APPEAL NO. 950102
FILED MARCH 3, 1995

This appeal is brought pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on November 21, 1994. Addressing the appealed issues, the hearing officer determined that the appellant (claimant herein) did not sustain a compensable occupational disease (repetitive trauma injury) on _____; that she did not timely report the injury and did not have good cause for her failure to timely report the injury; and that she did not have disability. The claimant appeals these determinations arguing that they are incorrect and not supported by the evidence. The respondent (carrier herein) replies that the decision and order of the hearing officer is supported by sufficient evidence and should be affirmed. Unless otherwise specified, all dates are in 1994.

DECISION

Affirmed as reformed.

The claimant worked on a production line assembling valves. Every hour she changed to a different part of the assembly process, but the work was always of a repetitive nature. She said that for a day or two before (date of injury), she began to experience pain in her neck, shoulders and right arm that would travel down to her fingers and produce a tingling sensation or numbness. By (date of injury), she said she knew this pain was caused by her job and told her supervisor (Ms. K), on the afternoon of (date of injury) both that she had the pain and that she thought it was from working on the assembly line. According to the claimant, Ms. K was very busy and made no response. The claimant also said that at about the same time she told two other supervisors, (Mr. O) and (Ms. L), about her pain. She said she had no other conversations with these supervisors about her condition because "everybody" knew why she was hurting. She stated she passed a pre-employment physical with no problems and that her current condition is the result of her job activities. She did not miss any work until she was terminated on _____ after she tested positive for marijuana in a random urinalysis. In response to a question by the hearing officer, she testified that if she had not been terminated she would still be working for this employer.

The claimant said she first sought medical care from (Dr. J), D.C., on July 11th. The earliest records of Dr. J's treatment in evidence are for a visit on July 22nd at which time Dr. J diagnosed brachial neuritis, cervical hypolordosis and subluxation, and muscle spasm. In a subsequent medical report of August 10th, Dr. J repeats this diagnosis and added, "in my opinion, her work, as an assembler, could exacerbate her spinal condition. [Claimant's] treatment has been for the purpose of stabilization and prevention of progressive symptoms. At the time of evaluation and treatment, [claimant] was working

without restrictions." The claimant said that she was intent on working and asked Dr. J not to excuse her from work.

The claimant signed an "Employee's Notice of Injury or occupational Disease and Claim for Compensation" (TWCC-41) on August 24th, and it was date stamped as received by the field office of the Texas Workers' Compensation Commission (Commission) the same day. She said that Dr. J's reports were first telefaxed to the Commission on September 16th and 24th.

(Ms. C), a human resources assistant with the employer, testified that she is responsible for the administration of the employer's workers' compensation program. In this capacity, she gets reports of injuries from supervisors and invariably tells them to prepare a written report. She said she has searched the employer's files and there is no record of a report of injury concerning the claimant. She denied being present at any conversation when anyone said the claimant was contending she sustained an occupational injury, and did not know of the claimant's injury until the carrier called her about it on September 20th. She was of the opinion that Ms. K was very efficient and if the claimant had reported a job-related injury to her, Ms. K would have reported it to Ms. C.

