

## APPEAL NO. 991419

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On June 2, 1999, a contested case hearing (CCH) was held. With regard to the issues before him, the hearing officer determined that: (1) appellant (claimant) had sustained a repetitive trauma bilateral carpal tunnel syndrome (BCTS) injury; (2) the date of the occupational disease was \_\_\_\_\_ (all dates are 1998 unless otherwise noted), pursuant to Section 408.007; (3) disability (assuming a compensable injury) would have been from \_\_\_\_\_ to the date of the CCH but for claimant's voluntary resignation (to avoid termination); and (4) the respondent (carrier) is relieved of liability for the injury by claimant's failure to timely give notice to the employer. The timely notice issue was added over claimant's objection on a finding of good cause by the hearing officer.

Claimant appealed certain of the factual findings and the conclusions on which they were based, contending the hearing officer erred by adding the issue of timely notice to the employer and refusing to add the issue of timely contest of compensability by the carrier. Claimant also contended that she had given timely notice, that a herniated C5-6 disc was part of the alleged compensable injury and that claimant had disability. Claimant requests that we reverse the hearing officer's decision and render a decision in claimant's favor. Carrier responds, urging affirmance.

### DECISION

Affirmed.

After having become employed by the employer as a receptionist in 1995, claimant began work as a document processor in 1997. There was considerable disputed testimonial as well as documentary evidence exactly what claimant's duties were and how repetitive those duties were. The hearing officer comments that the duties were to "un staple bundles of paper and insurance policies and prepare them for the microfilmer to copy. The Claimant would also on occasion move boxes of documents from place to place by means of a service cart." Claimant is alleging a repetitive trauma injury in the form of BCTS and a cervical disc herniation. Claimant's family and treating doctor was Dr. L.

One of the key issues in this case involves some of Dr. L's records. In an exchange of documents, carrier was given medical records and reports from Dr. L which included a note dated March 15, 1999, which stated:

[Claimant] has been a patient of mine since 1993. Prior to December 1998 she had no hand or neck problems that I have seen her for. After December 1998 she was subsequently diagnosed with [BCTS], as well as a herniated cervical disc. It is within reasonable medical probability that these problems are work related.

Based on this and other evidence, carrier appears to have relied on a date of injury of \_\_\_\_\_ or \_\_\_\_\_, with notice to the employer on or about that date. Carrier nonetheless subpoenaed Dr. L's records and, the day before the CCH, received additional records which included a progress note dated \_\_\_\_\_ which comments on complaints of pain and numbness in claimant's right hand and goes on to state:

She says she does a lot of repetitive work with her hands at her place of employment. She has to open a lot of mail with a large staple remover and it involves a lot of hand work. She thinks that might have brought it on.

Dr. L's assessment was right hand pain with possibilities to "include tendonitis from repetitive hand use. Maybe early carpal tunnel but there is no objective evidence of that at this point." Because the progress note directly contradicted Dr. L's March 15, 1999, report and carrier's understanding of a \_\_\_\_\_ or \_\_\_\_\_ date of injury and notice to the employer, carrier requested the addition of the issue of timely reporting based on newly discovered evidence, namely the subpoenaed but previously unexchanged progress notes. The hearing officer expressed some concern that Dr. L appeared to have attempted to mislead the tribunal with his March 15, 1999, report and found good cause to add the issue of timely notice to the employer over claimant's objection, citing Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 142.7 (Rule 142.7). Claimant then requested the addition of an issue of timely contest of compensability by the carrier. Carrier responded that it could not contest compensability of the injury when it did not have notice of that injury. The hearing officer refused to find good cause and did not add the issue on timely contest of compensability. Claimant appeals those rulings as being against the great weight and preponderance of the evidence, citing evidence that might lead to the inference that the employer had actual knowledge of claimant's hand pain removing staples in November and, therefore, Dr. L's \_\_\_\_\_ progress note "did not include any newly discovered evidence which would relieve carrier of filing a Payment of Compensation or Notice of Refused/Disputed Claim [TWCC-21] . . . ."

