APPEAL NO. 992949

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 December 10, 1999. She (hearing officer) determined that the appellant (claimant) did not sustain a compensable injury in the form of an occupational disease; that the date of the claimed injury was _____; that the claimant without good cause failed to give her employer timely notice of the claimed injury; and that she did not have disability. The claimant appeals all but the date of injury determinations, expressing her disagreement with them. The respondent (carrier) replies that the decision is correct, supported by sufficient evidence, and should be affirmed. The date of injury determination has not been appealed and has become final. Section 410.169.

DECISION

Affirmed.

The claimant worked as a hospice and home health care aide. She described her job as involving moving and pulling patients. She testified that she first experienced hand and neck problems in June 1998. On _____, she said, she noticed redness and swelling in her left hand. She saw Dr. P for left wrist pain and was diagnosed with carpal tunnel syndrome (CTS) and an arthritic condition. According to the claimant, Dr. P did not identify a cause of the CTS. She was placed on light duty and, though she discussed her condition with Ms. O, her supervisor, conceded that she did not attribute the condition to her work activities. By _____, the claimant said, she noticed pain in her neck and at the top of the left shoulder. The claimant then saw Dr. B. EMG and nerve conduction studies of the left upper extremity were normal; an MRI revealed narrowing at C6-7 with mild spondylosis and a small disc protrusion. Dr. B prescribed medication, a neck collar, and physical therapy and issued a limited-duty release. Dr. B provided no opinion of causation and referred the claimant to Dr. G. In April 1999, claimant stopped working because, she said, she could no longer do the work. She obtained continued group health benefits under COBRA. On _____, Dr. G noted significant pain in the upper back and left upper extremity. Her clinical impression was "[c]ervical musculoskeletal ligamentous injury/chronic myopathic pain" which, she said, "are 100% related to her employment, i.e. she was working as a home health nurse at the time." On October 7, 1999, Dr. G wrote that "[w]ithout question, her left upper extremity pain, neck pain and headaches are related to her work . . . . I have asked that she pursue steps necessary to reinstate her Workmen's comp./insurance."

The claimant testified that at her visit with Dr. G on _____, Dr. G went over her job duties and told her, the claimant, that her condition was work related.[1] About this time her COBRA benefits ended because she missed a payment. She said that she called the

[1]The parties have not appealed the hearing officer's determination that _____, was the date of injury. *See* Section 408.007.

Texas Workers' Compensation Commission (Commission) field office the day of the visit of _____, was sent some papers, filled out an Employee's Notice of Injury or Occupational Disease & Claim for Compensation (TWCC-41) on July 20, 1999, and mailed it back to the Commission as requested. She testified that she did not tell her employer that she did this. A few days later, she said, she spoke with a carrier representative who told her to call her employer. She said she did this a few days later, but nothing happened until she received a denial letter from the carrier. She also said in her testimony that she discussed her condition many times with Ms. O, but never told her that her problems were related to work. She paid for her treatment and medicine under her group health policy.

Mr. L, currently the employer's general manager, testified that "everyone" was aware of the claimant's health problems. He said that to his knowledge the claimant never told him or anyone else that her work was causing her problems. He learned this on August 17, 1999, when it was reported to him that the claimant called to report her injury. He clearly remembered that this was the date of the call because he knew the seriousness of such a report and called corporate headquarters about it on that date. Ms. O submitted an affidavit in which she said she was aware of the claimant's left hand pain in June 1998 and of her general health problems. She said the claimant never related these to her employment.

The claimant had the burden to prove that she sustained the injuries as claimed. Johnson v. Employers Reinsurance Corporation, 351 S.W.2d 936 (Tex. Civ. App.-Texarkana 1961, no writ). Whether she did so was a question of fact for the hearing officer to decide. Texas Workers' Compensation Commission Appeal No. 93449, decided July 21, 1993. In this case, the claimant is asserting an occupational disease in the nature of a repetitive trauma injury to her left hand, upper back, and neck. She relies on her testimony and the opinion of Dr. G to prove her claim. The hearing officer considered this evidence, but did not find it sufficient to establish the compensability of the claimed injuries. In particular, she did not find Dr. G's conclusory comments that the claimant's condition was "100%" related to her work persuasive. This opinion of Dr. G was given at about the same time the claimant's COBRA benefits expired, and the other doctors were silent on the question of causation. Section 410.165(a) provides that the hearing officer is the sole judge of the weight and credibility of the evidence. In her role as fact finder, the hearing officer could accept or reject all, part, or some of the evidence, including the medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). We do not believe that the evidence in this case compelled a finding of causation one way or the other. 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). While another hearing officer may have found otherwise, we conclude from our review of the record in this case that there was sufficient evidence to support the determination of the hearing officer that the claimant failed to establish a compensable repetitive trauma injury, and under our standard of review, we affirm that determination.

Section 409.001 requires an injured employee to report the injury by the 30th day after it happens, which in this case was _____. To be effective, the notice must include

the general nature of the injury and that it is claimed to be work related. DeAnda v. Home Insurance Company, 618 S.W.2d 529 (Tex. 1980). Failure to do so, with certain exceptions, renders the carrier and employer not liable for benefits. Whether and, if so, when notice is given are questions of fact for the hearing officer to decide. Texas Workers' Compensation Commission Appeal No. 94114, decided March 3, 1994. In her appeal, the claimant asserted that she reported her injury to her employer during the first week of August 1999 after she was told by the Commission that she needed to file a TWCC-41. This is contrary to the testimony of Mr. L and the affidavit of Ms. O at least as regards the requirement that the notice communicate that the injury was work related. Whether claimant's assertion on appeal accurately tracks her testimony at the CCH is also questionable. In any case, the hearing officer resolved the contradictions in the evidence by giving more weight and credibility to the statements of Mr. L and Ms. O. Under our standard of review, we find that this evidence deemed credible by the hearing officer was sufficient to support the determination that no timely notice was given.[2]

We also find no error in the hearing officer's determination that the claimant did not have disability, as the 1989 Act requires a finding of the existence of a compensable injury as prerequisite to a finding of disability. Section 401.011(16).

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

Alan C. Ernst
Appeals Judge

CONCUR:

Gary L. Kilgore
Appeals Judge

Dorian E. Ramirez
Appeals Judge

[2]Although the claimant did not rely on good cause for lack of timely notice, the hearing officer found no such good cause and we affirm that determination.