APPEAL NO. 990753

On March 10, 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 respondent (claimant) sustained a compensable occupational disease to his neck on or about _____; (2) whether the claimant sustained disability "from _____, and continuing"; (3) what is the correct date of injury; (4) whether claimant timely filed a claim for compensation with the Texas Workers' Compensation Commission (Commission); (5) whether claimant is barred from pursuing Texas workers' compensation benefits because of an election to receive benefits under a group health insurance plan; and (6) whether claimant timely notified his employer within 30 days of the date of injury. The appellant (carrier) requests reversal of the hearing officer's decision that: (1) claimant sustained an occupational disease (repetitive trauma injury to his neck) in the course and scope of his employment for which carrier is liable for workers' compensation benefits; (2) claimant had disability from _____, to January 4, 1999; (3) the date of injury is _____; (4) claimant timely filed his claim for compensation; (5) claimant "did not make an election of remedies to forgo workers' compensation benefits"; and (6) claimant timely notified his employer of his injury. The claimant requests affirmance.

DECISION

Affirmed.

Claimant claims a repetitive trauma injury and disability therefrom. An occupational disease includes a repetitive trauma injury, which is defined as damage or harm to the physical structure of the body occurring as the result of repetitious, physically traumatic activities that occur over time and arise out of and in the course and scope of employment. Sections 401.011(34) and (36). 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).

Claimant is 36 years of age. He began working for (employer) in May 1991 loading and unloading freight from aircraft for 14 months and then worked for the employer as a courier. He said that his courier job required him to lift boxes throughout the day, that once or twice a week he had to unload boxes one at a time by hand from a tractor trailer, and that after unloading a tractor trailer he had to load his truck one box at a time by picking them up and putting them into the truck. He said that the boxes weigh from one to 150 pounds apiece, that the employer requires couriers to be able to lift 75 pounds themselves and to maneuver 150 pounds with two people or proper equipment, and that throughout the day he is driving to customer locations to deliver boxes or to pick up boxes.

Claimant said that from when he started working at employer he had had soreness and tenderness in his back and neck from the lifting he had to do. According to Dr. C record of March 21, 1995, claimant saw him that day for neck pain after claimant had

pushed a heavy box that day. Dr. C noted that claimant had had a history of a neck problem. Claimant said that he first recalled having neck problems at work on October 11, 1996, when he threw a heavy box onto a shelf of a truck and felt something pull in his back, shoulder, and neck. He said it was a pulled muscle; that he made his manager aware of it; that she filled out an injury report on the computer on October 12, 1996; that he was scheduled to be off work the next few days; that he did not miss any work or see a doctor as a result of that incident; and that the soreness from that incident went away.

Claimant said that in June 1997 he woke up with a crick in his neck, that he went to Dr. C and was prescribed muscle relaxers, that he felt better that afternoon, and that he returned to work the following day. According to Dr. C's record of June 2, 1997, he saw claimant that day for neck pain that claimant had had since June 1, 1997. Dr. C wrote that there was no known injury and that claimant could return to work the next day.

Claimant said that in December 1997 he started having slight neck pain that got worse by _____; that he went to the doctor four times in _____; that he was sent for an MRI on February 17, 1998; and that he found out he had herniated discs in his neck on _____, when he got the MRI results. Claimant said that on _____, he asked Dr. C if he thought his neck condition was work related and Dr. C told him on that day that it was a work-related injury from all of the lifting he did at work.

According to a February 10, 1998, record from Dr. C's office, claimant told a doctor that day that he had a crick in his neck that started on February 9, 1998, when he was eating. A February 12, 1998, record from Dr. C's office reflects that claimant had a bump on his neck and pain radiating down his right arm. Claimant was prescribed pain medications. Another record from Dr. C's office notes that claimant was referred for a cervical MRI on February 17, 1998, and that on _____, Dr. C discussed the results of the MRI with claimant. The radiologist reported that the MRI done on February 17th showed multilevel spondylotic protrusions with posterior herniations and central canal stenosis at C5-6 and C6-7.

Claimant said that when Dr. C informed him of the MRI results on _____, Dr. C told him that he did not want him to do any driving or lifting until they could figure out how to have the problem fixed. Claimant said that on February 21, 1998, he gave his manager a note from Dr. C stating that he was to do no driving or lifting and his manager told him that she could not use him as a courier because he did not meet the requirements for that job. Claimant said he was having severe pain in his neck, arms, and hands; that pain medications were not helping him; and that he was not able to go back to work.

Dr. C referred claimant to Dr. CE and Dr. CE wrote in his report of March 5, 1998, that claimant's chief complaints were neck, right shoulder, and arm difficulties; that those difficulties began about a month before when claimant tilted his head back to swallow pills for low back difficulties and felt his neck pop; that for the past six months claimant had had problems with his right hand; that the MRI showed spondylotic changes and degenerative disc disease at C5-6 and C6-7 with probably some right sided disc protrusion affecting the

right C6 nerve root; that his impression was C6 radiculopathy; and that further testing should be done.