We will review the hearing officer's finding of good cause to add an issue (and to refuse to add an issue) on an abuse of discretion standard. Texas Workers' Compensation Commission Appeal No. 971626, decided September 29, 1997, contains a good recitation of cases and principles that the Appeals Panel relies on in determining whether there was such an abuse of discretion. In Morrow v. H.E.B., Inc., 714 S.W.2d 297 (Tex. 1986), the Texas Supreme Court stated that to review an abuse of discretion one looks to see if the trial court (in this case, the hearing officer) acted without reference to any guiding rules or principles. In this case, Section 410.151(b) and Rule 142.7 provide the guiding principles and, under the circumstances of this case, based on the newly discovered contradictory progress note, we do not find that the hearing officer abused his discretion in making his rulings.

Claimant testified at the CCH that her right hand began to bother her in November (on November 11th, when it felt like "somebody had hit my hand with a hammer") and that she sought treatment with Dr. L, as reflected in the \_\_\_\_\_ progress note. Claimant testified that she told her supervisor about the pain, asked about some kind of machine that

would pull the staples and asked for a wrist brace. Not so clear is whether claimant attributed the pain in her wrist as having been caused by her work or whether she requested the assistance to protect her wrist from further injury. Claimant apparently continued to work 32 hours a week (eight hours a day, four days a week). Claimant saw Dr. L about neck pain on December 9th. Claimant testified that she started putting ice packs on her neck and that on December 16th or 17th her supervisor referred her to Dr. B. Claimant said that she saw Dr. B on December 19th and that Dr. B took x-rays and did "adjustments." Claimant said that she had an appointment to see Dr. B again on \_\_\_\_\_, but saw Dr. B's associate, Dr. W, instead, and that Dr. B called her the afternoon of \_\_\_\_\_ and told her that the injury was "definitely a work-related injury" and that she needed "to fill out an E-1 form." Claimant testified she called the employer that afternoon, spoke with her supervisor and reported a work-related injury. Claimant said she was told to come in the next day to fill out the forms and that she went to work on December \_\_\_\_\_, completed the forms on the afternoon of December \_\_\_\_\_ and was subsequently offered the option of resigning or being terminated for falsifying her time sheet/production record on December 16th. Claimant admitted that her production record for December 16th was inaccurate and chose to resign.

In evidence is an off-duty slip dated \_\_\_\_\_ from Dr. W taking claimant off work December 19th. In a report dated January 27, 1999, Dr. B noted claimant's initial visit on December 19th, noted complaints of pain in her neck, upper back and both forearms, and commented that claimant "denied having had these symptoms prior to this occasion." Dr. B recites claimant's job duties as "included pulling heavy duty staples out of thick documents using a small non handled screw driver-like device several hours during the day" and lifting heavy boxes "weighing 40 to 60 pounds each." Dr. B assessed claimant had a cervical-thoracic strain, bilateral extensor tendinitis and radicular neuralgia. Claimant was subsequently referred to Dr. Edmund (Dr. E) for neurological evaluation. In a report dated February 1, 1999, Dr. E noted claimant's work, treatment and "chiropractic manipulations" by Dr. B and commented, "[t]here was clear exacerbation of symptoms with attempts at manual cervical traction." An MRI was performed on February 5, 1999, which showed a small left lateral "HNP" at C5-6 "probably impinging upon the left C6 root."

In another report, dated March 16, 1999, Dr. E stated:

The patient's history is such that her symptoms occurred after being required to repetitively remove staples from large packs utilizing a blade, as well as moving heavy objects during late November or December, 1998 time-frame. I think it is reasonable medical probability that her bilateral carpal tunnel complaints and her fibromyalgia/myofascial complaints of the cervical and upper body region are related to the repetitive nature of her employment at that time. As to whether the left lateral C5-6 disc herniation is related, that cannot be absolutely stated, but if it was there prior, then I suspect it was aggravated by the above motions.

Claimant testified that carrier was attempting to get all her prior medical history, which she was resisting, and that she asked Dr. L to "make a statement of any relevance to my neck

and hand injuries," which led to Dr. L's March 15, 1999, note. Dr. H performed a record review for carrier and testified at the CCH. Based on the employer's job description of claimant's duties (Dr. H believed that claimant only worked 20 hours a week), he placed claimant's job duties in the light to light-medium category. Dr. H testified that in his opinion, based on the employer's version of claimant's duties, that claimant's job does not support a repetitive work injury.

