APPEAL NO. 991905

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 10, 1999. He (hearing officer) determined that the respondent (claimant) sustained a compensable repetitive trauma injury on _____; that she gave her employer timely notice of the injury; and that she had disability as claimed from February 12 through 28, 1999, and from March 5, 1999, through the date of the hearing. The appellant (carrier) appeals these determinations, contending that they are against the great weight and preponderance of the evidence. The claimant replies that the decision is correct, supported by sufficient evidence, and should be affirmed.

DECISION

Affirmed.

The claimant worked as "homemaker" for the employer. Her duties involved going to homes of elderly, sick, and disabled clients and performing general "light" housekeeping, including cleaning, sweeping, mopping, dusting, and changing bed linens. She was typically scheduled to do this for two clients per day, one in the morning and one in the afternoon.

According to the claimant, she sustained a right shoulder rotator cuff injury in _____, for which she underwent surgery, while working for another employer, but considered the injury largely resolved when she started working for the current employer in 1995. Dr. S became her primary care doctor in May 1996. In the single record of Dr. S in evidence, Dr. S wrote on March 30, 1999, that the claimant complained to her of pain in the right shoulder in November 1996 and again on January 22, 1999. The claimant testified that as a result of the January 22, 1999, visit, Dr. S thought her problem was arthritis and the claimant had no reason to disagree with this diagnosis. Arthritis medication did not help. An MRI on _____, requested by Dr. S, showed a rotator cuff tear. At this point, the claimant said, she realized she had reinjured her shoulder and attributed it to her activities on the job. She continued working until February 12, 1999, when, she said, she experienced such shoulder pain that she could not continue working. On February 15, 1999, she completed an "Employee Incident Report" in which she attributed a right shoulder injury to "rotation of arm during sweeping, mopping, vacuum." The claimant was off work from February 12 to 28, 1999. She returned to work on March 1st, but had to leave again because of pain on March 5, 1999. She has not since returned to work. In describing the cause of her claimed right shoulder injury, the claimant could not point to any specific incident at work, but said the pain became particularly bad when she was changing bed linens.

The claimant was referred to Dr. Sc, D.C., by her attorney. Dr. Sc examined the claimant on April 6, 1999, and recorded a history of right shoulder pain for the last eight months. He testified at the CCH that he placed claimant in an off-work status and attributed her shoulder condition to repetitive activities at work.

Ms. L, the supervisor, testified that the claimant's housekeeping duties were limited to light cleaning and personal care of clients. She said that the claimant had stipulated that a condition of her employment was that the work include no lifting, and that a client had once called Ms. L to complain about the claimant not being willing to lift some small objects to do cleaning. She said the claimant never reported a shoulder injury to her. However, in a written statement of February 22, 1999, Ms. L wrote that on February 15, 1999, the claimant came to the office and asked for an incident report, which the claimant then filled out and gave back to Ms. L without discussing its content. Ms. L said that she then took the report to the human resources department.

Ms. S, the program manager, testified that the claimant had refused to do what she thought was beyond her physical capabilities and that she never did anything but light-duty chores. She also heard that the claimant was putting together her own personal home care business. She said that the claimant called her on February 7, 1999, to tell her she was going to have an MRI the next day. Ms. S said that she asked the claimant if this was for a work-related injury and the claimant said "no." Ms. T, the human resources coordinator, testified that the claimant never reported a work-related injury to her and that she was unaware of any on the job injury report completed by the claimant even though her assistant, Ms. D, completed an Employer's First Report of Injury or Illness (TWCC-1) on February 24, 1999.

The claimant had the burden of proving that she sustained a compensable injury as claimed. Johnson v. Employers Reinsurance Corporation, 351 S.W.2d 936 (Tex. Civ. App.-Texarkana 1961, no writ). Section 401.011(26) defines injury as "damage or harm to the physical structure of the body . . . . The term includes an occupational disease." An occupational disease is a "disease arising out of and in the course of employment that causes damage or harm to the physical structure of the body, including a repetitive trauma injury . . . . The term does not include an ordinary disease of life to which the general public is exposed outside of employment, unless that disease is an incident to a compensable injury or occupational disease." Section 401.011(34). A repetitive trauma injury is an injury that occurs "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). A main contention of the carrier, both at the CCH and on appeal, was that the claimant's work activities were activities of ordinary life and were neither repetitious nor traumatic enough to cause a repetitive injury. It describes these duties as "strictly homemaking, light housekeeping." In Texas Workers' Compensation Commission Appeal No. 94941, decided August 25, 1994, we pointed out that to establish a repetitive trauma injury, the claimant must present some evidence that he is engaged in essentially the same trauma-producing conduct that is reasonably frequent, that is, repetitive, in nature. For the repetitive trauma injury to be compensable, a claimant must further show these activities affect the claimant in a way not common to the general public, that is, that there is a causal link between the activities and the workplace. Texas Workers' Compensation Commission Appeal No. 91113, decided January 27, 1992. Whether repetitive trauma injury has been established

