

APPEAL NO. 992031

This appeal is considered in accordance with the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On August 19, 1999, a contested case hearing was held. The issues concerned whether the appellant, who is the claimant, sustained a repetitive trauma injury, the date of the injury (when he knew, or should have known, that he had an injury that may be related to his employment), whether he had disability from a compensable injury, and whether he gave timely notice to his employer of his injury, or had good cause for a failure to do so.

The hearing officer held that the date of injury was _____. She found credible evidence of a repetitive motion cervical and lumbar injury. She found, however, that he had not given timely notice of the work-relatedness of that injury to his employer and had no good cause for excusing timely notice. She found that he had disability (albeit not compensable) for the period from June 3 through August 7, 1998.

The claimant has appealed, and argues that his date of injury is _____. He argues that he timely reported his injury to his employer on this date. The respondent (carrier) responds that the decision is supported.

DECISION

Affirmed.

The hearing officer has summarized the evidence well; we will only briefly repeat the facts here. The claimant was employed by the (employer) from (the time frame pertinent to this claim). He worked as a welder, which included overhead and vertical welding. His hours varied quite a bit, with work in excess of 40 hours for several weeks. The claimant said the longest he ever worked on a single day was 17 hours.

Claimant described his welding activities, which involved assuming positions for long periods of time, among other activities, while holding the welding apparatus. Claimant said that somewhere in February 1998, he began having numbness and tingling in his hands and arms. He concluded his shirts were too tight and began wearing larger shirts. He continued to work, and the problem did not resolve. Claimant said that in March, his hands began to cramp up a lot and his back and neck were bothering him. He told his foreman, Mr. G, and showed him his cramping hand. Mr. G responded that his hand did that all the time, and, curiously, responded that he should eat a banana. Another supervisor to whom he reported, Mr. V, also advised him to eat a banana. The claimant said at this time that he assumed his pains came from lifting and holding metal and welding equipment. Pressed to indicate a date when this occurred, he indicated it could have been on or about

_____.

Claimant said that the time he was the worst was April 27, 1998, and at this time he assumed that his problems could be caused by inhalation of zinc. On this date, he had half a sick day and then went in when he was feeling better. Claimant said he asked if he could see a doctor, took Friday off, and then was fired when he showed up at work on May 5, 1998.

The first doctor claimant saw was Dr. W, the doctor for the employer, on May 5, 1998. Claimant pursued with Dr. W his theory that he had sustained zinc poisoning. Dr. W took him off work, completed tests, and told him he did not believe he had a metallic poisoning. He referred claimant to a neurologist, who recommended certain testing (MRI, EMG) that he understood was denied by the carrier. Claimant thereafter sought treatment from Dr. M, who told him on June 4, 1998, that his problems were work-related and from repetitive trauma. The claimant agreed that he was terminated for absenteeism.

Mr. G testified that he was a superintendent and had hired claimant. Mr. G said that claimant worked a full day on April 27th, and then his wife called in the next day to report that he had been up all night and was asleep, and would be in when he woke up. Claimant's wife said that claimant thought he had food poisoning. He came in later that day, and then worked April 29th, but not thereafter, and Mr. G said no one called pertaining to his absence. When claimant showed up to work on May 4th, he was told he had been replaced. Mr. G said claimant became angry and threatening.

Mr. G said that for the last six weeks of work, claimant was working closer to 40 hours a week. He agreed that claimant had done about five weeks of overhead welding. Mr. G said that he learned on May 4th or the next day that claimant was filing a workers' compensation claim for zinc poisoning. Mr. G was never asked to comment about whether claimant talked to him in March 1998 and was told to eat a banana.

Section 401.011(26) defines injury as follows:

[D]amage or harm to the physical structure of the body and a disease or infection naturally resulting from the damage or harm. The term includes an occupational disease.

The record supports the hearing officer's determination that the claimant's first belief that he had a condition related to working was on or about _____. The claimant clearly testified that he believed his pains were caused by lifting and holding metal and welding equipment on the job. A medical diagnosis confirming what he believed was not required.

Section 409.001(a)(1) & (b) require that the injured employee give notice of an accidental injury to a person in a supervisory or management capacity within 30 days. However, the notice given, while it need not be fully detailed, should at a minimum apprise the employer of the fact of an injury and the general area of the body affected. Texas

Employers' Insurance Association v. Mathes, 771 S.W.2d 225 (Tex. App.-El Paso 1989, writ denied). Thus, claimant was not required to necessarily identify the cause of his problems as either repetitive trauma or inhalation; he was, however, required to inform his supervisors that he felt he had a condition that had been caused by his work. The hearing officer was entitled to disbelieve that a notice had been given prior to May 5th.

The decision of the hearing officer will be set aside only if the evidence supporting the hearing officer's determination is so weak or against the overwhelming weight of the evidence as to be clearly wrong or manifestly unjust. Atlantic Mutual Insurance Company v. Middleman, 661 S.W.2d 182 (Tex. App.-San Antonio 1983, writ ref'd n.r.e.). We cannot agree that this was the case here, and affirm her decision and order.

Susan M. Kelley
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Robert W. Potts
Appeals Judge