refer to personal notes she had made in regard to events in her case, and that he denied her request to subpoena certain information from her employer. With regard to the latter points, the record of the hearing shows the hearing officer did not allow the claimant to leave the witness stand while on cross-examination to retrieve her personal notes, but does not reflect that she sought, but was not allowed, to refresh her memory on redirect examination. In addition, the record does not reflect that the claimant objected at the hearing to the partial denial of her subpoena request, so this point may not be raised for the first time on appeal. Texas Workers' Compensation Commission Appeal No. 93514, decided August 5, 1993.

The issue of whether the carrier timely contested compensability involves Section 409.021, which basically provides that if an insurance carrier does not contest the compensability of injury on or before the 60th day after the date on which the carrier is notified of an injury, it waives its right to contest compensability. We agree with the claimant that the carrier's own document, its TWCC-21, shows that it received notice of claimant's claim on March 24th rather than on March 30th; however, this point is immaterial as the claimant does not appear to contest the timeliness of the carrier's filing but rather the content. Section 409.022 provides that a carrier's notice of refusal to pay benefits under

Section 409.021 must specify the grounds for refusal, which grounds constitute the only basis for the carrier's defense on the issue of compensability in a subsequent proceeding, unless the defense is based on newly discovered evidence that could not reasonably have been discovered earlier. We have previously noted that Tex. W. C. Comm'n, 28 TEX. ADMIN. CODE § 124.6 (Rule 124.6), requires "a full and complete statement of the grounds for the carrier's refusal to begin payment of benefits," and have said we will look to a fair reading of the reasoning listed to determine if the notice of refusal or denial is sufficient. Texas Workers' Compensation Commission Appeal No. 93326, decided June 10, 1993.

The Appeals Panel has been called upon many times to determine whether the language in a TWCC-21 is sufficient to satisfy the requirements of the statute and rule (Rule 124.6(a)(9)) provides that "A statement that simply states a conclusion such as "liability in question," "compensability in dispute," "no medical evidence received to support disability" or "under investigation" is insufficient grounds for the information required by this rule"). In such cases, we have looked to language in previous decisions that was examined for purposes of sufficiency. Texas Workers' Compensation Commission Appeal No. 92468, decided October 9, 1992, held insufficient the language, "No medical to support;" in Texas Workers' Compensation Commission Appeal No. 94477, decided May 27, 1994, language was held inadequate which stated the definition of occupational disease and said the carrier's investigation was ongoing pending receipt of medical information. On the other hand, language found to be sufficient has included "Carrier disputes as no evidence of an injury in the course and scope. Carrier has not been able to locate employee," (Texas Workers' Compensation Commission Appeal No. 931148, decided February 1, 1994); and "Based on witness' statements vs. non-statement of claimant (attorney represented), and medical is nonconclusive on date of injury and history, this claim is disputed. The claimant continued to work full time through December 24, 1992, with no complaints to anyone. The first doctor's visit was January 7, 1993 . . ." (Texas Workers' Compensation Commission Appeal No. 931148, decided February 1, 1994).

While the language in the instant case appears to be a close call, we do not find that the hearing officer erred in determining that it was sufficient to call into dispute the issue of the compensability of the claimant's injury. Even had we held otherwise, however, there was no dispute that the carrier timely raised the defense of timely notice which, if determined against the claimant, would serve to relieve the carrier of liability for this claim. Section 409.002. We must therefore examine the evidence to determine whether it is sufficient to support the hearing officer's determination regarding the date of claimant's injury and when notice was given to her employer.

The 1989 Act provides that the date of injury for an occupational disease (which includes a repetitive trauma injury, Section 401.011(34)), is the date the employee knew or should have known that the injury may be related to the employment, and notice to the

employer must be given not later than the 30th day after that date. Section 409.001. As noted above, failure to timely notify relieves the employer and its insurance carrier of liability unless, among other things, good cause is shown. Section 409.002.

In the instant case the claimant testified that she experienced periodic pain and swelling in her wrists beginning in 1993, as well as apparent weakness which resulted in her fall in April. She testified that she believed that her wrist problems were caused by arthritis, and that even though she signed a petition requesting wrist pads to relieve her pain, she did not connect the condition to her work until informed by the ER doctor in February 1994. However, her statement to the carrier indicated that she first started having wrist problems in April 1993 and that she reported it to her supervisor at that time and periodically to coworkers thereafter. She also stated that she signed a petition in the summer of 1993 requesting wrist pads which she thought would eliminate her problem, although she maintained she still believed the problem to be arthritis. While the evidence before the hearing officer was somewhat conflicting, the hearing officer is responsible for reconciling conflicts in the evidence. Burelsmith v. Liberty Mutual Insurance Co., 568 S.W.2d 695 (Tex. Civ. App.-Amarillo 1978, no writ). The 1989 Act 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). Further, the law does not require the hearing officer to accept in its entirety the testimony of a claimant, an interested witness. Lopez v. Hernandez, 595 S.W.2d 180, 183 (Tex. Civ. App.-Corpus Christi 1980, no writ). The hearing officer could draw reasonable inferences from the evidence presented and his findings may not be disregarded if the record discloses any evidence of probative value in support thereof. Harrison v. Harrison, 597 S.W.2d 477 (Tex. Civ. App.-Tyler 1980, writ ref'd n.r.e.). In this case the hearing officer determined that by the time the claimant signed the petition in June of 1993 she should have known that her condition was related to her work. We cannot say, based upon the evidence presented, that the hearing officer's determination is not supported by the evidence or is so against the great weight and preponderance of the evidence as to be manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986). We observe that we have held that a claimant does not necessarily need medical confirmation of a condition before he or she is found to "know or should have known" that an injury was work related. See Texas Workers' Compensation Commission Appeal No. 92559, decided December 3, 1992.

Because the evidence supports the hearing officer's finding that the claimant knew or should have known of the work-related nature of her condition in June of 1993, we reform the hearing officer's Conclusion of Law No. 4 to include that date of injury rather than the date of "April, 1993," as written.

The hearing officer further found that the claimant did not notify her employer of a work-related injury until February of 1994, that she did not timely report such injury, and that she did not have good cause for failure to timely report. We also find the evidence sufficient to support these determinations. Claimant testified that she informed her

supervisor, Ms. M, on February 25, 1995; the latter denied that this occurred and Ms. T stated that the employer first received notice from the carrier on March 25, 1994. Regardless of which date was credited by the hearing officer, both were outside of the 30 days following the date of injury; good cause was never argued by the claimant.

Finally, in examining the evidence to support the hearing officer's determination that claimant's injury was not incurred in the course and scope of her employment, we note that the hearing officer could have reached this conclusion due to the lack of causation stated in the medical evidence (which although not necessarily required, does provide some support for the hearing officer's findings) and the fact that by claimant's own testimony, her physical problems intensified after she ceased working for her employer. Once again, the conflicting evidence was a matter for the fact finder to reconcile.

In sum, we are persuaded that the hearing officer's decision in this case was not so against the great weight of the evidence as to require this panel's reversal. Cain v. Bain, *supra*. While the record in this case did contain probative evidence in the claimant's favor, that fact alone is not a sufficient basis upon which to overturn the fact finder's decision. Garza v. Commercial Insurance Co. of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ).

The hearing officer's decision and order are affirmed, as reformed herein.

Lynda H. Nesenholtz
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Alan C. Ernst
Appeals Judge