

APPEAL NO. 990313

On January 11, 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) is barred from pursuing Texas workers' compensation benefits because of an election to receive benefits under a group health insurance policy; (2) whether respondent (carrier) is relieved of liability under Section 409.002 because of claimant's failure to timely notify the employer (of her claimed injury) under Section 409.001; (3) what is the date of injury under Section 408.007; and (4) whether claimant sustained a compensable injury in the form of an occupational disease. The claimant requests reversal of the hearing officer's decision that carrier is relieved of liability because of claimant's failure to timely notify her employer (of her claimed injury); that the date of injury is _____; and that claimant did not sustain a compensable injury in the form of an occupational disease. There is no appeal of the hearing officer's decision that claimant is not barred from pursuing Texas workers' compensation benefits under an election of remedies. The carrier requests affirmance.

DECISION

Affirmed.

Claimant testified that she has been a licensed vocational nurse for 35 years and for the last 25 years has worked as a nurse in intensive care units (ICU). She said in her recorded statement taken on August 18, 1998, that she began working for the employer's hospital in 1996. Claimant testified that in the 1980s, while working at a hospital for another employer, she felt extreme pain in her right hand while moving a patient and treated with Dr. W. She said that Dr. W diagnosed her as having mild right carpal tunnel syndrome (CTS) in her right hand only, that she was prescribed a splint and anti-inflammatories, that after a year she no longer had symptoms, and that that injury was filed as a workers' compensation claim. Dr. W wrote in 1989 that claimant injured her wrist moving a patient, that she wore a wrist immobilizer, and that she had mild CTS. Claimant is right-handed.

Claimant said that her job requires her to move, lift, and reposition patients a lot, administer medications, and clean and store medical equipment, and that all of her work activities require extensive use of her hands. The physical demands listed in the written job description for claimant's job include, among other things, heavy physical effort; lifting, transferring, and moving patients; lifting supplies and equipment; and manual dexterity and mobility. Claimant claims that she sustained a repetitive trauma injury in the form of bilateral CTS while performing her job duties for the employer. She said that her prior right CTS involved only pain while her current CTS is bilateral and involves numbness and weakness, and that her hand pain did not begin until March 1998.

In December 1997 claimant underwent a lumpectomy on the left for breast cancer and she said she returned to work doing her regular duties on March 29, 1998. She said that radiation therapy was begun in January 1998 and that in February 1998 she was prescribed Tamoxifen to prevent a recurrence of cancer. She said that the potential side

effects of taking Tamoxifen include bone and muscle pain in the arms and legs and depression. She said that she stopped taking Tamoxifen on _____. An information document on Tamoxifen Citrate states that the doctor should be contacted if the patient experiences, among other things, pain or swelling in the legs or unusual weakness. Another information document on Tamoxifen Citrate states that increased bone pain has occurred with its use and that depression is another adverse reaction.

Claimant said that she began having neck, shoulder, elbow, and arm pain in March 1998 and went to Dr. D, D.C., for those symptoms because she thought she had a pinched nerve. On March 19, 1998, which was before claimant returned to work from her cancer surgery, claimant saw Dr. D and wrote on a patient form that the reason she was seeing Dr. D was because she had been having numbness in her right arm and hand for the last several weeks. The patient history written on Dr. D's physical examination report states that claimant had numbness in her right hand and numbness and aching in the arm that began in January 1998 after her cancer surgery and that claimant had slept on her right side for two months. The presenting complaints were stated as right arm numbness and tingling. The diagnoses stated on Dr. D's March 19th examination report included "TOS" (later identified as thoracic outlet syndrome), "R/O carpal tunnel synd" (per claimant R/O stands for "rule out"), neck pain, and "R/O C-IJDS" (which was not explained). Dr. D wrote in a patient report of March 19, 1998, that he saw the claimant on that day for complaints of neck pain with radiation to the right upper extremity. Dr. D's March 20th report notes discomfort in the right arm with radiation to the right hand with tingling. According to the patient notes of Dr. D and Dr. S, D.C., who is apparently associated with Dr. D, they continued to provide chiropractic treatment to the claimant to May 11, 1998. In a letter dated November 4, 1998, Dr. D wrote that when he saw claimant on March 19, 1998, she complained of pain as well as numbness and tingling in her right arm; that he diagnosed her as having thoracic outlet syndrome; that he was concerned that her symptoms may have been due to a problem with a cervical disc; that he treated her for those two conditions; that her last visit was on May 11, 1998, at which time she was still complaining of pain in her neck and right arm; that claimant later told him that she discovered that her arm pain was being caused by medication she was taking and that within a few days of going off that medication her arm pain began to diminish; and that his office never diagnosed or treated claimant for CTS.

