

APPEAL NO. 000100

On December 27, 1999, a contested case hearing (CCH) was held. The CCH was held under the provisions of the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). The hearing officer resolved the disputed issues by deciding that respondent (claimant) failed to timely report her _____, work-related injury to her employer and that no good cause existed to excuse her failure to timely report the injury; that on _____, claimant sustained what would otherwise be a compensable injury in the form of an occupational disease; that appellant (carrier) waived the right to contest compensability by not contesting compensability within 60 days of its first written notice and is, therefore, liable for the _____, compensable injury; and that from April 20, 1999, through the date of the CCH, claimant has been unable to obtain and retain employment at her preinjury wages because of the _____, work-related injury. Carrier requests that the hearing officer's decision on the issues of compensable injury, waiver of its right to contest compensability, and disability be reversed. No response was received from claimant. There is no appeal of the hearing officer's decision that claimant failed to give employer timely notice of her injury.

DECISION

Affirmed.

Claimant testified that she began working for (employer), as a mail sorter in February 1999; that she worked two to three and one-half hours a day five days a week; that she is 64 years of age; that her job required her to lift packages weighing between two and 70 pounds; that she injured her right side at work; that carrier accepted an injury to her right side; that she went to a medical clinic for treatment; that the clinic doctor returned her to work; that she had to perform her sorter job using only her left arm because of the injury to her right arm; that she injured her left side on _____; that she went to Dr. E, who took her off work and has kept her off work; that she has not returned to any work after _____; that she has had prior workers' compensation claims and motor vehicle accidents; that she did not figure out until the benefit review conference of April 20, 1999, that her left side was a second injury; and that her injuries are the result of repetitive work lifting boxes. In August 1998, Dr. E diagnosed claimant as having cervical spine syndrome and a possible herniated nucleus pulposus, bilateral shoulder impingement versus rotator cuff tear, tardy ulnar neuritis at the elbows versus chondromalacia, and bilateral carpal tunnel syndrome. Claimant underwent surgery on her right elbow in January 1999.

In a Benefit Dispute Agreement (TWCC-24) dated April 20, 1999, the parties agreed that, with regard to the date of injury of (alleged date of injury), the compensable injury extends to include the right wrist only. A nerve conduction velocity test notes that claimant is right hand dominant. In an Employee's Notice of Injury or Occupational Disease & Claim for Compensation (TWCC-41) dated April 20, 1999, claimant stated a date of injury of _____, for injury to her left wrist, left elbow, left shoulder, and cervical area from

repetitive work as a sorter. Claimant testified that AG, who assisted her at the CCH, faxed the TWCC-41 for the _____, date of injury to carrier on April 20, 1999. In a written statement, AG stated that he assisted claimant at the April 20, 1999, BRC; that claimant described the incident of how she was injured on (alleged date of injury), but continued working using only her left hand, elbow, and shoulder; that at the April 20th BRC, he explained to PR, carrier's adjustor, that claimant would be submitting a claim for a different injury date and PR gave him a fax number; that an agreement was then signed for the (alleged date of injury), injury; and that after the BRC, he and claimant completed a TWCC-41 and he faxed it to carrier on April 20, 1999, with a cover letter and the assistance request. In evidence is AG's fax cover page to carrier dated April 20, 1999, and attached to it is the TWCC-41 dated April 20, 1999, for the _____, date of injury; claimant's written request for AG's assistance; and a "transaction report" noting a sent date of April 20, 1999, the fax number AG stated PR had given him as the last 10 digits of the receiver's number, and an "OK." A Texas Workers' Compensation Commission (Commission) claims forms list for claimant notes that a TWCC-41 was received by the Commission on April 20, 1999.

BH, an adjustor for carrier, testified that carrier did not receive a copy of claimant's TWCC-41 for the _____, date of injury until late October 1999 or early November 1999 and that he filed a report contesting that claim when he found out at that time that claimant was claiming a second injury. He agreed that the last 10 digits of the receiver's number on the fax transaction report of April 20, 1999, is carrier's fax number. In a Payment of Compensation or Notice of Refused or Disputed Claim (TWCC-21) dated November 1, 1999, carrier noted a date of injury of _____; wrote that it had first received written notice of injury on November 1, 1999; and denied medical and indemnity benefits for the date of injury of _____, based on a failure to report the injury within 30 days, the injury not happening within the course and scope of employment, and the injury not being the sole cause of disability. The Commission's claims forms list notes that a TWCC-21 was received by the Commission on August 12, 1999, and that another TWCC-21 was received by the Commission on November 1, 1999.

