APPEAL NO. 990317

Following a contested case hearing (CCH) held on January 25, 1999, pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act), the hearing officer, resolved the disputed issues by determining that the date of the appellant/cross-respondent's (claimant) injury, pursuant to Section 408.007, is _____; that the respondent/cross-appellant (carrier) is not relieved from liability under Section 409.002 because of claimant's failure to timely notify her employer pursuant to Section 409.001; that claimant did sustain a compensable injury in the form of an occupational disease on _____; that claimant's compensable injury extends to the right elbow, left hand, and neck; and that claimant had disability resulting from the _____, injury beginning on July 30, 1997, and continuing through November 25, 1997. Claimant has appealed the disability determination, asserting that the evidence established that her disability continued to the date of the hearing. The carrier's request for review asserts, generally, that all of the hearing officer's substantive findings of fact and conclusions of law are not sufficiently support by the evidence. However, the carrier's lengthy appeal, which contains 10½ pages of testimony from the hearing transcript, devotes all discussion to the issue of whether claimant sustained a repetitive trauma injury, asserting that the use of her hands throughout her workday varied and that no objective medical evidence supported her contention that her work caused the claimed injuries. The file does not contain a response from either party to their respective requests for review.

DECISION

Affirmed.

Claimant testified that in 1989, while employed by a previous garment industry employer, she sustained a compensable injury to her right upper extremity, underwent a right carpal tunnel release and excision of a ganglion, and settled her claim with the insurance carrier in October 1991. She said her settlement included three years of medical care for her injury but that she never had to return to a doctor for that injury because it had resolved. Claimant stated that she developed a nodule on her right hand in 1996 which she would notice when typing but which was not painful and did not bother her.

Claimant further testified that she commenced employment with (employer) on November 12, 1993; that, initially, her duties involved data entry on a computer; that in December 1996, she was given additional duties involving the printing and sorting of labels and size stickers to be affixed to pants; that although she continued to perform data entry work, she also had to keep four printers supplied with rolls of blank labels and stickers, weighing eight to 10 pounds, which she obtained from a storage room, carried to the location of the printers, and loaded into the printers; and that she also had to separate the printed labels and stickers into stacks, put rubber bands around them, and box them. Claimant, who stated that she worked eight to nine hours per day on the afternoon-evening shift, said she was only infrequently assisted with the obtaining of the rolls from storage and she estimated that she spent a little more than one-half her work time performing data

entry. She indicated that the balance of her work time was spent carrying rolls of labels and stickers to the four printers, loading the rolls, separating the printed labels and stickers into various categories, separating and counting out stacks of about 60, putting rubber bands around the stacks, and packing them. Claimant stated that although she was not given quotas, "it was a very fast paced job." The carrier devotes most of its appeal to an exposition of the lack of specific evidence of the amounts of time claimant spent doing repetitious tasks with her upper extremities. However, we are satisfied that the evidence of record is sufficient to permit the hearing officer to infer that claimant spent nearly all of her work time using her hands in repetitious motions, albeit the nature of the several tasks varied.

Concerning the date of injury and timely notice issues, claimant stated that on _____, she reported to her supervisor, Mr. D, who was present at the CCH but not called to testify, that she was having pain, burning, numbness, and weakness in her right hand up to her elbow, and that she particularly noticed the symptoms when typing and when carrying the heavy rolls of labels. She said Mr. D palpated her fingers, including the nodule, and advised her that the employer did not want to pay for tests. She indicated that the employer sent her to see Dr. N, who gave her some pills and returned her to work, and that shortly thereafter she began experiencing the symptoms in her left hand and wrist. Dr. N's Initial Medical Report (TWCC-61) dated May 19, 1997, reflects claimant's visit of May 16, 1997, and states the diagnosis as finger nodule and elbow pain. An addendum to Dr. N's report states Dr. N's opinion that while he cannot say that claimant's work has caused her nodule and elbow condition, her work has aggravated these conditions. Claimant indicated that she also reported her injury to the claims administrator, Ms. MR, on or about May 15, 1997, and that on or about May 21, 1997, she was interviewed by the carrier's adjuster, Ms. IR, and reported injuries to both her right and left hands. The transcript of Ms. IR's May 21st interview in evidence reflects claimant's complaints about pain in both hands. In evidence is an employer's accident investigation report signed by claimant, Ms. M, the safety representative, and Mr. D on May 15, 1997, and by Ms. MR on May 16, 1997, which claimant stated was filled out Ms. M. This form stated the injury date as approximately June 1996, referring to the development of the nodule on claimant's right hand which did not hurt at the time. The report listed the injured body part as the middle finger on the right hand and also stated that in April 1997 claimant began to have pain in the finger which radiated to the wrist and elbow and since then has continued to have pain both at work and at night. The report further states that "I was notified on 5-8-97 about her nodule."

