

APPEAL NO. 990235

On January 12, 1999, a contested case hearing (CCH) was held. The CCH was held under the provisions of the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). The issues at the CCH were: (1) whether appellant (claimant) sustained a compensable occupational disease; (2) the date of injury; (3) whether respondent (carrier) is relieved of liability under Section 409.002 because of claimant's failure to timely report the injury to her employer; (4) whether claimant has had disability; and (5) whether claimant is barred from receiving workers' compensation benefits because of an election to receive group health/accident benefits. The claimant requests reversal of the hearing officer's decision that the date of injury is _____; that she reported the injury to the employer on October 7, 1998; that she did not have good cause for not timely reporting the injury to her employer; that carrier is relieved of liability under Section 409.002; that she did not sustain a compensable occupational disease; and that she did not have disability. Carrier requests affirmance. There is no appeal of the hearing officer's decision that claimant sustained an occupational disease while working for the employer and that claimant is not barred from receiving workers' compensation benefits based on an election of remedies.

DECISION

Affirmed.

Claimant testified that she worked for the employer for five years and that beginning in January 1998, she worked in the employer's warehouse where she lifted heavy boxes of merchandise. Claimant said that in Alleged injury she and Dr. CH, her gynecologist, attributed her back pain to gynecological problems she was having at that time. Claimant said that on May 15, 1998, Dr. CH took her off work for her gynecological problems and she has not worked since that time. On June 18, 1998, claimant underwent a hysterectomy procedure for endometriosis. She said that on August 12, 1998, Dr. CH told her she had recovered from her June surgery. She said that she told Dr. CH she was still having back pain. Claimant said she had a MRI done on August 12, 1998, and that on August 13, 1998, Dr. CH told her she had a bulging lumbar disc and referred her to Dr. R, an orthopedic surgeon. Claimant said that by August 13th she did not believe her back pain was due to her gynecological problems. Dr. CH wrote on August 14, 1998, that claimant had recovered from her surgery for endometriosis, that she had been found to have a bulging disc at L5-S1, that he referred her to Dr. R, and that she would not be able to return to work unless she could be placed in a desk job with no physical activity.

Claimant said that when she saw Dr. R on _____, she told Dr. R she worked in a warehouse doing lots of lifting and asked Dr. R if that could possibly have caused her to hurt her back. Claimant said that on _____ she was not sure her back was injured at work and only believed that that was a possibility. She said that Dr. R told her it did not appear to be work related. In his report dated _____, Dr. R wrote that claimant related that she had had pain in her coccyx region since March 1998 and that "she suggests that this may

have been caused by repetitive lifting of heavy freight pallets, etc., at work." Dr. R wrote that a CT scan showed degenerative changes at L4-5 and a mild central disc protrusion at L5-S1. He wrote that he told the claimant that her tail bone pain is not the type of pain produced by an L5-S1 disc protrusion, particularly if the disc protrusion does not impinge upon the neurologic structures, and suggested she visit Dr. RO. No report from Dr. RO is in evidence. Dr. R does not state in his report of _____ whether he told claimant that her tail bone pain was or was not related to her work activities.

Dr. R referred claimant to Dr. CA. Claimant first saw Dr. CA on October 1, 1998, and, in a report of that date, Dr. CA wrote that he was seeing claimant for a complaint of intractable coccygeal and lower back pain and in the history section of his report stated that claimant was injured in Alleged injury lifting pallets and boxes at work. Dr. CA noted that an MRI showed a degenerative change at L4-5 and a central disc protrusion at L5-S1. In the impressions section of his report, Dr. CA wrote that claimant has a lumbar strain injury with subsequent coccydynia and noted the MRI findings. He recommended injections and physical therapy and wrote that claimant could not return to work at that time. Claimant said that before she saw Dr. CA on October 1, 1998, she only suspected her back injury may be work related and she did not know for sure her back injury was work related until Dr. CA told her that on October 1, 1998.

Claimant said that she first reported to her employer that her back injury was work related on October 7, 1998, and on that day she completed a written statement for the employer about her injury in which she stated, among other things, that she had reported to the employer's personnel manager on August 13, 1998, that she has a bulging disc. She did not state in the written statement that she had reported on August 13th that she had been injured at work.

Dr. CA examined claimant again on November 5, 1998, and, in a report of that date, Dr. CA wrote that claimant has a posttraumatic lumbar strain injury and that in his opinion claimant's symptoms are the result of a work-related injury that occurred in Alleged injury while lifting repetitively at work.