The parties stipulated that claimant's preinjury average weekly wage (AWW) was $594.82. Dr. C released claimant to limited-duty sedentary work with a restriction of no lifting on March 30, 1998. Claimant said he went back to work for employer doing light-duty work for four hours a day, 20 hours a week, at $14.53 an hour from March 31, 1998, to June 26, 1998, which resulted in weekly earnings that were less than his AWW. Claimant explained that employer's policy is to allow an employee working light duty to work only four hours a day, 20 hours a week. Claimant said his light-duty work involved doing paperwork. Claimant further explained that the reason he stopped working on June 26th was because employer's policy allows light-duty work for 90 days and after that the employee must obtain a release to full duty. Claimant said that Dr. C would not release him to full-duty work as a courier for employer, which, according to claimant, would require an ability to lift 75 pounds, because Dr. C told him that he still had physical problems from his herniated cervical discs.

Dr. C indicated in a record dated April 10, 1998, that carrier was denying claimant's claim. On April 14, 1998, Dr. C wrote that claimant suffers from several herniated discs in his neck; that "this is an occupational disease caused by repetitive motion that the claimant does on his job, i.e. lifting, bending, twisting, and turning"; that claimant did not have a history of injury prior to October 11, 1996; and that in his medical opinion "this is a work related injury which should be covered by workers' compensation." Dr. C provided a physical capacities evaluation of claimant for employer on June 1, 1998, and noted in that evaluation that the claimant can continuously lift a maximum of 25 pounds, occasionally lift 50 pounds, never lift 70 pounds, and that claimant's injury is work related and that he was released to restricted duty. On June 26, 1998, Dr. C wrote that in his opinion, claimant's neck injury is directly related to the repetitive motion that he does on his job, such as lifting heavy boxes, bending, twisting, and turning.

Claimant said that since his 90 days of light duty with employer were up and Dr. C would not release him to return to work as a courier for employer and he needed money to support his family, he went to work for (F Company) on or about July 16, 1998, as a driver doing light-duty work. He said Dr. C told him not to lift more than 25 pounds. He said he worked for F Company for about two weeks for 40 hours a week at $10.00 an hour, which was less than his AWW. Claimant said he did not lift anything heavy while working for F Company and that he was not injured while working for that company. Claimant said that he stopped working for F Company because around July 23, 1998, he went grocery shopping with his wife and lifted grocery bags and cokes weighing not more than 15 or 20 pounds and after that felt severe pain. Claimant said that he went to Dr. C, told Dr. C that he had gone grocery shopping and started feeling bad, and Dr. C told him that he did not want him doing any driving or lifting.

Dr. L saw claimant on July 29, 1998, and he wrote that claimant has a left C6-7 cervical radiculopathy. On August 6, 1998, claimant underwent a cervical myelogram and

CT scan. Dr. C referred claimant to Dr. S and on August 19, 1998, Dr. S diagnosed claimant as having cervical myelopathy secondary to a herniated disc at C5-6 and C6-7 with a left radicular component and performed surgery on claimant's cervical spine at the C5-6 and C6-7 levels.

Claimant said that after his surgery, he returned to work for F Company with a doctor's restrictions on lifting no more than 50 pounds and worked as a dispatcher. He said he could not return to work for employer as a courier at that time because of the employer's 75-pound lifting requirement. Claimant said he worked for F Company 40 hours a week for $10.00 an hour, which was less than his AWW. Dr. S released claimant to return to full-duty work on January 4, 1999. Claimant said he continued to work for F Company through January 4, 1999, and that he returned to work for employer on March 3, 1999, working as a service agent.

The hearing officer found that claimant's courier job for employer required him to lift 75 pounds by himself; that claimant had an incident at work on October 11, 1996, when lifting a box, which he reported to a supervisor at the time it occurred; that lifting boxes at work constituted repetitious, traumatic activities causing him to have an injury to his neck around _____; and that claimant's _____, neck injury caused him to be unable to obtain and retain employment at wages he earned before _____, from _____, until January 4, 1999. The hearing officer concluded that claimant sustained an injury to his neck that arose out of repetitious, physically traumatic activities at work; that he sustained an occupational disease in the course and scope of his employment; and that he had disability from _____, to January 4, 1999, from the injury of _____.

Claimant had the burden to prove that he was injured in the course and scope of his employment. Johnson v. Employers Reinsurance Corporation, 351 S.W.2d 936 (Tex. Civ. App.-Texarkana 1961, no writ). Claimant also had the burden to prove he had disability as defined by the 1989 Act. There is conflicting evidence in this case; however, Dr. C's opinion and claimant's testimony support the claimant's claim of a repetitive trauma injury and the medical records and claimant's testimony support a finding of disability. 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 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 sustained a repetitive trauma injury to his neck in the course and scope of his employment and that he had disability from _____, to January 4, 1999, is supported by sufficient evidence and is not so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust.