The hearing officer found that claimant sustained a compensable injury in the form of an occupational, repetitive trauma injury (see Section 401.001(34) and (36) for definitions of occupational disease and repetitive trauma) "in the form of [BCTS]." That finding is not appealed. The hearing officer also found that claimant's herniated disc at C5-6 is not a part of the occupational disease. Claimant appeals that finding, pointing to the reports of Dr. B and Dr. E which state that the herniated disc was either caused by or aggravated by claimant's repetitive job. On the other hand, Dr. H's opinion and testimony was that it was not related. All the doctors' opinions appear to have been somewhat skewed by whoever was giving them a description of what claimant's job was and the nature of the repetitive movements. Fairly clearly, the expert opinion was divided based on what claimant's job was. Section 410.165(a) provides that the hearing officer, as finder of fact, is the sole judge of the relevance and materiality of the evidence as well as the weight and credibility that is to be given the evidence. 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). Because of the conflicting evidence, we find the hearing officer's decision on this issue supported by sufficient evidence.

The date of injury of an occupational disease is the date the employee knew or should have known that the disease may be related to the employment. Section 408.007. The date of injury, when claimant knew or should have known the BCTS may be related to the employment, is generally a question of fact for the hearing officer to resolve. In this case, the hearing officer found the date of injury to have been \_\_\_\_\_ based on Dr. L's progress note of that date which reflects that claimant believed, at that time, that her hand pain was possibly caused by her work and that Dr. L had suggested that she might have BCTS. The date of injury does not necessarily require that a definitive diagnosis be made, although it may be. In this case, claimant testified of pain like a hammer had hit her hand, she sought medical treatment and she even told her doctor that she thought the pain was brought on by her work. We find sufficient evidence to support the hearing officer's decision on this point.

Having affirmed the hearing officer's determination that the date of injury was \_\_\_\_\_, the next issue is whether claimant gave timely notice of her injury to the employer. Section 409.001 requires that an employee notify the employer of an injury by the 30th day after the injury occurs. 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. Whether, and if so, when, notice is given is a question of fact for the hearing officer to decide. Although claimant contends that the employer had actual notice of the injury because claimant had asked for a wrist brace and had complained of hand and/or neck pain, mere complaints of pain are insufficient to give notice to the employer that claimant was claiming a work-related injury. Fairly clearly, the first actual notice that claimant was asserting a work-related repetitive trauma injury was when claimant called her supervisor on \_\_\_\_\_. Employer's administrative manager testified that she referred claimant to Dr. B for a headache and that claimant had never said why she wanted a wrist brace. The credibility of a witnesses' testimony is solely within the hearing officer's province. Although the hearing officer does not make specific findings regarding what claimant's supervisor or the administrative manager knew, inferentially, it did not rise to giving notice because the hearing officer specifically found that claimant did not report the occupational injury to the employer until \_\_\_\_\_, a date more than 30 days after \_\_\_\_\_.

Although the hearing officer found claimant would have had disability, as defined in Section 401.011(16), from \_\_\_\_\_ through the date of the CCH, claimant's failure to timely give notice (rather than claimant's "voluntary" resignation as found by the hearing officer) to the employer relieves carrier of liability under Section 409.002. We will affirm the hearing officer's decision upon any reasonable theory supported by the evidence. Daylin Inc. v. Juarez, 766 S.W.2d 347 (Tex. App.-El Paso 1989, writ denied).

Upon review of the record submitted, we find no reversible error and we will not disturb the hearing officer's determinations unless they are so against the great weight and preponderance of the evidence as to be clearly wrong or unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). We do not so find and, consequently, the decision and order of the hearing officer are affirmed.

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Thomas A. Knapp  
Appeals Judge

CONCUR:

\_\_\_\_\_  
Alan C. Ernst  
Appeals Judge

\_\_\_\_\_  
Elaine M. Chaney  
Appeals Judge