

APPEAL NO. 992061

This appeal arises pursuant to the Texas Workers' Compensation Act of 1989, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On June 30, 1999, a hearing was held. She (the hearing officer) determined that respondent (claimant) sustained a repetitive physical trauma injury to both upper extremities in the course and scope of her employment on _____, with (employer 1) for which appellant (carrier) is the insurer; she also found that carrier did not timely controvert compensability of the injury and did not show that it had newly discovered evidence as the basis for controverting past the time limit of 60 days. The hearing officer also found that claimant did not sustain a repetitive physical trauma injury on _____, while employed for (employer 2), for which respondent (carrier) is the insurer. Carrier asserts that while claimant was concurrently employed by the two employers, her work with employer 2 was more demanding, that claimant's medical evidence discloses no indication that her physician knew of her employment with employer 2, and that no injury was sustained while working for employer 1; carrier also states that it did not waive its right to dispute compensability, relative to employer 1, because it received newly discovered evidence of claimant's employment with employer 2 that could not reasonably have been discovered earlier. Carrier replied that the hearing officer did not err in determining that claimant did not sustain an injury while employed by employer 2.

DECISION

We affirm.

Claimant worked for employer 1 an average of 42 hours a week. She worked in the office of a lumber company with varied duties, including waiting on customers, taking orders by phone, and making entries in a computer. Claimant testified that in any eight-hour day, approximately six hours were spent at the computer; she added that she would be making entries in the computer while taking an order over the telephone. She agreed that she did not type letters, stating that invoices and work orders were a significant part of her typing. She stated that she worked 20 to 25 hours a week as a waitress/line attendant for employer 2. (She had held both jobs for several years at the time of the date of injury, _____, and that date of injury was not contested.) She further explained that during the five evenings a week she worked for employer 2, she worked as a line attendant two nights and as a waitress three nights.

Claimant said that she had to lift heavy items at employer 2 while she did not at employer 1. She described delivering dinners to patrons, carrying pitchers full of beverages (two or three at a time), carrying heavy plates when bussing tables, restocking with stacks of clean plates, filling ice bins, sweeping, mopping, filling drink glasses when working as an attendant and also entering orders by touching a touchpad computer. She said "it never stops" at employer 2. When counsel for carrier, in regard to employer 2, referred to other employees and said, "You're not going to sit here and testify that you're the only person that gets ice for everybody? . . ." Claimant then replied:

What I'm saying is they all don't do their job.

Claimant was asked also if there was "any type of work where you are going through these same motions like you do at [employer 1] for such a period of time?" to which claimant replied, "[n]ot any one in particular." Later in the hearing, claimant said she thought the two jobs were "pretty much equal" in regard to causing her carpal tunnel syndrome, and she then was asked, "and you did do a lot of repetitive work at [employer 1] and at [employer 2], is that right?". Claimant replied, "[o]n the computer, yes, I did a lot of computer work. Different types of duties, you know, at [employer 2], because it's a different type of company."

Mr. W testified that he is the manager at employer 1. He said that claimant's work is varied so it is hard to say how much time is spent at any one thing, but said he believed she spent about four hours a day at the computer, pointing out that this would not be continuous. Mr. W also stated that he was aware that claimant worked concurrently for employer 2.

A Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) provided by carrier in regard to employer 1 shows on its face that carrier received written notice of injury on January 5, 1999. That form also is dated March 15, 1999, and recites that carrier learned of the other employment on March 3, 1999, when claimant was providing a recorded statement to carrier; in that statement claimant was asked by an agent of carrier, "do you work for anybody else at this time?" to which claimant replied that she worked for employer 2 and had done so for several years. There was no evidence provided indicating that carrier had arranged a date for a statement earlier which claimant had failed to keep, or even any evidence that carrier could not, for some reason, interview claimant until that date, or any other evidence indicating that an interview of claimant on March 3, 1999, indicated due diligence on carrier's part.

Medical records in evidence showed that claimant saw Dr. T on December 31, 1998. Dr. T noted pain in claimant's right hand and arm, commenting that claimant works "on a computer on a daily basis." A following note, undated, indicates continuing symptoms and refers to claimant saying that "she can hardly do her computer job because of the pain and numbness" Dr. T referred her for nerve conduction testing by Dr. D, who reported bilateral carpal tunnel syndrome, more pronounced on the right. He also noted "wasting of the thenar (radial palm) muscles on the right." (The parties did not litigate this case by questioning date of injury or injury.)

The hearing officer is the sole judge of the weight and credibility of the evidence. See Section 410.165. She found that carrier, relative to employer 1, was not timely in contesting compensability; she stated also that claimant's employment with employer 2 did not constitute newly discovered evidence in that it could have reasonably been discovered with diligence earlier. That determination is sufficiently supported by the evidence including the TWCC-21 showing over 60 days since the date of written notice and the fact that

claimant's own statement provided the information--when the question was asked. In addition, the evidence showed that claimant's manager at employer 1 knew of the employment at employer 2 had he been asked. See Texas Workers' Compensation Commission Appeal No. 961184, decided August 2, 1996. Compare to Texas Workers' Compensation Commission Appeal No. 980684, decided May 21, 1998.

While the evidence indicated two areas of employment which could, conceivably, have been causative, the hearing officer's finding that claimant's work for employer 1 was causative is sufficiently supported by the evidence; more hours each day were worked for employer 1, there is some medical evidence which could support an inference that claimant's work for employer 1 was a factor in the injury, and claimant described her work as being more of a repetitive nature at employer 1. Carrier's point that Dr. T does not indicate that he knew of claimant's work for employer 2 is accurate but does not negate Dr. T's references to claimant's problem in doing her computer work. The weight to give Dr. T's records was a matter for the hearing officer to decide as was the amount of time the evidence showed claimant spent at the computer.

We note that claimant and carrier, in regard to employer 2, did not appeal. Therefore, other findings of fact that claimant did not sustain a compensable injury while working for employer 2, that claimant had good cause for late reporting to employer 2, and that carrier, in regard to employer 2, did not timely controvert compensability, have become final.

Finding that the decision and order are sufficiently supported by the evidence, we affirm. See In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951).

Joe Sebesta
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Alan C. Ernst
Appeals Judge