

APPEAL NO. 991471

On June 25, 1999, a contested case hearing (CCH) was held. The CCH was held under the provisions of the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). The issues at the CCH were: (1) whether appellant/cross-respondent (claimant) sustained a compensable injury in the form of an occupational disease on _____; (2) whether respondent/cross-appellant (carrier) is relieved of liability under Section 409.002 because of claimant's failure to timely notify her employer under Section 409.001; and (3) whether claimant has had disability. Claimant requests that the hearing officer's decision that she did not sustain a compensable injury on _____, or on any other relevant date, and that she has not had disability be reversed and that a decision be rendered in her favor on the issues of compensable injury and disability. Carrier requests that the hearing officer's decision that claimant's husband, acting on claimant's behalf, timely notified the employer under Section 409.001 and that carrier is not relieved of liability under Section 409.002 be reversed and that a decision be rendered in its favor on the timely notice issue. Carrier requests that the hearing officer's decision against the claimant on the compensable injury and disability issues be affirmed and that the hearing officer's decision that it is not liable for benefits be affirmed.

DECISION

Affirmed.

Claimant began working for employer as a dough master in March 1998. Her main job duty was to make dough for pizzas. She described in detail the repetitive lifting and bending she did at work. She said that the huge mixing bowl held at least 30 pounds of dough and that she had to put the dough into the mixing bowl and take it out. She said she also had to lift cases of sauce, cheese, and meat, and gallons of oil. She said that her work activities caused injury to her neck, back, right shoulder, right arm and feet, but that she had been told that injury to her feet would not be covered and so she was pursuing her claim for a neck and right arm injury. She also said that she has headaches and blurred vision. She said she had not had neck problems prior to February 1999. She said that around February 1, 1999, she began feeling pain when lifting dough. She said that on _____, she talked to her husband, who also worked for employer, about her pain, and knew at that time that something was wrong with her and that she would be unable to continue to do her job. She gave _____, as the date of injury.

Claimant said that on February 22, 1999, she gave her manager, MT, a two-week notice that she was leaving employment. Claimant said she was not able to perform her job because of pain. She took vacation time and a billing clerk job she thought she had lined up did not come through. She said she asked MT for her dough master job back and MT said yes. She said that on March 11, 1999, her husband gave notice of her injury to MT and that MT at first said that she could have reduced hours and later said that she could answer the telephone or get a doctor's release to work as a dough master. Claimant said that she was paid her vacation time by employer through March 12, 1999, and that she

has been unable to work because of her claimed work-related injuries since March 13, 1999.

Claimant's husband testified that he taught claimant the work of a dough master. He described the constant lifting and bending that that job requires and provided estimates of weights involved. He said that around _____, claimant told him that she thought she had strained her neck, that they thought she had strained her neck lifting something at work, and that they discussed finding another job for her. He also testified that on March 11, 1999, he told MT that claimant's job was killing her, that he mentioned claimant's legs, that he said that claimant had trouble lifting the dough out of the mixing bowl, that he reported to MT that claimant's injuries were work related, and that when MT said claimant could answer the telephone or get a doctor's release to work as a dough master, he told MT that claimant would see a doctor because he and claimant thought she had a work-related injury and so that claimant could continue to do the dough master job.

Claimant went to Dr. VB on March 12, 1999, and Dr. VB took her off work. Claimant underwent a cervical CT scan on April 7, 1999, and the radiologist reported that claimant has a disc herniation at C5-6 and a disc protrusion at C4-5. In a report dated May 3, 1999, Dr. VB detailed the claimant's work activities for the employer and stated diagnoses of cervical disc herniation and displacement, cervical sprain/strain, cervical radiculopathy, right carpal tunnel syndrome/tenosynovitis, thoracic sprain/strain, lumbar disc displacement, lumbosacral sprain/strain, and lumbosacral radiculopathy. Dr. VB had noted in an earlier report that claimant also had bilateral foot and calf pain. Dr. VB wrote that claimant's cervical disc herniation resulted from lifting the heavy dough on a daily basis; that the claimant's continual bending and lifting at work resulted in injury to claimant's cervical, thoracic, and lumbar regions; and that claimant also sustained a work-related injury to her right wrist.

