APPEAL NO. 991866

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 August 6, 1999. The issues at the CCH were whether the respondent (carrier) is relieved from liability under Section 409.002 because of the appellant's (claimant) failure to timely notify her employer pursuant to Section 409.001; the date of injury pursuant to Section 409.007; the date the claimant knew or should have known the disease may be related to the employment; and whether the claimant had disability beginning May 26, 1999. The hearing officer determined that the date of injury is (injury date); that 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 that the claimant had disability from May 26, 1999, through August 6, 1999, the date of the CCH. The claimant appeals, urging that the date of injury is (alleged injury date); that she notified the employer in a timely manner; and that the determination of disability is incorrect. The carrier replies that the hearing officer's decision is supported by sufficient evidence and should be affirmed.

DECISION

Affirmed.

The claimant testified that she began employment as a baker for employer in August 1998. The claimant's job duties required her to make bread, cookies, and biscuits, and wash and clean the equipment. The claimant performed these job duties until February 1999 when she was transferred to a school to serve lunches. The claimant testified that in November 1998 she began having problems with her fingers going numb, but thought it was because she had not worked in eight years and her body was not used to it. The claimant sought medical treatment with Dr. G) on (injury date). Dr. G's notes indicate that the claimant complained of pain to the right elbow and forearm, as well as pain and numbness in both wrists and hands; that the claimant admitted that her job involved repetitive motion with her arms and hands; and that the claimant may need to perform a different job at work. Dr. G diagnosed right lateral epicondylitis and probable bilateral carpal tunnel syndrome (CTS).

The claimant testified that she was on vacation in December and in February her condition worsened. On (alleged injury date), the claimant returned to Dr. G with the same symptoms. Dr. G diagnosed right lateral epicondylitis and bilateral CTS and his notes state, "[h]ave encouraged her to report these problems to her supervisor at work since her duties need to be modified to prevent worsening. She is afraid to lose her job." The claimant testified that she reported the injury to her employer on February 26, 1999. On March 1, 1999, Dr. G prescribed wrist splints and referred the claimant to other doctors. The claimant testified that surgery has been recommended for both wrists.

It was the claimant's position that the date of injury is (alleged injury date), the date she was diagnosed with CTS. The claimant asserts that on (injury date), Dr. G was not certain of the diagnosis and that he did not positively conclude that her condition was work related until (alleged injury date). The claimant testified that on (injury date), Dr. G told her that her condition was possibly work related, but that she did not accept it because she had not worked for a very long time. Dr. G, on May 26, 1999, states in pertinent part:

> [The claimant] presented to my office for examination on (injury date) complaining of pain to the right elbow and forearm, as well as pain and numbness to both wrists and hands. She stated that the symptoms would improve over the weekend. She admitted that her job consisted of repetitive motion with her arms and hands. The physical examination revealed moderate tenderness at the right lateral epicondyle and tenderness of both wrists. In addition, she had an equivocal Tinel's sign bilaterally. I explained to her that these problems were most likely due to the type of work that she was performing at the school.

The date of injury for purposes of an occupational disease is "the date on which the employee knew, or should have known that the disease may be related to the employment. [Emphasis added.]" 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.). In Texas Workers' Compensation Commission Appeal No. 941374, decided November 23, 1994, we noted that the date of injury in an occupational disease case presents a question of fact for the hearing officer to resolve. We have previously recognized that while the date of injury in an occupational disease case is not necessarily the date of diagnosis, it can be that date. Texas Workers' Compensation Commission Appeal No. 951666, decided November 20, 1995; Texas Workers' Compensation Commission Appeal No. 950411, decided May 2, 1995. The key question is when the claimant knew or should have known that her work activities may be causing her injury.

The 1989 Act provides that the hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). Where there are conflicts in the evidence, the hearing officer resolves the conflicts and determines what facts the evidence has established. The hearing officer determined that the date of injury is (injury date). Although the hearing officer did not make a finding which indicates that the claimant knew or should have known that her injury may be related to her employment on (injury date), we can infer such a finding since the statement of the evidence indicates that the hearing officer applied the correct standard for determining the date of injury. When reviewing a hearing officer's decision, we will reverse such decision only if it is so contrary to the overwhelming weight 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). The determination that the claimant's date of injury is (injury date), is sufficiently supported by the evidence.

Section 409.001 requires that an employee notify the employer of an occupational disease injury not later than the 30th day after the date the employee knew or should have known that the injury may be related to the employment. 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. It was undisputed that the claimant first reported the injury on February 26, 1999. A claimant must act with diligence in notifying the employer of a claim. Texas Workers' Compensation Commission Appeal No. 93649, decided September 8, 1993. Good cause is defined as whether the claimant has exercised the degree of diligence of an ordinarily prudent person in prosecuting a claim. Texas Workers' Compensation Commission Appeal No. 92075, decided April 7, 1992. The question of good cause for failure to timely report an injury is a question for the fact finder. The hearing officer considered the evidence and determined that the claimant did not have good cause for her failure to report the injury within 30 days of (injury date). We find sufficient evidence to support the hearing officer's determination that 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.

The claimant's appeal states that she disagrees with the hearing officer's determination of disability, although the issue was resolved in her favor. We note that a compensable injury is one that is defined as an injury "that arises out of and in the course and scope of employment for which compensation is payable. [Emphasis added.]" Section 401.011(10). Section 401.011(16) defines disability as "the inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage. [Emphasis added.]" In this case, the carrier is relieved from liability and compensation is not payable. Thus, the injury is not compensable and the claimant cannot have disability. This is so, even though the claimant was found unable to obtain and retain employment at wages equivalent to her preinjury wage beginning on May 26, 1999, through August 6, 1999. We reform Conclusion of Law No. 5 and the decision to reflect that the claimant did not have disability from May 26, 1999, through August 6, 1999.

The claimant's appeal states that all of the evidence was not discussed, and that "all evidence should have been introduced." We note that all of the claimant's offered evidence was admitted into the record. The hearing officer's decision reflects that although not all of the evidence presented was discussed, it was considered and his findings of fact and conclusions of law were based on all of the evidence presented.

The decision and order of the hearing officer are affirmed.

_____
Dorian E. Ramirez
Appeals Judge

CONCUR:

_____
Robert W. Potts
Appeals Judge

_____
Susan M. Kelley
Appeals Judge