Dr. E noted in May 1999 that claimant's status was post right carpal tunnel release. On November 8, 1999, Dr. E's physician's assistant wrote that, because of the disability to the right side, claimant was forced to compensate with the left arm, causing an injury to her left wrist, elbow, and shoulder.

There is no appeal of the hearing officer's decision that claimant failed to timely report her _____, work-related injury to her employer and that no good cause existed to excuse her failure to timely report that injury. With regard to the issue of whether claimant sustained a compensable injury in the form of an occupational disease on _____, carrier appeals the hearing officer's finding that on _____, claimant injured her left wrist, left shoulder, left elbow, and cervical area as a result of having to overuse her left upper extremity in order to perform the repetitive work duties of a mail sorter and the hearing officer's conclusion that "on _____, claimant sustained what would otherwise be a compensable injury, in the form of an occupational disease." Carrier contends that the evidence is not sufficient to meet claimant's burden of proof. Claimant had the burden to

prove that she was injured in the course and scope of her employment. Johnson v. Employers Reinsurance Corporation, 351 S.W.2d 936 (Tex. Civ. App.-Texarkana 1961, no writ). Section 401.011(34) provides that an occupational disease includes a repetitive trauma injury, which is defined in Section 401.011(36). The 1989 Act makes the hearing officer the sole judge of the weight and credibility of the evidence. Section 410.165(a). An appellate level body is not a fact finder and does not normally pass upon the credibility of witnesses or substitute its judgement for that of the trier of fact. Texas Workers' Compensation Commission Appeal No. 950084, decided February 28, 1995. When reviewing a hearing officer's decision to determine the factual sufficiency of the evidence, we should set aside the decision only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Appeal No. 950084. We conclude that the appealed finding and conclusion on the compensable injury issue are supported by sufficient evidence and that they are not so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175 (Tex. 1986).

Carrier also appeals the hearing officer's findings that claimant reported her _____, injury to carrier on April 20, 1999, by fax and that carrier did not contest compensability of the _____, injury until November 1, 1999, and the hearing officer's conclusion that carrier waived the right to contest compensability of the claim by not contesting compensability within 60 days of its first written notice and is thereby liable for the _____, compensable injury. Carrier states that the BRC was held on November 2, 1999, therefore, even if BH had received notice at the BRC that claimant was claiming injury to the left side of her body, it would have been less than 60 days from the time of contesting compensability. The hearing officer found that claimant reported her _____, injury to carrier on April 20, 1999, by fax. She did not find that carrier did not receive notice of the _____, injury until the BRC of November 2, 1999. We conclude that the hearing officer's decision on the waiver issue is supported by sufficient evidence and that it is not so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Cain, supra.

Section 401.011(16) defines "disability" as "the inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage." Carrier appeals the hearing officer's finding that from April 20, 1999, through the date of the CCH, claimant has been unable to obtain and retain employment at her preinjury wages because of a _____, work-related injury. Carrier states that "by definition this is not disability." The hearing officer states in her decision that claimant established disability from April 20, 1999, through the date of the CCH. Although claimant failed to timely report her _____, injury to her employer, the hearing officer found that on _____, claimant injured her left wrist, left shoulder, left elbow, and cervical area as a result of having to overuse her left upper extremity in order to perform the repetitive work duties of a mail sorter, and those injuries became compensable because carrier waived its right to contest compensability. Section 409.021(c); Texas Workers' Compensation Commission Appeal No 992763, decided January 24, 2000; Texas Workers' Compensation Commission Appeal No. 992780, decided January 26, 2000. We conclude that the hearing officer has determined that claimant has had disability because of her _____, compensable injury from April

20, 1999, through the date of the CCH and that that determination is supported by sufficient evidence and that it is not so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Cain, *supra*.

The hearing officer's decision and order are affirmed.

Robert W. Potts
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Judy L. Stephens
Appeals Judge