Claimant further testified that because the carrier denied her claim, she used her personal insurance to see Dr. K and Dr. G, who became her treating doctors and treated her until sometime in November 1997. Dr. K's progress note of June 16, 1997, states that claimant's chief complaint is neck, back, and bilateral upper extremity pain which began at work on _____, while claimant was performing data entry. Dr. K's assessment was cervical and thoracic sprain with bilateral shoulder/hand syndrome. Dr. K's work slip of October 14, 1997, states that claimant is to continue light-duty work. Dr. K's work slip of November 11, 1997, states that claimant "may return back to work [with] no repetitious use

of [illegible but possibly an abbreviation for upper extremities]." Claimant indicated that in February 1998 she commenced treatment with Dr. B. Dr. B's February 19, 1998, record reflects complaints of pain in the neck, upper back, and both arms and hands, and of weakness and numbness in both hands and arms, and states that claimant does not work and does not receive workers' compensation benefits. Several of Dr. B's later form reports in April and May 1998 have checkmarks by the words "not working" while others have checkmarks by the words, "disabled unable to work." Dr. B's record of claimant's May 4, 1998, visit states that claimant has been taken off duty because of an increase in cervical pain. Claimant further testified that the employer laid her off on July 30, 1997, because she could not perform at 100%; that she worked for several weeks in August 1997 at a convenience store; and that she has not since worked, although in 1998 she applied for jobs with (department store), (retail store), and another store. She did not provide evidence of her preinjury wages.

The disputed issues presented the hearing officer with questions of fact to resolve. It is the hearing officer who is the sole judge of the weight and credibility of the evidence (Section 410.165(a)) and who, as the trier of fact, is to resolve the conflicts and inconsistencies in the evidence and determine what facts have been proved (Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ)). As an appellate reviewing tribunal, the Appeals Panel will not disturb the challenged factual findings of a hearing officer unless they are so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust and we do not find them so in this case. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). Concerning the issues relating to the occurrence, date, and extent of the injury, as well as the timely reporting thereof, the hearing officer could credit claimant's unrefuted testimony and find corroboration in the documentary evidence.

Disability is defined in Section 410.011(16) as "the inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage." The Appeals Panel has recognized that disability may be established by lay testimony including that of the injured employee (Texas Workers' Compensation Commission Appeal No. 92167, decided June 11, 1992) and that objective medical evidence of disability is not required (Texas Workers' Compensation Commission Appeal No. 91083, decided January 6, 1991). The Appeals Panel has also recognized that "determining the end of disability within the meaning of the 1989 Act can be a very difficult and imprecise matter." Texas Workers' Compensation Commission Appeal No. 91045, decided November 21, 1991. As for the hearing officer's determination that claimant did not have disability after November 25, 1997, notwithstanding the different work status options checked off on Dr. B's form reports in April and May 1998 and the report taking claimant off work altogether in May 1998, the hearing officer could consider that claimant had no treatment from November 25, 1997, to February 1998, that some of Dr. B's form reports simply noted that she was not working, that she worked for several weeks in a store, and that she applied for jobs in several other stores. We do not consider the hearing officer to have been bound by checked-off options or statements in Dr. B's reports in view

of the contrary evidence indicating claimant's ability to obtain and retain employment at her preinjury wage equivalent, including her own efforts to find work.

The decision and order of the hearing officer are affirmed.

_____
Philip F. O'Neill
Appeals Judge

CONCUR:

_____
Stark O. Sanders, Jr.
Chief Appeals Judge

CONCUR IN THE RESULT:

_____
Gary L. Kilgore
Appeals Judge