is a question of fact for the hearing officer to decide. Texas Workers' Compensation Commission Appeal No. 93057, decided February 25, 1993.

In the case we now consider, the claimant testified to repeated motion or "rotation" of the right arm in her cleaning activities. She also said that she did this regularly at work in up to two homes per work day. The carrier counters that such activities are of the type performed by the general public and do not rise to the level of repetitious trauma. In doing so, it refers to various job descriptions and the claimant's own testimony that she was doing "light" cleaning. There was evidence from Dr. Sc that the claimant's right shoulder pain developed over some eight months. Regardless of the description of the duties as "light," the hearing officer could conclude from the length of time the claimant was doing this job and her description of performing housekeeping activities, essentially throughout her working day, that she was engaged in physically traumatic activities above and beyond those to which the general public is exposed. Stated another way, he could conclude that the general public does not engage in these activities throughout a normal day. *See* Texas Workers' Compensation Commission Appeal No. 980352, decided April 6, 1998. 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 find the testimony of the claimant and Dr. S, deemed credible and persuasive by the hearing officer, sufficient to support her finding that the claimant sustained a work-related repetitive trauma injury.

As to the timely notice issue, we believe it worthwhile to point out that no separate issue was framed in terms of the date of injury. Better practice is to phrase as separate issues whether the claimant sustained an occupational disease and what is the date of the claimed injury. Section 408.007 defines date of injury of an occupational disease as the date the claimant "knew or should have known that the disease may be related to the employment." The determination of such a date presents something of a "moving target." Texas Workers' Compensation Commission Appeal No. 970851, decided July 2, 1997. We have noted that this date of injury need not be as early as the first symptoms nor as late as a definitive diagnosis. Texas Workers' Compensation Commission Appeal No. 941484, decided December 16, 1994. The claimant testified that Dr. S initially diagnosed arthritis and only after the MRI on _____, did she understand that the injury was a rotator cuff tear. The hearing officer determined from this evidence that _____, was the date of injury and so found. The date of injury is a question of fact and under our standard of review of factual determinations, we find the evidence sufficient to support this determination. As to timely notice to the employer by the 30th day after the date of injury as required by Section 409.001, the claimant testified to filling out the employer's incident report on February 15, 1999. Ms. L testified that she received it from the claimant on this date and forwarded it to the human resources department. The fact that no one in this department may have paid attention to this employer-prescribed form is of no consequence

and does not defeat the efficacy of the notice. The mere fact that the employer completed a TWCC-1 for this injury on February 24, 1999, also suggests notice was given.[1]

The claimant also had the burden of proving disability for the periods claimed. Whether there was disability for these periods was a question of fact and could be proved by her testimony alone if found credible. Texas Workers' Compensation Commission Appeal No. 93560, decided August 19, 1993. Both the claimant's testimony and Dr. S's opinion after the claimant's visit on April 6, 1999, support the findings of disability. In its appeal, the carrier argues that the claimant had a home health care business of her own and "[b]ased upon the establishment of her own business the claimant did not have disability following the _____ claim." The claimant testified that she and her husband decided to start a home health care business "about a year ago" to house the disabled. She also said that this project was "put on hold" until she got better and that it was not a business "right now." The hearing officer weighed this evidence and concluded that the claimant had disability as claimed. In doing so, he clearly rejected the carrier's evidence that the claimant was engaged in a separate business endeavor during the periods of claimed disability. Under our standard of review of factual issues, we find the evidence sufficient to support the disability determination.

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

_____
Alan C. Ernst
Appeals Judge

CONCUR:

_____
Robert W. Potts
Appeals Judge

_____
Thomas A. Knapp
Appeals Judge

[1] In making this statement, we are not using the information in this form against the employer as prohibited by Section 409.005(c). Rather, we simply observe that the form was completed on this date.