APPEAL NO. 990289

On January 14, 1999, a contested case hearing (CCH) was held in. 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 respondent (carrier) waived its right to contest the compensability of the claimed injury by not contesting within 60 days of being notified of the injury; (2) the date of injury; (3) whether appellant (claimant) sustained a compensable injury in the form of an occupational disease; (4) whether carrier is relieved of liability under Section 409.002 because of claimant's failure to notify the employer within 30 days of the injury under Section 409.001; and (5) whether claimant has had disability. Claimant requests reversal of the hearing officer's decision that he did not sustain a compensable injury in the form of an occupational disease; that the date of injury is (date of injury No. 2); and that carrier is relieved of liability under Section 409.002 because of claimant's failure to timely report the injury to the employer. There is no appeal of the hearing officer's decision that carrier did not waive its right to contest compensability of the claimed injury. No response was received from carrier.

DECISION

Affirmed.

Claimant sustained a low back injury while working for the employer on (date of injury No. 1), and after that injury began operating a front-end loader for the employer. Claimant has been treated by Dr. B, and Dr. D for his low back injury. On (date of injury No. 2), claimant wrote on an equipment inspection report that the front-end loader he was operating had excessive slack in it and was causing severe jerking and whiplash. According to the employer's maintenance superintendent, claimant was laid off in February 1998 due to a reduction in the number of front-end loader operators it needed. Claimant said in a recorded statement that he has not worked since being laid off. In an Employee's Notice of Injury or Occupational Disease and Claim for Compensation (TWCC-41) dated July 22, 1998, claimant claimed that he sustained a repetitive trauma injury to his neck, mid back, and upper back and gave the date that he knew that the occupational disease may be related to his employment as (date of injury No. 3). Claimant said that the front-end loader jerked and slung him around and that he began having soreness in (date of injury No. 1) from that. Claimant said that on (date of injury No. 3), Dr. B informed him that he had a repetitive trauma injury from operating the front-end loader after taking cervical x-rays on that date. Claimant testified and it is undisputed that claimant first reported to his employer on July 20, 1998, that he had sustained a repetitive trauma injury to his neck from operating the front-end loader.

According to medical reports in evidence, on five occasions between May 22, 1995, and July 24, 1996, while Dr. B was treating claimant for his (date of injury No. 2) low back

injury, claimant told Dr. B that he had neck stiffness or tightness and Dr. B provided chiropractic treatment to his neck on those occasions. Claimant said that Dr. B told him that his neck problem in 1995 was from overcompensating for his low back injury. Claimant said the front-end loader was not throwing him around in 1995 and that that started around (date of injury No. 1). Claimant testified that his neck condition got progressively worse and answered in the affirmative when asked if he would agree that his neck condition did not worsen until April 1998.

On March 3, 1998, Dr. B first mentioned in a report that claimant complained of neck pain as opposed to just stiffness or tightness and on April 13, 1998, Dr. B first began rating claimant's complaints of neck pain. After March 1998, claimant began seeing Dr. B for complaints of neck pain, as well as low back pain, several times a month, and Dr. B provided chiropractic care for those complaints. On June 12, 1998, Dr. B wrote that claimant complained of lower back and neck pain, noted that claimant had had increasing lower back pain, and that claimant should remain off of work. In a report dated (date of injury No. 3), Dr. B wrote that claimant was complaining of pain in the neck, mid back, and upper back and that claimant had initially reported the onset of those complaints around (date of injury No. 1) and that his pain seemed to have increased with time. Dr. B also noted in the (date of injury No. 3) report that cervical and thoracic x-rays were taken on that date and he diagnosed claimant as having degenerative disc disease of the cervical and thoracic spine and degenerative joint disease of the cervical spine. Dr. B wrote in the (date of injury No. 3), report that his findings were consistent with people who have sustained repetitive trauma injuries to the spine, that the injuries could be directly related to the types of biomechanical stresses that were placed on the cervical and thoracic regions when claimant worked as a loader operator for the employer, and that it should be considered an occupational disease. Dr. B also noted that claimant is unable to work and should remain off work and recommended a cervical and thoracic MRI. On September 14, 1998, Dr. B wrote that in his opinion claimant's complaints of pain in the neck, mid back, and upper back regions are a direct result of the biomechanical stresses placed on those areas while working as a loader operator for the employer.

The hearing officer decided that claimant sustained a repetitive trauma injury to his cervical spine in the course and scope of his employment, but that that injury is not compensable because claimant failed to report the injury within 30 days and did not have good cause for failing to report the injury until July 20, 1998. A repetitive trauma injury is an occupational disease. Section 401.011(34). 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. Section 408.007. The hearing officer found that claimant knew or should have known that he had sustained a cervical injury as a result of his employment on (date of injury No. 2), and concluded that the date of injury was (date of injury No. 2). Claimant contends that his date of injury was (date of injury No. 3), when Dr. B took x-rays, that he received Dr. B's (date of injury No. 3) report on July 17th, and that he timely reported the injury on July 20, 1998.

Section 409.001(a) provides that if an 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 carrier of liability unless certain enumerated exceptions apply, including when the Texas Workers' Compensation Commission determines that good cause exists for failure to provide notice in a timely manner. A good faith belief that an injury is not serious can constitute good cause for a delay in reporting the injury. Aetna Casualty & Surety Company v. Brown, 463 S.W.2d 473 (Tex. Civ. App.-Fort Worth 1971, writ ref'd n.r.e.). The hearing officer found that claimant trivialized his injury to his neck but that claimant knew or should have known that his injury was not trivial on April 13, 1998. It has been held that a reasonable time should be allowed for the filing of a claim after the seriousness of the injury is suspected or determined, and that each case rests upon its own facts. Hawkins v. Safety Casualty Company, 207 S.W.2d 370 (Tex. 1948)). The hearing officer further found that. claimant failed to give notice of the work-related injury to the employer until July 20, 1998; that he did not give notice of the cervical injury to the employer within a reasonable time after he knew or should have known that the injury was not trivial; and that he did not act as a reasonably prudent person would have acted under the same or similar circumstances by not giving notice of injury to the employer within a reasonable time after April 13, 1998. The hearing officer decided that carrier is relieved of liability under Section 409.002 because claimant failed to report the injury to the employer within 30 days and did not have good cause for failing to report the injury until July 20, 1998.

The questions of the date of injury, timely reporting of the injury, and good cause for failing to timely report the injury were fact questions for the hearing officer to determine from the evidence presented. The 1989 Act makes the hearing officer the sole judge of the relevance and materiality of the evidence offered and 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. Texas Workers' Compensation Commission Appeal No. 950084, decided February 28, 1995. An appellate level body is not a fact finder and does not normally pass upon the credibility of witnesses or substitute its judgement for that of the trier of fact. Appeal No. 950084. When reviewing a hearing officer's decision to determine the factual sufficiency of the evidence, we should set aside the decision only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Appeal No. 950084. We conclude that the hearing officer's decision on the appealed issues is supported by sufficient evidence and is not so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust.

The hearing officer's decision and order are affirmed.

Robert W. Potts
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Alan C. Ernst
Appeals Judge