APPEAL NO. 990834

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 March 16, 1999. He determined that the date of injury is (date claimant first learned that her injury was related to her employment), the appellant (carrier) is not relieved from liability under Section 409.002 because the respondent (claimant) timely notified her employer pursuant to Section 409.001, the claimant sustained a compensable injury in the form of an occupational disease as a result of repetitive trauma, and the claimant had disability beginning June 29, 1998, through January 4, 1999. The carrier appeals, urging that the evidence is insufficient to support the findings and conclusions of the hearing officer on all four issues, and that the decision should be reversed. The file does not contain a response from the claimant.

DECISION

Affirmed in part, reversed and rendered in part.

The claimant testified that she sustained an occupational disease, a repetitive trauma injury to her left shoulder, as a result of her work as an order puller over a period of 18 months. According to the claimant, her job consisted of pulling different sizes of boxes off of shelves, throwing them into a buggy and pushing a buggy. The claimant testified that she felt pain in her left shoulder prior to going on a scheduled vacation from June 22, 1998, through June 26, 1998. According to the claimant, she did not do anything on her vacation that would have caused an injury, but the pain in her shoulder became worse and she went to the emergency room on (date claimant first learned that her injury was related to her employment). The claimant received medical treatment from Dr. Q on July 2, 1998. The claimant testified that Dr. Q gave her an off-work slip for four weeks, which she took to her supervisor, Mr. A, on either July 2, or July 3, 1998. The claimant stated that when she gave the off-work slip to Mr. A, she told him that her injury was work related.

Dr. Q's report dated July 2, 1998, indicates that the claimant gave a history of pain for a couple of weeks, performing overhead work all day long and stocking boxes. Dr. Q diagnosed the claimant as having calcific tendinitis left shoulder, with acute episode. The claimant also sought medical treatment from Dr. H. On February 9, 1999, Dr. H diagnosed calcific tendinitis and bursitis/tenosynovitis of the left shoulder and left upper extremity, and states "due to the nature of her job requirements, this injury is most likely sustained as a result of her employment." The carrier had the claimant examined by Dr. P. Dr. P states that the claimant's condition is a preexisting and degenerative condition which is not related to the claimant's employment.

An employee must prove, by a preponderance of the evidence, the compensability of an occupational disease. Texas Workers' Compensation Commission Appeal No. 960582,

decided May 2, 1996, citing Schaefer v. Texas Employers' Insurance Association, 612 S.W.2d 199 (Tex. 1980). "[O]ne must not only prove that recurring, physically traumatic activities occurred on the job, but must also prove that a causal link exists between these activities on the job and one's incapacity; that is, the disease must be inherent in that type of employment as compared to employment generally." Texas Workers' Compensation Commission Appeal No. 950868, decided July 13, 1995, citing Davis v. Employers Insurance of Wausau, 694 S.W.2d 105 (Tex. App.-Houston [14th Dist.] 1985, writ ref'd n.r.e.).

The carrier argues that the claimant failed to offer sufficient expert medical evidence to demonstrate the necessary causal relationship between her alleged condition and her employment. The contested case hearing officer, as finder of fact, is the sole judge of the relevance and materiality of the evidence as well as of the weight and credibility that is to be given the evidence. Section 410.165(a). The hearing officer determined that the claimant's work activities caused a repetitive trauma injury. This determination is sufficiently supported by the claimant's testimony and the medical opinion of Dr. H. To the extent there were conflicting medical reports regarding causation, this was an issue for the hearing officer to resolve. It was for the hearing officer, as trier of fact, to resolve the inconsistencies and conflicts in the evidence. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). This is equally true regarding medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). The trier of fact may believe all, part, or none of the testimony of any witness. Aetna Insurance Company v. English, 204 S.W.2d 850 (Tex. Civ. App.-Fort Worth 1947, no writ). We substitute our judgment for that of the hearing officer only when his determinations are so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Texas Workers' Compensation Commission Appeal No. 950456, decided May 9, 1995. The hearing officer chose to give more weight to the medical report of Dr. H. Although Dr. H based his opinion regarding the cause of the claimant's injury primarily on her history, we conclude that the compensability determination is not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust.

