APPEAL NO. 991499

This appeal is considered in accordance with the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On June 16, 1999, a contested case hearing (CCH) was held. There were two docket numbers, involving two claims. The earlier claim, for which respondent (Carrier 1) was the carrier, occurred on Injury 1. The issues here concerned whether the respondent (claimant) sustained a new injury in injury 2 when the appellant, (Carrier 2), was the carrier; whether she had disability from that injury; and whether Carrier 2 was released from liability because the claimant failed to give timely notice of her injury in accordance with Section 409.001.

The hearing officer held that the claimant sustained a new repetitive carpal tunnel syndrome (CTS) injury to her right hand, with the date of injury being Injury 2, and that she reported this injury on that same day to her employer. The hearing officer further found that she had disability from this injury from September 20, 1997, through December 7, 1998.

Carrier 2 has appealed. It contends that her right wrist injury was part of her earlier injury 1 CTS and recites evidence it believes favor this interpretation of the facts. Carrier 2 also argues that the claimant failed to present specific facts about the activities that she alleged were traumatic, and simply stated in a conclusory fashion that they were repetitive. Carrier 2 also generally states that the determination that the claimant gave timely notice of her injury is against the great weight and preponderance of the evidence. Both the claimant and Carrier 1 respond that the decision should be affirmed.

DECISION

Affirmed.

The claimant worked for the same employer, a mail-order prescription company, on her injury 1 and 1997 dates of injury. Briefly, the claimant stated that she sustained a left-sided CTS injury on Injury 1, while the employer was insured by Carrier 1. The claimant denied that her right arm was affected at all. The claimant said that her work during the day was repetitive. More details were not developed as to her work, however, until she was cross examined by Carrier 2. Then, the claimant said, each morning the workers would receive their assignments for the day. According to the claimant, there were five potential shift tasks that could be assigned and usually a worker would be assigned to at least two tasks in a day. All tasks involved various stages of the processing of hundreds of orders for prescription drugs, and a few involved working on a "line" of production. Work orders or products might be contained in a bin, most of the time weighing under a pound, which had to be lifted from its receptacle, reviewed or filled, and then reloaded onto a line or another carousel device. As one example, for a task at the "baker" carousel, the claimant testified that in a two hour shift she would process at least 500 orders, transferring the product bins from one level to another. According to the claimant, there were days at the time of her first injury when she was assigned to the baker carousel all day.

It was undisputed that she sustained a injury 1 injury and was treated by Dr. S. A November 13, 1995, letter from Dr. S noted severe pain in the claimant's neck and left-sided pain and parasthesia. He said she had swelling in her hands and wrists. Near the end of his letter, he observed that she also had "some"symptoms in her right hand but less than the left side." The claimant was found to be at maximum medical improvement from this previous injury on or around August 16, 1996, with an 11% impairment rating (IR). The original Report of Medical Evaluation (TWCC-69) is not in evidence, but Dr. S's narratives and schedules are. He indicated that the injured limb was the left extremity. Dr. S computed his IR by also evaluating what he described as the "normal" right wrist and determining that it had a five percent rating, which he then deducted from the left extremity IR of 14% to come up with a nine percent upper extremity IR.

The claimant returned to work after this and resumed her same duties; she said there was really no light duty as such. She said that her right hand began to bother her and on Injury 2, she reported the swelling and discomfort to her supervisor and asked to see the doctor. She returned to Dr. S on this date, but he thereafter retired and she sought treatment, first through Dr. V and then through Dr. K, who diagnosed right-handed CTS.

There was controversy about a Family Medical Leave Act (FMLA) request that the claimant dated May 21, 1997, which had a portion that was to be completed by her doctor. Dr. S put on this part of the form that the claimant had bilateral CTS. The claimant contended that, although she signed it, she was not aware that Dr. S put this as the reason, and she maintained that her reason for seeking the leave was due to recurrent left extremity pain and numbness. Carrier 2 called as its witness the human resources coordinator for the employer, and asked whether the claimant approached her regarding this request for leave, apparently as a foundation for testimony about subsequent conversations. At this point, the witness stated that she had not been approached by the claimant because she had not been employed in this capacity at the time the claimant requested the FMLA leave.

On June 20 and July 15, 1997, Dr. S wrote to the employer that the claimant was still under his care for bilateral CTS. She was treated primarily for right wrist and hand pain and numbness by Dr. V on November 11, 1997.

The claimant was unequivocal in stating that she did not understand Dr. S to be treating her for anything but a left wrist injury. She speculated that she favored her left hand once she returned to work, and thus may have overused her right hand, eventually leading to CTS injury. The claimant was off work beginning September 20, 1997, and returned to the employer's office on October 10, 1997, to complete workers' compensation paperwork. She said she was released back to work on December 8, 1998.

Section 401.011(36) defines repetitive trauma injury as "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." To recover from an occupational disease of this type, one must not only prove that

repetitious, physically traumatic activities occurred on the job, but also must prove that a causal link existed between these activities on the job and one's incapacity; that is, the disease must be inherent in that type of employment as compared with employment generally. Davis v. Employer's Insurance of Wausau, 694 S.W.2d 105 (Tex. App.-Houston [14th Dist.] 1985, writ ref'd n.r.e.). While the claimant's earlier testimony did in fact include only conclusory assessments that what she did was repetitive, the details of her work were more fully fleshed out during cross-examination. Likewise, there are descriptions of her tasks in the record through either medical records or job description forms from the employer. The hearing officer's inference that what she did was repetitive is supported sufficiently in the record.

The hearing officer is the sole judge of the relevance, materiality, weight, and credibility of the evidence presented at the hearing. Section 410.165(a). The decision should not be set aside because different inferences and conclusions may be drawn upon review, even when the record contains evidence that would lend itself to different inferences. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). All matters in this case involved conflicting evidence and the hearing officer could choose to credit the claimant's assertion that her injury 1 injury was to the left extremity. Certainly, her assessment of IR was focused on this area. We likewise find sufficient evidence for the decision as to the duration of disability and timely notice and, accordingly, affirm the decision and order of the hearing officer.

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Susan M. Kelley
Appeals Judge

CONCUR:

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Stark O. Sanders, Jr.
Chief Appeals Judge

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Robert W. Potts
Appeals Judge