APPEAL NO. 990903

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 April 5, 1999. He determined that: the respondent/cross-appellant (claimant) sustained an injury in the form of an occupational disease; the claimant's date of injury pursuant to Section 408.007 is Injury 1; the appellant/cross-respondent (carrier) timely and properly contested and disputed compensability and timely notice on January 14, 1999; the carrier's defense on compensability is not limited to the sole cause defense listed on the first Payment of Compensation or Notice of Refused or Disputed Claim (TWCC 21) filed; the carrier is relieved from liability under Section 409.002 because of the claimant's failure to timely notify her employer pursuant to Section 409.001; and the claimant has not had disability. The carrier appeals only the finding of fact and conclusion of law that found the claimant sustained an injury in the form of an occupational disease, urging that it is contrary to the great weight of the evidence. The claimant responds that sufficient evidence supports the determination that she sustained an occupational disease injury and the hearing officer's decision should be affirmed. In her cross-appeal, the claimant urges that there are insufficient facts to support the hearing officer's determination of the date of injury, failure to timely report, timely controversion, and disability, and the decision should be reversed. The carrier responded to the claimant's cross-appeal, asserting that there is sufficient evidence to support the hearing officer's determination on the claimant's appealed issues, and the decision should be affirmed.

DECISION

Affirmed in part, reversed and remanded in part.

The claimant testified that she worked for employer, an airfreight company, for 17 years. The claimant testified that she sustained a repetitive trauma injury to her right hip, left shoulder, left arm, and back as a result of her job duties as a dispatcher from October 1998 through December 1998. According to the claimant, her shift was from 1:00 p.m. until 9:30 p.m. From 1:00 p.m. until 3:30 p.m., the claimant assisted the main dispatcher and sat on a stool approximately three feet high without a back. Because the stool was low, the claimant had to stand up to reach the phone and the computer terminal. The claimant testified that, between 3:30 p.m. and 9:30 p.m., she worked by herself as the main dispatcher, and sat on a high chair, approximately 40 inches tall, which was unstable, and she could not lean back. According to the claimant, she is approximately 5'2" tall and, when she worked by herself, she would have to climb up and down from the chair and stool to answer the telephones and hold her head tilted to the left to hold the telephone receiver. The claimant stated it was the Christmas season, there were lots of telephone calls, and this required her to work quickly. The claimant testified that she began having shoulder problems and headaches around the first of December 1998, but she thought it was because it was the Christmas season and she was stressed. The claimant testified that she began to have back and neck pain in mid-December 1998, but did not know it was work related. On January 4, 1999, the claimant told her supervisor her back was hurting,

but she testified she did not know what was wrong. The claimant sought medical treatment on Injury 2, with Dr. C. According to the claimant, Dr. C asked her what she had been doing, she told him about her job duties, and Dr. C told her not to sit in the chair at work, that her condition was work related. The claimant sought medical treatment with Dr. B on (alleged date of injury No. 1), and he took her off work. The claimant testified that she has been unable to work due to the injury, from Injury 2, through the date of the CCH.

The medical records indicate that Dr. B diagnosed the claimant as having lumbar facet syndrome, curvature of lumbar spine-acquired, thoracic joint dysfunction, and cervical joint dysfunction. The claimant testified that she never had back or neck problems prior to December 1998, just tension from stress, and had not been involved in a motor vehicle accident (MVA) in the last three years.

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 there was no competent evidence introduced that would establish the claimant's neck and back problems were causally related to her work activities, nor evidence introduced that the claimant sustained harm to the physical structure of her body. 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 found the claimant's work activities were not sedentary and caused a repetitive trauma injury. This determination is sufficiently supported by the claimant's testimony and the medical opinion of Dr. B, who causally relates the claimant's job duties to her injury. 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). 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 determination of the hearing officer that the claimant sustained an injury in the form of an occupational disease is sufficiently supported by the evidence.