Claimant testified that from the minute she returned to work on March 29, 1998, she had arm and leg pain. She said that after she stopped taking Tamoxifen on _____, both her hands were numb, her right more than her left, and that she went to Dr. T, a neurologist, in July 1998. Medical records show that claimant first went to Dr. T on July 2, 1998, and on that date claimant wrote in a patient form that her complaints were right arm pain, wrist pain, numbness in her fingers, and occasional generalized weakness. Dr. T wrote in the history section of his report of July 2nd that claimant's chief complaint was right arm and neck pain; that claimant was an ICU nurse; that for several years claimant had had progressive right arm pain, wrist pain, occasional numbness in the fingers, and a feeling of weakness in the right arm; that claimant had previously been told that she may have CTS on the right side, but had not required any surgical intervention; that claimant occasionally experiences pain in the left arm and wrist; and that claimant had a previous history of an aneurysm repair (records indicate that was during a 1985 brain surgery) and that there had

been no sequelae or problems from that. Dr. T recorded an impression of cervical radicular syndrome and status post aneurysm repair and recommended an "EMG/NCV" "for assessment of radiculopathy and rule out [CTS]" and a CT scan of the cervical spine.

On July 7, 1998, Dr. T performed an EMG on claimant's upper extremities and in a report of that date he gave an impression of bilateral CTS, right worse than left. He recommended obtaining the CT scan films for review and wrote that he would then consider referring claimant to a surgeon for decompression of the median nerve. Dr. DI reported in a radiology report dated July 7, 1998, that a CT scan of claimant's cervical spine done that day showed minimal narrowing at two levels and a small nodule within the right lobe of the thyroid gland and that cervical x-rays were normal. Claimant said that a thyroid profile done in July was normal and a document in evidence reflects that it was within an expected range. Dr. T wrote on July 10, 1998, that the CT scan of the neck was abnormal, but did not demonstrate a surgical lesion. He wrote that a discussion ensued regarding claimant's CTS and the need for surgical intervention and again gave an impression of CTS. Dr. T wrote on August 11, 1998, that he had a follow-up visit with claimant on that day, that claimant reported continued pain and numbness in her left hand and persistent pain in her right hand, that he had previously documented CTS, that claimant reported that she had increasing pain that really came on in April or so of 1998, that claimant works as an ICU nurse and does a lot of lifting, that "she is encouraged to report this as a new work-related injury to her supervisor," and that his impression was bilateral CTS. In another report of the August 11th visit dated August 24, 1998, Dr. T wrote that claimant reports increasing bilateral hand pain with numbness and tingling since approximately April 1998 and that she stated that her symptoms occurred after heavy lifting while performing her job duties. Dr. T also wrote that the EMG/NCV "confirms [CTS], right worse than left."

In a letter dated September 8, 1998, Dr. T wrote that he initially saw claimant on July 2, 1998, and that during the August 11, 1998, visit he told claimant that he felt that her symptoms were secondary to a work-related injury and encouraged her to report that to her supervisor. Dr. T wrote on September 22, 1998, that claimant's CTS had been confirmed by the EMG/NCV, that claimant was being treated with anti-inflammatory medication and wrist splints, that he had recommended that claimant be placed on light duty, that claimant told him that no light-duty position was available for her, and that he had, therefore, instructed claimant to defer from work duties for an indefinite period. Claimant said she has not worked since September 26, 1998, and was subsequently terminated from her employment.

On November 13, 1998, Dr. T wrote that claimant's CTS is directly related to her job duties, that claimant had been on Tamoxifen earlier in the year and experienced severe extremity pain, that that was what he had been referring to earlier when he reported that claimant had experienced arm pain before, that when claimant discontinued the Tamoxifen much of the arm pain went away, that claimant returned to her normal work duties and began experiencing increasing pains consistent with CTS, that claimant's job duties include intensive repetitive activity of her wrist, that claimant thought her arm and hand pain would go away, that claimant came to him and it was clear that claimant had either a cervical radicular syndrome or CTS, that further studies confirmed CTS was present, that it was not until August 11th when he was able to review her CT films personally that he was able to

conclude that all of the pain that claimant was experiencing was due to CTS and there was no component attributable to the cervical spine, and that in his opinion the Tamoxifen did not cause her CTS. Dr. T further wrote that based on reasonable medical probability, the claimant's symptomatology is work related, and that the diagnosis of CTS as a work-related injury was not made conclusively until August 11, 1998, at which time he informed claimant of that fact. On November 30, 1998, Dr. T wrote that on August 11, 1998, claimant was instructed to report the confirmed CTS as being work related.