MT testified that on March 10, 1999, claimant called him and asked for her job back; that on March 11, 1999, claimant's husband told him that claimant's legs were torn up; that he told claimant and claimant's husband that claimant could have a telephone job or get a doctor's release stating she was able to do the dough master job; that they were very upset about that; and that claimant's husband told him that claimant would be filing a workers' compensation claim. MH, a coworker, stated in a written statement that he told MT that claimant had complained about the weight of the dough.

Claimant appeals the hearing officer's decision that she did not sustain a compensable injury and that she has not had disability. The hearing officer found that claimant's injury did not occur while she was performing her job duties for employer and that she did not sustain a compensable injury on _____, or on any other relevant date, and he concluded that claimant did not sustain a compensable injury on _____, or on any other relevant date. Section 401.011(34) provides that an occupational disease includes a repetitive trauma injury, which means damage or harm to the physical structure of the body occurring as the result of repetitious, physically traumatic activities that occur over time and arise out of and in the course and scope of employment. Section

401.011(36). Claimant has the burden to prove that she was injured in the course and scope of her employment. Johnson v. Employers Reinsurance Corporation, 351 S.W.2d 936 (Tex. Civ. App.-Texarkana 1961, no writ). The trier of fact may believe that a claimant has an injury, but disbelieve that the injury occurred at work as claimed. Johnson.

The 1989 Act makes the hearing officer the sole judge of the relevance and materiality of the evidence offered and of the weight and credibility to be given to the evidence. Section 410.165(a). As the trier of fact, the hearing officer resolves conflicts in the evidence and may believe all, part, or none of the testimony of any witness. Texas Workers' Compensation Commission Appeal No. 950084, decided February 28, 1995. The hearing officer also judges the weight and credibility to be given to the medical evidence. Appeal No. 950084. An appellate level body is not a fact finder and does not normally substitute its judgment for that of the trier of fact or pass upon the credibility of witnesses. Appeal No. 950084. When reviewing a hearing officer's decision to determine the factual sufficiency of the evidence, we should set aside the decision only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Appeal No. 950084. We conclude that the hearing officer's decision that claimant did not sustain a compensable injury is supported by sufficient evidence and is not so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175 (Tex. 1986). The hearing officer did not err in deciding that claimant has not had disability because, without a compensable injury, claimant would not have disability as defined by Section 401.011(16).

Carrier contends that the hearing officer should have found a date of injury earlier than _____. 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. While the hearing officer did not make a specific finding on the date of injury, which he should have done since timely notice of injury was an issue, it is clear from his Statement of the Evidence and finding and conclusion on timely notice to the employer that he was using _____, as the date of injury. The Appeals Panel has noted that the date of injury for an occupational disease is not necessarily the date of the first symptom and that the time period for notice begins to run when a reasonable person would recognize the nature, seriousness, and the work-related nature of an injury. Texas Workers' Compensation Commission Appeal No. 982944, decided January 21, 1999. We conclude that the carrier has not shown that the hearing officer erred in not determining an earlier date of injury.

Carrier appeals the hearing officer's decision in favor of claimant on the timely notice issue. Section 409.001(a) provides that, if an injury is an occupational disease, an employee or a person acting on the employee's behalf shall notify the employer of the employee of an injury not later than the 30th day after the date on which the employee knew or should have known that the injury may be related to the employment. The hearing officer found that on March 11, 1999, claimant's husband, acting on claimant's behalf, notified MT, a person in a management position with employer, that claimant had sustained a compensable injury and the hearing officer concluded that claimant's husband, acting on

claimant's behalf, timely notified claimant's employer pursuant to Section 409.001. The hearing officer resolved the conflicting evidence on the notice issue in favor of claimant. The Appeals Panel has held that a claimant is not required to report the extent of injury to meet the reporting requirement. Texas Workers' Compensation Commission Appeal No. 950844, decided July 10, 1995. We conclude that the hearing officer's decision in favor of claimant on the timely notice issue is supported by sufficient evidence and is not so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Cain, supra.

The hearing officer's decision and order are affirmed.

Robert W. Potts
Appeals Judge

CONCUR:

Alan C. Ernst
Appeals Judge

Tommy W. Lueders
Appeals Judge