

APPEAL NO. 991407

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 June 2, 1999. She (hearing officer) determined that the appellant (claimant) sustained a repetitive trauma work-related cervical spine injury; that the date of injury was _____; that the claimant failed without good cause to timely report the injury; that the claimant did not have disability; and that the claimant's average weekly wage was \$1,442.66. The claimant appeals the date of injury, timely notice, and other adverse determinations to the extent they were premised on the lack of a compensable injury by virtue of the failure to give timely notice of the injury, expressing his disagreement with them. The respondent (carrier) replies that the decision is correct, supported by sufficient evidence, and should be affirmed.

DECISION

Affirmed.

The claimant worked as a "gear press operator." This work involved the repetitive removal of tires from presses and their placement on stands. He stated that in August 1998 he saw Dr. Z, his family doctor, for headaches. Dr. Z referred him to Dr. H. An MRI of the head of September 1998 was normal as was a nerve test in October 1998. In a report of September 22, 1998, Dr. H wrote that the claimant's "[o]ccupational history is significant in that he has a job which involves unloading tall racks of raw tires." In his assessment, he wrote that "[c]ervicogenic pain . . . may be occupationally related." According to the claimant, Dr. H told him in October 1998 that he had bulging discs.

The claimant then self-referred to Dr. D. At his first visit on _____, Dr. D noted a history of headaches as well as "several years of intermittent neck and shoulder pain. . . ." Discography and a cat scan on January 28, 1999, showed degenerative disc disease of the cervical spine. According to the claimant, on _____, Dr. D discussed with him the results of the discogram and told him that he had a "ruptured" disc at C5-6, which was caused by repetitive trauma at work and that he needed surgery. The claimant then reported a work-related cervical injury on (alleged date of injury).

Included in the definition of an occupational disease is a repetitive trauma injury. Sections 401.011(34) and (36). 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." An injured employee is required to give the employer notice of the injury by the 30th day after it occurs. Section 409.001. Failure to do so without good cause or actual knowledge of the injury relieves the employer and carrier of liability for the injury. Section 409.002. The claimant in this case does not dispute that he gave his employer notice of his claimed repetitive trauma injury on (alleged date of injury). His position is that the date of injury was _____, "because that is when Dr. D told me what the problem was," that is, a ruptured disc caused by repetitive trauma at

work. He specifically disavows reliance on good cause or any other legal excuse for failing to give timely notice and insists his notice was timely based on a _____, date of injury.

In a transcribed telephone conversation of February 22, 1999, the claimant said that the date of injury he gave Ms. R, a nurse at the employer's clinic, was _____, because "that's about the time we found out that I had disc damage." At the CCH, the claimant denied that he derived a date of injury of _____, from anything that Dr. D had told him up to that point and attributed this date to Ms. R. The carrier prepared a Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) on February 24, 1999, in which it listed a date of injury of _____, and asserted a defense of untimely notice. The report of the benefit review conference (BRC) convened on April 22, 1999, stated the claimant's position that the date of injury was _____. The claimant made no written response to this report, but testified at the CCH that this assertion in the BRC report was "wrong." The claimant answered the carrier's interrogatories sometime shortly before the CCH and stated that the BRC report accurately described his position "to the best of my knowledge" and that the date of injury was _____.

The determination of the date of injury can be an imprecise exercise. See Texas Workers' Compensation Commission Appeal No. 94546, decided June 7, 1994. We have observed that the date need not be as early as the first symptoms, nor as late as a definitive diagnosis and a statement of causation by a treating doctor. Texas Workers' Compensation Commission Appeal No. 94521, decided June 13, 1994. What is required to establish the date of injury is generally a recognition by the claimant of the nature and seriousness of an injury and that it may be related to the employment. Texas Workers' Compensation Commission Appeal No. 92443, decided September 28, 1992. The claimant proposes _____, as the date of injury in this case because on that date, he said, he received Dr. D's definitive diagnosis of his injury and its work-relatedness. The carrier's position was that the correct date of injury was _____, and that the claimant only changed his position to reflect a later date of injury when he realized the carrier was asserting a defense of untimely notice. This issue of the date of injury presented a question of fact for the hearing officer to resolve. Texas Workers' Compensation Commission Appeal No. 931028, decided December 23, 1993. In her discussion of the evidence, the hearing officer described the claimant as "evasive" in his assertions that he did not know his claimed injury was work-related on _____. The evidence was clearly subject to varying inferences on this question. We will reverse a factual determination of a hearing officer only if that determination is 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); Pool v. Ford Motor Company, 715 S.W.2d 629, 635 (Tex. 1986). Applying this standard of review to the record of this case, we decline to substitute our opinion of the persuasiveness of the claimant's testimony for that of the hearing officer, but rather find that her determination of the date of injury was sufficiently supported by the evidence.

We also affirm the finding of no disability, based on our affirmance of the determination that the injury, though work related, was not compensable.

For the foregoing reasons, we affirm the decision and order of the hearing officer.

Alan C. Ernst
Appeals Judge

CONCUR:

Judy L. Stephens
Appeals Judge

Dorian E. Ramirez
Appeals Judge