In a letter dated October 7, 1998, Dr. SA, claimant's oncologist, wrote that claimant was treated on a clinical trial of hormonal adjuvant therapy for breast cancer from mid-January of 1998 until mid-August of 1998, that during that time she experienced very severe disabling side effects due to hormonal therapy, that those effects included profound depression and generalized muscle aches and pains, and together those symptoms caused considerable fatigue and virtually precluded her ability to function effectively at work.

Dr. T referred claimant to Dr. Y, who, on November 18, 1998, diagnosed claimant as having bilateral CTS, right worse than left. Claimant underwent a right carpal tunnel release in December 1998 and she said she was scheduled for a left carpal tunnel release the day after the CCH.

Dr. H reviewed claimant's medical records at the carrier's request and, in a report dated December 21, 1998, wrote that in reasonable medical probability the CTS was preexistent or secondary to other factors unrelated to work, that claimant has multiple medical problems that could in themselves produce CTS, and indicated that the medication for the cancer was one of those.

The claimant had the burden to prove that she was injured 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 hearing officer found that the claimant's bilateral CTS is not a result of the duties she performed as an ICU nurse and he concluded that claimant did not sustain a compensable injury in the form of an occupational disease. The claimant contends that her CTS is a repetitive trauma injury from her work for the employer. There was conflicting evidence regarding whether claimant sustained a repetitive trauma injury in the course and scope of her employment with the employer. 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 to be given to 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 judgment 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 that claimant did not sustain a compensable injury in the form of an occupational disease is supported by sufficient evidence and is not so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust.

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. 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. Claimant testified that she first reported her bilateral CTS to the employer as a work-related injury on August 12, 1998, and that is the date the hearing officer found the claimant notified her employer of the injury. Claimant testified that prior to August 11, 1998, she did not have a clue that she had CTS that was work related and that it was not until August 11, 1998, that Dr. T confirmed to her that she had CTS that was work related and she reported her injury to her employer the next day. However, claimant also testified that when Dr. T performed the EMG on her upper extremities on July 7, 1998, he discussed with her that if she had CTS, that it would possibly be related to her work. Claimant was obviously confused about the date that Dr. T performed her EMG when she answered questions in her recorded statement because she indicated in that statement that the EMG was done in _____, whereas the medical records show it was done on July 7, 1998. Claimant said in the recorded statement that when Dr. T did the EMG he told her that he thought she had CTS but wanted to do a CT scan of her neck, which was done on July 7, 1998, by Dr. DI. When the claimant was asked when did he, referring to Dr. T, tell her that he thought it might be work related, claimant replied that she guessed it was in June, and mentioned the EMG.

In finding that the date claimant knew or should have known that her hand and upper extremity problems may have been related to her employment was _____, the hearing officer apparently relied on what claimant said in her recorded statement about the EMG being done in _____ and overlooked the fact that the medical reports show that claimant did not see Dr. T until July 2, 1998, and that the EMG was actually done on July 7, 1998. Contrary to the hearing officer's statement, claimant did not say in her recorded statement that she thought her CTS might be work related in _____; that is what she indicated Dr. T told her in _____, which is when she incorrectly stated the EMG was done. While the evidence does not support a _____, date of injury, there is some evidence from claimant's testimony and recorded statement that could support a date of injury of July 7, 1998. As noted, claimant testified and the hearing officer found that notice of injury was given to the employer on August 12, 1998. Regarding good cause for a delay in reporting the injury until August 12th, the claimant testified that her cancer medication was masking her injury and that in July 1998 she was weak from her cancer surgery and radiation treatments, was depressed from her medication, her daughter was ill, another family member was ill, and she had stress at work. The hearing officer found that claimant did not have good cause for waiting until August 12, 1998, to report her injury as work related to her employer and concluded that carrier is relieved of liability under Section 409.002 because of claimant's failure without good cause to timely notify her employer of an injury.

The determination of whether claimant had good cause was a fact question for the hearing officer to determine from the evidence presented. We cannot conclude that the hearing officer's decision that claimant did not timely notify her employer and did not have good cause for waiting until August 12, 1998, to report the injury is so contrary to the overwhelming weight of the evidence as to be clearly wrong or unjust. Claimant contends that her date of injury was August 11, 1998, the date she and Dr. T state that Dr. T confirmed to her that she had CTS that was work related. We note that even had it been found that the date of injury was August 11, 1998, which would make the August 12th report to the employer timely, it would not change the outcome of this case, because we are affirming, as being supported by sufficient evidence, the hearing officer's finding that claimant's CTS is not a result of her work duties as an ICU nurse and his decision that claimant did not sustain a compensable injury in the form of an occupational disease based on that finding.

The hearing officer's decision and order are affirmed.

Robert W. Potts
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Alan C. Ernst
Appeals Judge