APPEAL NO. 990876

Following a contested case hearing held on December 18, 1998, with the record closing on March 2, 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 injury is _____; that respondent (claimant) sustained a compensable occupational disease injury, bilateral carpal tunnel syndrome (CTS), while in the course and scope of her employment with (employer); that claimant timely reported her _____, injury to the employer; that claimant is not barred from pursuing benefits under the 1989 Act since she did not make an informed election to receive group health insurance benefits instead of workers' compensation benefits; and that she had disability from June 11, 1997, to the date of the hearing. The appellant (carrier) has appealed these determinations, asserting the insufficiency of the evidence to support them in view of the conflicts and inconsistencies in the evidence. Claimant's response urges the sufficiency of the evidence and seeks our affirmance.

DECISION

Affirmed.

Claimant testified that she has worked as a clerk for the employer for 23 to 24 years; that for the past five years, she has used a computer on the job (working nine to 10 hour shifts per day, five days per week) to handle all types of transactions with customers, such as loans, sales, merchandise pickups, renewals, and so forth; that in 1991 she had a compensable neck injury resulting in cervical spine fusion surgery; that she subsequently had a compensable knee injury resulting in surgery; that she was aware of the requirement to report on-the-job injuries to her supervisor; and that she did report the neck and knee injuries to her supervisors at those times. She further stated that in early 1996, some pain in her arms and hands, which she had previously experienced to some extent, began to bother her and she began to drop things; that she also had neck and shoulder spasms as well as arm pain; that she started seeing Dr. N in March or April 1996 and related her symptoms; and that she told Dr. N about her job duties but did not say that her pain was work related and that she continued to work. As she put it, "I knew I'd get pain from doing things" and "I knew something was happening to me but I didn't know what." Claimant further stated that Dr. N indicated that testing was necessary, and that immediately after Dr. N reviewed with her, in late August or early _____, the results of an EMG and advised her that she had CTS and that it was work related, she immediately, on _____, told her supervisor, Mr. J, about the injury and asked him to prepare the report or claim so she could get medical care.

According to claimant, she asked Mr. J several times about her claim and he kept putting her off. She indicated that she continued to work and that her pain got so bad by April 1997 that she had to use her group health insurance to pay for medical care because Mr. J had not taken care of her workers' compensation paperwork following her report to him on _____, and because she did not learn until May 1997, when she called the Texas

Workers' Compensation Commission, that she could file her own claim. Claimant said she worked through June 10, 1997; that on June 11, 1997, she had a pre-operative visit as an outpatient; and that on June 12, 1997, she underwent the first of nine operations for her bilateral CTS. Claimant stated that Dr. B, a hand specialist, took her off work as of June 12, 1997, and said "No way" when she broached the matter of returning to work. She said she has not yet been released to return to work. Dr. B's report of December 1, 1997, reflected that claimant had carpal tunnel release surgeries on June 12, June 24, August 19, and October 16, 1997, and stated that she was not released to work at that time.

Ms. M testified that she was a coworker of claimant's; that she heard claimant complain to Mr. J about her pain; that she massaged claimant's shoulders; and that in either June or September (the year unrecalled), she heard claimant tell Mr. J, on several occasions, that she needed a workers' compensation form to get therapy and that Mr. J responded, variously, that claimant did not need a form, that he would talk to the manager about it, and that he would get a form but never did.

Dr. K, a neurosurgeon, reported on June 4, 1994, that claimant stated a history of cervical discectomy and fusion in 1991 and that he would advise claimant to undergo an EMG to "assess where her symptoms are likely to be coming from (carpal tunnel or cervical radiculopathy)." Dr. K reported on June 23, 1994, that an EMG report indicated moderately severe bilateral median nerve compression at the wrists and no evidence of cervical radiculopathy but that he believed that while a large portion of the pain may be coming from the carpal tunnel, a portion of it may be associated with neck problems despite the EMG. Dr. K reported on January 9, 1996, that a cervical spine MRI showed spondylitic changes at multiple levels; that claimant has significant spasm of the posterior neck and shoulders; that her symptoms in the distal portion of her arms are likely to be related to her CTS rather than to the spondylitic process; and that "where her cervical problem ends and the carpal tunnel problem begins is a difficult task to identify."

A June 2, 1997, record of Dr. T, who apparently performed an EMG on that date, stated that the exam showed a severe degree of bilateral CTS and that in addition claimant has signs of chronic bilateral C6 radiculopathy.

Claimant had the burden to prove that she sustained the claimed occupational disease injury, the date of the injury, that she provided timely notice of the injury, and that she had disability as that term is defined in Section 401.011(16). The carrier had the burden to prove the claimant is barred from receiving workers' compensation benefits by having elected to receive group health insurance benefits. The Appeals Panel has stated that in workers' compensation cases, the disputed issues of injury and disability can, generally, be established by the lay testimony of the claimant alone, if believed. Texas Workers' Compensation Commission Appeal No. 91124, decided February 12, 1992. However, the testimony of a claimant, as an interested party, only raises issues of fact for the hearing officer to resolve and is not binding on the hearing officer. Texas Employers Insurance Association v. Burrell, 564 S.W.2d 133 (Tex. Civ. App.-Beaumont 1978, writ ref'd n.r.e.).

The hearing officer is the sole judge of the weight and credibility of the evidence (Section 410.165(a)), resolves the conflicts and inconsistencies in the evidence (Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ)), and determines what facts have been established from the conflicting evidence. St. Paul Fire & Marine Insurance Company v. Escalera, 385 S.W.2d 477 (Tex. Civ. App.-San Antonio 1964, writ ref'd n.r.e.). 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). The hearing officer could conclude from claimant's testimony that her data entry duties, together with merchandise handling, did cause her bilateral CTS; that it was not until after her doctor reviewed with her the most recent EMG report on or about _____, that she knew or should have known that her symptoms were from CTS which may be related to her work and not from her neck injury; that she timely reported the injury to Mr. J; and that she has had disability since June 11, 1997. As for the election-of-remedies issue, the hearing officer could conclude that claimant pursued her group health insurance benefits simply because she was in pain and needed treatment and the carrier had denied her claim and not because she made an informed choice between two remedies which are so inconsistent as to constitute manifest injustice. *See* Bocanegra v. Aetna Life Insurance Company, 605 S.W.2d 848 (Tex. 1980).

The decision and order of the hearing officer are affirmed.

_____
Philip F. O'Neill
Appeals Judge

CONCUR:

_____
Stark O. Sanders, Jr.
Chief Appeals Judge

_____
Robert W. Potts
Appeals Judge