The claimant in a worker's compensation case has the burden to prove by a preponderance of the evidence that she sustained a compensable injury in the course and scope of her employment. Johnson v. Employers Reinsurance Corporation, 351 S.W.2d 936 (Tex. Civ. App.-Texarkana 1961, no writ). The 1989 Act defines "injury" as damage or harm to the physical structure of the body and a disease naturally resulting from the damage or harm. Section 410.011(26). Included in the definition of injury is an "occupational disease" which in turn includes a "repetitive trauma injury." Section 410.011(34). A repetitive trauma injury is an injury which results from repetitious, physically traumatic activities that occur over time and arise out of and in the course and scope of employment. Section 401.011(36). In addition, we have held that the aggravation of a pre-existing condition may be a compensable injury in its own right. Texas Workers' Compensation Commission Appeal No. 94819, decided August 4, 1994. Whether the necessary causation between a claimed repetitive trauma injury and the employment activities exists is a question of fact for the hearing officer to decide. Texas Workers' Compensation Commission Appeal No. 93420, decided July 16, 1993. The hearing officer, as fact finder, is the sole judge of the relevance and materiality of the evidence and of its weight and credibility. Section 410.165. To this end, the hearing officer may believe all, part or none of the testimony of any witness. The testimony of a claimant as an interested party raises only an issue of fact for the hearing officer to resolve. Burelsmith v. Liberty Mutual Insurance Company, 568 S.W.2d 695 (Tex. Civ. App.-Amarillo 1978, no writ). The hearing officer found that the claimant failure to establish a causal link between the work she was performing and her claimed injury and that she did not sustain a compensable occupational disease. In doing so, he obviously found the claimant's account of how she was injured unpersuasive. The hearing officer was not compelled to find the statements of Dr. J determinative of this issue. 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 we will 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); Pool v. Ford Motor Company, 715 S.W.2d 629 (Tex. 1986). Given our standard of review, we find the evidence sufficient to support the determination of the hearing officer on this issue and decline to reverse it on appeal.

The claimant also contends that the hearing officer erred in finding the date of injury to be (date of injury), not _____. In support of this proposition, claimant states the "compensable injury begin [sic] on the last day of employment, _____, . . . [w]hen they (employer) knew for a fact that appellant had a work-related injury and was already under treatment for the medical condition." The claimant testified repeatedly that she knew by (date of injury) that the pain, numbness and tingling in her right arm were caused by her repetitive job activities. Section 408.007 provides that "the date of injury for an occupational disease is the date on which the employee knew or should have know that the disease may be related to the employment." *See also* Texas Workers' Compensation Commission Appeal No. 94896, decided August 25, 1994. The claimant's position that the correct date of her occupational disease (repetitive trauma injury) is her last day of work is incorrect as a matter of law. The finding of the hearing officer that the correct date of her injury in this case is (date of injury) is sufficiently supported by claimant's own testimony and we affirm this finding.

We next consider the claimant's argument on appeal that the hearing officer erred in finding that she did not give her employer timely notice of the injury and that good cause did not exist for her failure to do so. Section 409.001 provides in pertinent part that an injured employee shall notify the employer of an injury not later than 30 days after the injury occurred. Absent good cause for failing to provide this notice, such failure relieves the carrier and employer of liability for benefits. The claimant contended that she notified three supervisors of her injury on or about (date of injury). Ms. C denied that she ever received such a report from any of these supervisors. The evidence of timely notice was thus in stark contrast. The hearing officer was unpersuaded by the claimant's testimony and resolved the issue against the claimant. We will not overturn this credibility determination and substitute our judgment for that of the hearing officer.

The hearing officer alternatively found that the claimant did not have good cause for her failure to give timely notice of her injury. The test for the existence of good cause is that of ordinary prudence, that is, whether the employee has prosecuted her claim with the degree of diligence that an ordinarily prudent person would have exercised under the same or similar circumstances. Hawkins v. Safety Casualty Company, 146 Tex. 381, 207 S.W.2d 370 (1948). The claimant did not provide a rationale or explanation for her untimely notice to justify a finding of good cause. This is understandable since the theory of her case has always been that she did provide timely notice. We find no error in the decision and order of the hearing officer that the claimant did not have good cause for failing to give timely notice of her injury.

We also find no error in the hearing officer's determination that the claimant did not have disability, as the 1989 Act requires a finding of the existence of a compensable injury as a prerequisite to a finding of disability. Section 401.011(16).

We reform the decision and order of the hearing officer to reflect the proper carrier is American Motorists Insurance Company, not African Motorists Insurance Company, and affirm.

Alan C. Ernst
Appeals Judge

CONCUR:

Gary L. Kilgore
Appeals Judge

Tommy W. Lueders
Appeals Judge