The claimant appeals the determination of the hearing officer that the carrier timely and properly contested and disputed compensability and timely notice on January 14, 1999, and the carrier's defense on compensability is not limited to the sole cause defense listed on the first TWCC-21. Section 409.021 provides that a carrier which fails to contest the compensability of a claimed injury within 60 days of receiving written notice of the injury waives its right to contest compensability. *See* Texas Workers' Compensation Commission Appeal No. 941387, decided December 2, 1994. In Texas Workers' Compensation Commission Appeal No. 931131, decided January 26, 1994, the Appeals Panel determined that a carrier who did not initiate benefits within seven days of receiving written notice of the injury is limited to the statement of grounds it sets forth within the prescribed period unless the defense is premised on newly discovered evidence not reasonably discoverable at an earlier date. *See also* Texas Workers' Compensation Commission Appeal No. 950519, decided May 18, 1995; Texas Workers' Compensation Commission Appeal No. 950944, decided July 24, 1995.

In this case, the carrier filed two different TWCC-21s with the Texas Workers' Compensation Commission (Commission) on January 14, 1999, both of which indicate the carrier received written notice of the injury on (alleged date of injury No. 1). One of the TWCC-21s indicates a date of injury of (alleged date of injury No. 1), the nature of the injury as back pain, and states the claim is disputed because: the claimant did not suffer a compensable injury in the course and scope of employment, and the sole cause of the claimant's back pain was a prior MVA approximately three years ago. The other TWCC-21 indicates a date of injury of (alleged date of injury No. 2); nature of injury as back pain; and states the claim is disputed because: the claimant did not suffer a compensable injury in the course and scope of employment. The claimant did not notify the employer within 30 days in accordance with Section 409.001; therefore, the carrier is relieved of liability in accordance with Section 409.002; and the sole cause of the claimant's back pain was a prior MVA approximately three years ago. The carrier subsequently filed two other TWCC-21s on January 25, 1999--one with the date of injury of (alleged date of injury No. 1); the other with the date of injury of (alleged date of injury No. 2)--both of which identically dispute the extent of the injury.

The claimant asserts that the carrier's defense on compensability is limited to the sole cause defense listed on the "first" TWCC-21 that was filed with the Commission because the "second" TWCC-21 is based on an erroneous date of injury of (alleged date of injury No. 2). There was no evidence presented indicating which TWCC-21 was filed first, but both were filed on the same date, January 14, 1999. The date of injury indicated on a TWCC-21 is not dispositive of the issue of whether the carrier has waived its right to dispute the claim. The determination of the hearing officer that the carrier timely and properly contested and disputed compensability and timely notice on January 14, 1999, and that the carrier's defense on compensability is not limited to the sole cause defense listed on the first TWCC-21 is sufficiently supported by the evidence.

The date of injury for purposes of a repetitive trauma/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 date of injury is when the injured employee, as a reasonable person, could have been expected to understand the nature, seriousness, and work-related nature of the disease. Commercial Insurance Co. of Newark, N.J. v. Smith, 596 S.W.2d 661 (Tex. Civ. App.-Fort Worth 1980, writ ref'd n.r.e.). While a definite diagnosis from a doctor is not required, neither is the employee held to the standard of a doctor's knowledge of causation. *See* Texas Workers' Compensation Commission Appeal No. 91097, decided January 16, 1992. The date of the first symptoms will not necessarily constitute the date of injury.

The claimant appeals the hearing officer's determination that the date of injury is Injury 1, asserting that the date of injury is Injury 2. At the CCH, the claimant argued that she was first aware that she had a work-related injury when she saw Dr. C on Injury 2. The hearing officer made the following finding of fact:

FINDING OF FACT

5. On Injury 1 Claimant knew or should have known that her back condition may be related to her employment with Employer.

The claimant's testimony and statement were vague concerning the date that she knew or should have known the injury may be related to her employment. The claimant testified that she did not know her condition was work related in mid-December 1998. The claimant indicated in her written statement the following:

> Around the beginning of Dec.'98, I noticed I was experiencing neck, back pain, and severe headaches. One night I got such a bad headache and muscle cramps that an 800-mg Ibuprofen and muscle relaxer could not prevent my leaving early. I also had numbness and tingling in my left leg. I thought this was due to my feet dangling in the air.

