APPEAL NO. 991963

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 July 26, 1999. The issues at the CCH were whether the appellant (self-insured) is relieved from liability under Section 409.002 because of the respondent's (claimant) failure to timely notify his employer pursuant to Section 409.001, and whether the claimant sustained a compensable injury in the form of an occupational disease on or about _____. The hearing officer determined that the claimant sustained a compensable injury in the form of an occupational disease on _____; that the claimant did not provide timely notice to his employer pursuant to Section 409.001; and that the self-insured is not relieved from liability under Section 409.002 because good cause existed for the claimant's failure to provide notice in a timely manner. The self-insured appeals, urging that the hearing officer erred in making findings on good cause without the issue being raised at the CCH; that the hearing officer erred in finding that good cause existed for the claimant's failure to provide notice in a timely manner; that the hearing officer erred in finding that the claimant gave notice of his compensable injury on April 9, 1998; and that the hearing officer erred in finding that the claimant suffered a compensable occupational disease on _____. The claimant replies that the self-insured's appeal is not timely, that the hearing officer did not err, and that the decision of the hearing officer should be affirmed.

DECISION

Affirmed.

Records of the Texas Workers' Compensation Commission (Commission) show that the decision of the hearing officer was signed for by the self-insured's (City) representative on July 30, 1999. Under Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 156.1(a) (Rule 156.1(a)), each carrier shall designate an (City) representative to act as agent for receiving notice from the Commission, and, under Rule 156.1(c), notice to the carrier's (City) representative is notice from the Commission to the carrier. Therefore, the self-insured received the decision of the hearing officer on July 30, 1999, when its (City) representative received it. Rule 143.3(c) provides that a request for review shall be presumed to be timely filed if it is mailed on or before the 15th day after the date of receipt of the hearing officer's decision and received by the Commission not later than the 20th day after such receipt. The last day to timely file an appeal was August 16, 1999, since August 14, 1999, fell on a Saturday. The receipt attached to the self-insured's appeal shows it was sent FedEx on August 16, 1999, and the self-insured's appeal was received by the Commission on August 17, 1999. Accordingly, the appeal is timely and will be considered.

The claimant testified that for 12 years he has been employed as the director of student financial aid for employer. The claimant's job duties include: reviewing, flipping pages, initialing, and making notations in 1,500 to 2,500 files a semester; locating and flipping cards in an index box; and using a keyboard four to six hours per day. In November 1995, the claimant had numbness and tingling in his arms at night and he

sought medical treatment with Dr. L, who referred him to Dr. K. On December 18, 1995, Dr. K diagnosed the claimant with bilateral carpal tunnel syndrome (CTS), and prescribed a brace. The claimant testified that use of the brace relieved his symptoms and he had no need to go back to the doctor. The claimant stated that in February or March of 1998, he began to have increased pain in his hands and wrists and he discussed it with his wife; that his wife discussed his condition and job duties with church friends and a doctor who indicated that his CTS could be work related; and that after his wife relayed this information to him, he came to the conclusion that his CTS was work related. It was not until June 5, 1998, that the claimant sought medical treatment with Dr. D, was diagnosed with CTS, and affirmatively told that his CTS was caused by his work. The claimant testified that he at no time realized that his CTS might be work related until _____, after a conversation with his wife, and that he timely reported the injury to Ms. B in a memorandum on _____, and to the employer's nurse, Ms. G, on April 9, 1998.

The self-insured asserted that the claimant did not sustain CTS as a result of his employment, and that Dr. D's opinion cannot be relied upon because it is based upon the history as given by the claimant. The self-insured argued that the claimant knew his CTS was related to his employment on November 14, 1995, based upon the claimant's Employee's Notice of Injury or Occupational Disease & Claim for Compensation (TWCC-41), and the 1995 medical records which indicate "working with hands computer." In the alternative, the self-insured argued that the claimant knew his CTS was related to his employment in 1996, when he ordered modified computer keyboards for himself and coworkers, because his keyboard was irritating his hands. It was the self-insured's position that the injury was not reported until May 29, 1998, when Ms. G completed an Employer's First Report of Injury or Illness (TWCC-1).

The claimant had the burden to prove that he sustained an occupational disease, CTS. Whether he did so was a question of fact for the hearing officer to decide. Texas Workers' Compensation Commission Appeal No. 93449, decided July 21, 1993. Although a diagnosis of CTS must be based on expert medical evidence, we have routinely held that the cause of CTS can be established by the testimony of the claimant alone if found credible by the hearing officer. *See, e.g.*, Texas Workers' Compensation Commission Appeal No. 961008, decided July 1, 1996; Texas Workers' Compensation Commission Appeal No. 941077, decided September 26, 1994; and Houston Independent School District v. Harrison, 744 S.W.2d 298 (Tex. App.-Houston [1st Dist.] 1987, no writ). The hearing officer is, nonetheless, allowed to consider medical evidence along with a claimant's description of work duties in determining whether causation has been proved.

