

APPEAL NO. 990531

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on February 2, 1999. The issues at the CCH were: Did the appellant (claimant) suffer an injury in the course and scope of her employment, is the respondent/cross-appellant (carrier) relieved from liability under Section 409.002 because of the claimant's failure to timely notify her employer pursuant to Section 409.001, did the claimant have disability as a result of her compensable injury, and what is the date of injury. The hearing officer determined that the claimant's date of injury for this claim is _____, the claimant did not suffer an injury in the course and scope of employment, the carrier is not relieved from liability pursuant to Section 409.002, and the claimant has not had disability. The appellant (claimant) appeals this determination on sufficient grounds. The respondent/cross-appellant (carrier) appeals, urging that the date of injury is (alleged date of injury), the claimant did not timely report the injury, and no good cause exists for failure to timely report the injury. The carrier also responds to the claimant's appeal, urging that the evidence is sufficient to support the hearing officer's decision as to the issues of injury and disability.

DECISION

Affirmed.

The claimant testified that she began to work for the employer in January 1998. The claimant testified that her job duties were sewing and repairing clothing and that she had to carry bundles of clothing, from 35 to 50 items at a time. The claimant testified that on (alleged date of injury), a day that she carried lots of clothes, she started feeling pain in her hands, but thought it would go away. On the night of (alleged date of injury), the claimant stated, her hands became swollen and painful, but she did not know what was wrong. According to the claimant, she worked 50 hours per week in the two weeks prior to (alleged date of injury). The claimant testified that she continued working until March 27, 1998, when her father died. On the day the claimant was to return to work, _____, the claimant testified, she called the employer and spoke with Abel Carrasco, informing him of her condition and told him that it was related to the sewing and lifting.

On _____, the claimant went to the emergency room for treatment of her hands. The claimant testified that on April 8, 1998, she went to the Texas Workers' Compensation Commission (Commission) and filed a notice of injury. (Employee's Notice of Injury or Occupational Disease & Claim for Compensation (TWCC-41)). The claimant testified that she has received no treatment for her injury, but was examined on July 30, 1998, by Dr. W, who was appointed by the Commission for a required medical examination. Dr. W's impression was possible bilateral carpal tunnel syndrome (BCTS) and bilateral ulnar tunnel syndrome. On November 25, 1998, the claimant was examined by Dr. N, a

carrier-selected doctor. Dr. N stated that he believes the claimant's condition is myofascial pain syndrome, but objective findings would be necessary to confirm this diagnosis. The claimant testified that she has been unable to work from _____, through the date of the CCH.

The claimant asserts that the hearing officer erred by failing to consider and give weight to Dr. W's independent opinion. The claimant had the burden to prove that she sustained an injury, BCTS. Johnson v. Employers Reinsurance Corporation, 351 S.W.2d 936 (Tex. Civ. App.-Texarkana 1961, no writ). Whether she did so was a question of fact for the hearing officer to decide. Texas Workers' Compensation Commission Appeal No. 93449, decided July 21, 1993. The hearing officer, as fact finder, 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. National Union Fire Insurance Company of Pittsburgh, Pennsylvania v. Soto, 819 S.W.2d 619, 620 (Tex. App.-El Paso 1991, writ denied). The hearing officer was the sole judge of the weight and credibility to be given the evidence. Section 410.165(a). Based on the evidence presented, the hearing officer concluded that the claimant did not meet her burden of proving she sustained an injury. It is up to the fact finder to determine what weight to give to the medical evidence. Even though Dr. W was chosen by the Commission, it is not bound by his findings.

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 carrier appeals the date of injury, asserting that the claimant sustained a specific injury on (alleged date of injury), not an occupational disease, repetitive trauma injury. The hearing officer's conclusion of law finds the date of injury for this claim is _____. We interpret from the hearing officer's Finding of Fact No. 4, which states "Claimant was first informed the pain might be work related on _____ and put that date down as the date of injury," that the hearing officer determined the date of injury as that of an occupational disease. This is sufficiently supported by the record, even though another fact finder might have drawn other inferences and reached other conclusions.

Section 409.001 requires that an employee notify the employer of an injury not later than the 30th day after which the injury occurs or, if the injury is an occupational disease, the employee knew or should have known that the injury may be related to the employment. Failure to do so, absent a showing of good cause or actual knowledge of the injury by the employer, relieves the carrier and employer of liability for the payment of benefits for the injury. Section 409.002. While the statement of AC indicates that the claimant did not report an injury to him on _____, and his first notice of the claimant's alleged injury was received from the carrier, the hearing officer, April 26, 1999 after considering all of the evidence, found that the claimant first reported an injury to her supervisor on _____. Whether, and if so, when, notice is given is a question of fact for the hearing officer to decide. It is of note that even had the hearing officer determined that the date of injury was (alleged date of injury), notice to the employer on _____ would have been timely.

The claimant appealed the hearing officer's finding of no disability. Disability is defined as the inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage. Section 401.011(16). Since we have found the evidence to be sufficient to sustain the determination of the hearing officer that the claimant did not sustain an injury in the course and scope of employment, the claimant cannot have disability under the 1989 Act. Texas Workers' Compensation Commission Appeal No. 92640, decided January 14, 1993.

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, 635 (Tex. 1986). We find there was sufficient evidence to support the determinations of the hearing officer that the claimant's date of injury for this claim is _____, that the claimant did not suffer an injury in the course and scope of employment with date of injury of either (alleged date of injury), or _____, that the carrier is not relieved from liability pursuant to Section 409.002, and that the claimant has not had disability.

The decision and order of the hearing officer are affirmed.

Dorian E. Ramirez
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Robert W. Potts
Appeals Judge