In an answer to a carrier written interrogatory, claimant wrote that, with regard to the timely notice issue, she agrees to the injury date of August 13, 1998, but did not report it due to good cause, that she initially thought her pain resulted from a gynecological problem, that in August 1998 she suspected it to be work related, and that in October 1998 Dr. CA confirmed it to be a work-related injury. In her Employee's Notice of Injury or Occupational Disease and Claim for Compensation (TWCC-41) claimant wrote in response to the question of when did you first know that the occupational disease may be related to your employment, "suspected on 8-13-98 confirmed suspicion on 10-1-98." Claimant said she has not been released to return to work by her doctors.

The hearing officer found that the claimant was exposed to repetitious physically traumatic activities at work and that her work-related activities caused or aggravated a lower back injury, and he concluded that claimant sustained an occupational disease in the

form of a repetitive trauma injury, but that it is not compensable because the injury was not timely reported to the employer. There is no appeal of the hearing officer's decision that claimant sustained an occupational disease.

Section 408.007 provides that the date of injury for an occupational disease is the date on which the employee knew or should have known that the disease may be related to the employment. The hearing officer found that claimant knew she may have a work-related injury on _____, at the latest, and he concluded that the date of injury was _____. Claimant contends that her date of injury was October 1, 1998, when she first spoke with Dr. CA because that is when she first realized "without a doubt" that her back injury was work related. The date of injury is not established by the date a claimant knows "without a doubt" that she has a work-related injury, but instead is determined under the standard set out in Section 408.007. The date of injury was a fact question for the hearing officer to decide from the evidence presented. The hearing officer is the judge of the weight and credibility of the evidence. Section 410.165(a). As the finder of fact, the hearing officer resolves conflicts in the evidence and may believe all, part, or none of the testimony of any witness. Among other evidence, the hearing officer could consider the _____ report of Dr. R wherein Dr. R wrote that claimant had suggested that her pain may have been caused by repetitive lifting at work. The hearing officer was not required to believe claimant's testimony that Dr. R told her it did not appear to be work related. We conclude that the hearing officer's determination that the date of injury was _____, is supported by sufficient evidence and is not against the great weight and preponderance of the evidence.

Section 409.001(a) provides that if the injury is an occupational disease, an employee or a person acting on the employee's behalf shall notify the employer of the employee of an injury not later than the 30th day after the date on which the employee knew or should have known that the injury may be related to the employment, and Section 409.002 provides that failure to notify an employer as required by Section 409.001(a) relieves the employer and the employer's insurance carrier of liability unless an enumerated expectation, one of which is good cause for failure to provide notice in a timely manner, applies. Claimant states in her appeal that she informed the personnel manager on August 13, 1998, that a CT scan revealed a bulging disc; however, as previously noted, claimant testified at the CCH that she first notified her employer on October 7, 1998, that she had a work-related back injury. For purposes of the notice provision, the employer need only know the general nature of the injury and the fact that it is job related. DeAnda v. Home Insurance Company, 618 S.W.2d 529 (Tex. 1980). Claimant contends that she had good cause for not reporting her injury to her employer until October 7, 1998, because it was not until October 1, 1998, that she realized "without a doubt" her back injury was work related because that is when Dr. CA confirmed that to her.

The hearing officer determined that claimant reported her injury to her employer on October 7, 1998, that claimant did not establish continuing good cause to excuse her failure to timely report the injury, and that the carrier is relieved of liability under Section 409.002. The questions of when claimant reported her injury and whether she had good cause for late reporting were fact questions for the hearing officer to determine. With regard to good

cause, the hearing officer noted that while claimant had stated in her answers to interrogatories that she had initially thought her pain was from a gynecological problem, the evidence reflected that her gynecological problem had resolved by August 14th when Dr. CH wrote she had recovered from her surgery and claimant no longer attributed her back pain to her gynecological problem at that time. We conclude that the hearing officer's determinations are supported by sufficient evidence and are not against the great weight and preponderance of the evidence.

"Disability" means the inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage. Section 401.011(16). Since the hearing officer determined that claimant did not sustain a compensable occupational disease because she failed without good cause to timely notify her employer of her injury, claimant would not have disability as defined by Section 401.011(16).

The hearing officer's decision and order are affirmed.

Robert W. Potts
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Elaine M. Chaney
Appeals Judge