The contested case hearing officer, as finder of fact, is the sole judge of the relevance and materiality of the evidence, as well as of the weight and credibility that is to be given the evidence. Section 410.165(a). The hearing officer found the claimant's work activities caused his CTS. This determination is sufficiently supported by the claimant's testimony and the medical opinion of Dr. D, who causally relates the claimant's job duties to his injury. 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). 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). We substitute our judgment for that of the hearing officer only when his determinations are 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); Texas Workers' Compensation Commission Appeal No. 950456, decided May 9, 1995. The determination of the hearing officer that the claimant sustained an injury in the form of an occupational disease is sufficiently supported by the evidence.

We now address the second issue before the hearing officer, whether the self-insured is relieved from liability under Section 409.002 because of the claimant's failure to timely notify his employer pursuant to Section 409.001. The self-insured argues on appeal that the hearing officer erred in making findings on good cause without the issue being raised at the CCH. We have held that an issue on notice subsumes the exceptions set forth in Section 409.002. Texas Workers' Compensation Commission Appeal No. 92386, decided September 8, 1992. In this case, the issue identifies Section 409.002, which includes the exceptions of actual knowledge and good cause. Therefore, the hearing officer, if he was persuaded that claimant had failed to give timely notice, could consider the applicability of either good cause or actual knowledge exceptions, although the claimant did not articulate he was asserting good cause for failure to give timely notice of the injury. The hearing officer did not err in making findings on good cause, as the issue was properly before the hearing officer.

Section 409.001 requires that an employee notify the employer of an injury not later than the 30th day after which the injury occurs or, if the injury is an occupational disease, 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. 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.). While a definite diagnosis from a doctor is not required, neither is the employee held to the standard of a doctor's knowledge of causation. *See* Texas Workers' Compensation Commission Appeal No. 91097, decided January 16, 1992. The date of the first symptoms will not necessarily constitute the date of injury.

Conflicting evidence was presented as to the date that the claimant knew or should have known that his CTS may be related to his employment and the date that the claimant gave notice of the injury to the employer. The hearing officer determined that the act of obtaining modified equipment designed to prevent repetitiously traumatic injuries in others should have led the claimant to conclude that his own condition may have been caused by

the equipment he sought to replace, and found that the date of injury is _____, the date the computer keyboards were obtained. The hearing officer found the testimony of the claimant credible and determined that the employer's first notice of a claimed injury was April 9, 1998, when claimant visited the employer's nurse. We find sufficient evidence to support the hearing officer's determination that the claimant knew or should have known that his injury may be related to his employment on _____, and that he reported the injury to the employer on April 9, 1998.

The question of good cause for failure to timely report an injury is a question for the fact finder. Texas Workers' Compensation Commission Appeal No. 93550, decided August 12, 1993. 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. Trivialization of an injury, that is, a bona fide belief that the injury is not serious is commonly considered good cause for a delay in reporting. Texas Workers' Compensation Commission Appeal No. 91066, decided December 4, 1991. Good cause must continue up to the date when the claimant actually notifies the employer. Appeal No. 93649*, supra*. The hearing officer states:

> I find that under the circumstances of this case, the claimant's conduct establishes that continuous good cause existed for the failure to give notice from _____ until April 9, 1998. During this time, the claimant's symptoms were controlled by the use of his splint, and his condition appeared stabilized. Furthermore, no medical attention was received during this period of time, apparently because none was required. During this period of time the claimant testified that the CTS did not bother him and that relatively minor treatment (the splint) relieved his pain. He testified that he did not miss work because of it. I find that the claimant prosecuted his claim with the same degree of diligence that another ordinarily prudent person would have done under similar circumstances.

The self-insured argues that this is an incorrect statement of the evidence presented at the hearing because the evidence did not show good cause extending from early February or early March until the injury was actually reported. The record indicates that the claimant testified that he began having increased pain in his hands and wrists "sometime in the beginning of--probably of February or March," and that in the latter part of March his wife discussed his condition with church friends. Evidence that the claimant's pain began to increase does not necessarily indicate that the claimant at that point believed the injury to be serious and good cause ended. The hearing officer applied the correct standard in determining whether good cause was met and it was a question of fact for him to resolve. It was up to the hearing officer to judge the claimant's credibility and to determine what weight to give his testimony. We find sufficient evidence to support the hearing officer's finding of good cause.

The decision and order of the hearing officer are affirmed.

Dorian E. Ramirez
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Gary L. Kilgore
Appeals Judge