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. At the CCH, the claimant argued that she trivialized the injury until (date claimant first learned that her injury was related to her employment), when she had to go to the emergency room. The carrier appeals the date of injury, asserting that the date of injury is June 1, 1998. The hearing officer found the date of injury to be (date claimant first learned that her injury was related to her employment), and found as follows:

FINDING OF FACT

9. On (date claimant first learned that her injury was related to her employment), the Claimant first learned that her condition was related to her employment. This was further confirmed by [Dr. Q] on July 2, 1998.

Evidence of the date the claimant "first learned" her injury was related to her employment, while relevant, is not conclusive in determining when she "knew or should have known that the injury may be related to the employment." Section 409.001(a)(2). This is reiterated in Section 408.007 of the 1989 Act, entitled "DATE OF INJURY FOR OCCUPATIONAL DISEASE" and mirrored in Tex. W.C. Comm'n, 28, TEX. ADMIN. CODE § 122.1(b) (Rule 122.1(b)). The claimant's testimony and statement was vague concerning the date that she knew the injury may be related to her employment. The claimant testified that she knew her shoulder hurt from pulling orders in June, prior to her scheduled vacation on June 22, 1998, but she did not think it was serious. On cross-examination, the claimant testified that June 19, 1998, was her last day at work, and she knew it was work related a couple of weeks before she went on vacation. She also testified on cross-examination as follows:

Q. Okay. And you said you felt it–problems several weeks before that. Would it be fair to say two weeks before that, _____?

A. Yes, it would.

Q. And you said that you knew at that time that that condition–or at least you thought that condition arose from your employment; is that right?

A. Yes.

Finding of Fact No. 9 is an improper standard to determine the date of injury for an occupational disease. The date of injury for an occupational disease is not the date the claimant receives a definitive diagnosis or when the claimant discovers the seriousness of her injury, rather it is the date the claimant "knew or should have known that the injury may be related to the employment." Section 409.001(a)(2). Despite the fact there was vague testimony regarding the month in which the date the claimant "knew or should have known that the injury may be related to the employment," the only specific date that the claimant testified to was _____. Per Section 409.001(a)(2), Section 408.007, and Rule 122.1(b), we reverse the date of injury determination and render that the claimant's date of injury is _____.

Section 409.001 requires that an employee notify the employer of an occupational disease not later than the 30th day after which 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 testimony of Mr. A indicates that the claimant did not report an injury until September 7, 1998, the hearing officer, after considering all of the evidence, found that the claimant first reported an injury to Mr. A on or about July 6, 1998. Whether, and, if so, when, notice is given is a question of fact for the hearing officer to decide. In this case, the 30th day after _____, is (30th day after date of injury), which was a Sunday. Rule 102.3(a) states that if the last day of any period is a Saturday, Sunday, or legal holiday, the period is extended to the next day that is not a Saturday, Sunday, or legal holiday. The Appeals Panel has held that where the 30th day is a Sunday, notice is timely if given on the next working day. Texas Workers' Compensation Commission Appeal No. 92038, decided March 20, 1992. Applying the statute and rule to the facts of this case, the claimant's July 6, 1998, notice to her employer would be timely. We find sufficient evidence to support the hearing officer's determination that the carrier is not relieved from liability under Section 409.002, because the claimant timely notified her employer pursuant to Section 409.001.

The carrier 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). Whether disability exists is a question of fact for the hearing officer to decide and a finding of disability may be based on the claimant's testimony alone. The claimant testified that she was unable to work because of the injury from June 29, 1998, through January 4, 1999. The medical records of Dr. H indicate the claimant was taken off work from October 8, 1998, through January 4, 1999. The hearing officer considered the evidence and concluded that the claimant had disability from June 29, 1998, through January 4, 1999. The hearing officer's finding of disability is sufficiently supported by the evidence.

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 sustained a compensable injury in the form of an occupational disease as a result of repetitive trauma; that the carrier is not relieved from liability pursuant to Section 409.002; that the claimant had disability from June 29, 1998, through January 4, 1999; and we affirm as to those issues. The decision regarding the claimant's date of injury is reversed and a new decision rendered that the claimant's date of injury is _____.

Dorian E. Ramirez
Appeals Judge

CONCUR:

Tommy W. Lueders
Appeals Judge

Elaine M. Chaney
Appeals Judge