With regard to the issue of whether claimant is barred from pursuing workers' compensation benefits because of an election to receive benefits under a group health insurance plan, in Bocanegra v. Aetna Life Insurance Company, 606 S.W.2d 848 (Tex. 1980), the court stated that the election of remedies doctrine may constitute a bar to relief when (1) one successfully exercises an informed choice (2) between two or more remedies, rights, or states of fact (3) which are so inconsistent as to (4) constitute manifest injustice. Claimant testified that before being informed by Dr. C on _____, that he had herniated cervical discs that resulted from repetitive lifting at work he had used his health insurance to pay for medical services; that thereafter he attempted to obtain workers' compensation benefits, which were denied; that his health insurance has refused to pay for his cervical surgery because it claims that his injury is work related; and that his surgery bill remains unpaid. We conclude that the hearing officer's determination that claimant did not elect to forgo workers' compensation benefits is supported by sufficient evidence and is not so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust.

Concerning the issue of the date of injury, 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. In Texas Workers' Compensation Commission Appeal No. 941505, decided December 22, 1994, the Appeals Panel noted that in Commercial Insurance Company of Newark, New Jersey v. Smith, 596 S.W.2d 661 (Tex. Civ. App.-Fort Worth 1980, writ ref'd n.r.e.), the court stated that the statutory time period for notice begins to run in an occupational disease case when claimant, as a reasonable man or woman, recognizes the seriousness and the work-related nature of the disease, which was not necessarily the date of the first symptom.

The claimant testified that on _____, Dr. C informed him of the results of the MRI, which showed herniated cervical discs, and told him that all the lifting he did at work caused his neck injury. There is much conflicting evidence regarding the date of injury. There is an unsigned and undated Employee's Notice of Injury or Occupational Disease and Claim for Compensation (TWCC-41), which states a date of injury of October 11, 1996, and which does not show a date-received stamp of the Commission. Claimant said that he did not fill out that document and does not know when it was filled out. A TWCC-41 signed by claimant on May 4, 1998, states a date of injury of April 10, 1998, but claimant said that his prior attorney made a mistake in noting April 10th as the date of injury on that form because that attorney was not aware of what Dr. C had told claimant on _____. The TWCC-41 dated May 4th does not show a date-received stamp of the Commission. A TWCC-41 dated October 6, 1998, and a TWCC-41 dated October 30, 1998, both signed by claimant, state _____, as the date of injury and state the injury as an occupational disease or repetitive trauma injury. The TWCC-41 dated October 6th has a Commission date-received stamp of October 6, 1998.

The hearing officer, as the finder of fact, was responsible for determining the facts from the conflicting evidence that was presented. The hearing officer determined that the date of injury for claimant's repetitive trauma injury was _____, the date claimant was informed by Dr. C of the results of the MRI and that he had sustained a work-related injury

from repetitive lifting at work. We conclude that the hearing officer's determination on the date of injury 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 409.003 provides that an employee or a person acting on the employee's behalf shall file with the Commission a claim for compensation for an injury not later than one year after the date on which: (1) the injury occurred; or (2) if the injury is an occupational disease, the employee knew or should have known that the disease was related to the employee's employment. The hearing officer found that claimant, as a reasonably prudent person, first knew or should have known that his neck symptoms were related to his work on _____, when his doctor told him that the defects shown in the MRI were related to his work as a courier. The TWCC-41 dated October 6, 1998, is date stamped as being received by the Commission on October 6, 1998, which was within one year of _____. The October 6, 1998, TWCC-41 is signed by claimant and states the injury as a repetitive motion/occupational disease injury, the body parts affected as neck and right arm, a date of injury of _____, and the employer's name as the employer. We conclude that the hearing officer's determination that claimant timely filed a claim for compensation with the Commission and that carrier is not excused from liability for a failure to timely file a claim for compensation 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 409.001 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. To fulfill the purpose of the notice provision the employer need only know the general nature of the injury and the fact that it is work related. DeAnda v. Home Insurance Co., 618 S.W.2d 529 (Tex. 1980). We are affirming the hearing officer's determination that the date of injury for claimant's repetitive trauma injury was _____.

Claimant said that after he was informed by Dr. C on _____, that he had a work-related neck injury, he informed his manager on March 11, 1998, that he had a work-related neck injury and that his manager asked him when was the first time that his neck was hurt and he told his manager that the first time he remembered hurting his neck was on October 11, 1996. The Employer's First Report of Injury or Illness (TWCC-1) dated March 11, 1998, states a date of injury of October 11, 1996.

Carrier contends that since the TWCC-1 reports a date of injury of October 11, 1996, claimant did not give timely notice of "a _____ date of injury." However, claimant also testified that when he informed his manager on March 11, 1998, that he had a work-related neck injury he asked if he needed to fill out a report and his manager replied that he did not have to do that because she said she was aware of his situation, knew he had had the MRI, and knew that he was working while hurt during the month of February. The hearing officer found that claimant reported a neck injury to the employer no later than March 11, 1998, which was within 30 days of _____, and he concluded that because claimant

notified his employer of the _____, injury within 30 days, carrier is not excused from liability for benefits because of late reporting. We conclude that the hearing officer's decision that claimant gave timely notice of the injury to employer 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:

_____
Thomas A. Knapp
Appeals Judge

_____
Elaine M. Chaney
Appeals Judge