On cross-examination, the claimant was questioned about a notation in Dr. C's medical records on Injury 1, which states "has a knotted muscle in [right] shoulder--can you call in a muscle relaxer?" She testified on cross-examination as follows:

Q. Okay. 6-18-98, I have a notation, knot in muscles in shoulder. I think you wanted a muscle relaxer at that point?

A. Uh-huh.

Q. And do you know what brought that problem on?

A. Well, any time that you work at a computer those many hours a day as I do,--

Q. Uh-huh.

A. --your shoulders are going to get tense. You know, and also like when I have my period I'm very tense. So with my PMS and combination of working at the computer, staring at it all the time you know, especially when I was doing International, I was on the computer, you know, eight hours a day straight. Your shoulders do get tense.

Q. All right. So did you think that the problems you were having in June of '98 were related to your work activity as looking at a computer?

A. They could be. I don't know because I'm not a doctor. So I really don't know.

This was the only testimony concerning the date Injury 1. The carrier asserted at the CCH that the date of injury is (alleged date of injury No. 2). The claimant alleged her repetitive trauma injury was caused by the job duties she performed beginning October 1998. The claimant testified that prior to October 1998, she worked in international freight, sitting at a desk, taking care of paperwork and opening envelopes. The claimant's testimony regarding her condition on Injury 1, involved only her shoulder, and was caused by a completely different mechanism of injury, working at a computer. In light of the fact the hearing officer found the claimant credible, as reflected in Finding of Fact No. 4, regarding the mechanism of injury caused by job duties which began in October 1998, we do not believe the date the claimant knew or should have known the condition may be related to the employment can predate October 1998. We find the hearing officer's Finding of Fact No. 5 against the great weight and preponderance of the evidence and we reverse the hearing officer's determination that the claimant's date of injury is Injury 1. We remand this issue to the hearing officer for further development and consideration of the evidence.

The issue of whether the claimant gave timely notice to the employer is dependent on the date of injury. The parties stipulated that the claimant first reported the alleged injury to employer on Injury 2. Since the issue of the date of injury is remanded, we must also reverse and remand the issue of whether the carrier is relieved from liability under Section 409.002 because of the claimant's failure to timely notify her employer pursuant to Section 409.001. If the hearing officer finds that the claimant did not give notice to the employer within 30 days of the date of injury for an occupational disease, the hearing officer should also make findings as to the existence of good cause, if appropriate, for the claimant's failure to give timely note of the injury.

The claimant appeals the hearing officer's determination that she has not had disability because the injury is not compensable due to the claimant's failure to timely notify her employer pursuant to Section 409.001. Disability, by definition, depends upon there being a compensable injury. Section 401.011(16). The hearing officer made a finding of fact indicating the claimant was unable to obtain and retain employment from Injury 2, and continuing through the date of the CCH, which has not been appealed, and is sufficiently

supported by the evidence. However, since the issue of compensability has not been resolved, we must reverse and remand the issue of disability for the appropriate determination, based upon whether the hearing officer determines the occupational disease injury to be compensable.

We affirm the determinations that the claimant sustained an injury in the form of an occupational disease, that the carrier timely and properly contested and disputed compensability and timely notice on January 14, 1999, and that the carrier's defense on compensability is not limited to a sole cause defense. The hearing officer's determinations that the date of injury is Injury 1, that the carrier is relieved of liability under Section 409.002 because of the claimant's failure to timely notify her employer pursuant to Section 409.001, and that the claimant did not have disability, are reversed and the case is remanded for the hearing officer to reconsider those issues in light of this decision. Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Commission's Division of Hearings, pursuant to Section 410.202. *See* Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

_____
Dorian E. Ramirez
Appeals Judge

CONCUR:

_____
Joe Sebesta
Appeals Judge

_____
Robert W. Potts
Appeals Judge