APPEAL NO. 000273

This appeal arises pursuant to the Texas Workers' Compensation Act of 1989, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). On January 14, 2000, a hearing was held. The hearing officer determined that respondent (claimant) sustained an occupational disease; that claimant gave notice to employer on _____; that appellant (carrier) is not relieved of liability because claimant's notice was not late; and that claimant had disability from September 17, 1999, through November 17, 1999, and from December 23, 1999, through the date of hearing. The hearing officer also found that claimant was not barred from seeking workers' compensation because of an election of remedies and that carrier did not timely dispute based on grounds that included an election of remedies. (There was no issue of date of injury, which the parties agreed was _____.) Carrier asserts that claimant did not sustain a compensable carpal tunnel injury, pointing out that he did not continuously use his pliers and crimping tools, that no evidence shows that "squeezing pliers or crimpets compresses the median nerve," and that, according to its evidence, carpal tunnel syndrome (CTS) is tied to lifestyle. Carrier also pointed out that Dr. D in identifying claimant's work as causative did not rule out other potential causes. Carrier also says that claimant did not give notice of a work injury in a timely manner, citing the testimony of Mr. B, and asserting that claimant did not notify any other "supervisor." Carrier also takes exception to a finding of fact that carrier received written notice of injury on April 14, 1999. Carrier states that disability is not warranted because there is no compensable injury and claimant chose not to work. Finally, carrier says that there was an election of remedies, citing the testimony of Mr. B that he did not tell claimant not to file under workers' compensation and stating that carrier did not learn facts of an election of remedies until the benefit review conference. Claimant replied, in effect, that the decision should be upheld.

DECISION

We affirm.

Claimant worked for (employer) on _____. As stated, there was no issue as to date of injury, and claimant did not testify as to how he knew on _____, that his arm problem may be related to his work. The parties litigated the issues at the hearing in a manner accepting _____, as the date of injury.

One of the points made by carrier is that the hearing officer's finding of fact that carrier received written notice of injury on April 14, 1999, is in error becasue the date of injury was _____. While the hearing officer found that written notice was received by carrier on April 14, 1999, the evidence shows that carrier's own Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) states that it first received written notice on April 14, 1999 (whether this date is in error or not was not shown by the evidence, but the TWCC-21 was not dated until November 8, 1999; however, there was no issue of carrier's timely controversion as to the reasons stated in that TWCC-21--notice and course and scope). Since carrier provided no other evidence as to when it received written notice

of the injury and there is no TWCC-21 stating that carrier also disputed based on election of remedies (the only matter at issue in regard to controversion), a finding of fact as to when carrier received written notice of injury was not necessary to the decision in this case.

Claimant described his work as being a lineman's helper who cut, crimped, and did various tasks with hand tools such as wire cutters, in preparing wire for linemen working above him on high wires. He said that he first noticed some problem with his arms about nine months before April 1999, but did not even know what CTS was. At some point "around _____" he determined that something in his work was affecting his arms and stated that he told this to his supervisor, Mr. B, on _____. Claimant at one point on cross-examination said that he told Mr. B that he "didn't know what was going on" but "needed to see a doctor and have it checked out." When claimant was again asked on cross-examination about what he told Mr. B, he said he told him "that something at work is causing me to have to go to the doctor" (claimant had also answered, "yes" to a question on direct examination that asked if he told Mr. B that he had a problem with his hands that was caused by his work). Claimant also testified that when he told Mr. B of this problem with his hands, that Mr. B told him to "put it on my health insurance."

When Mr. B testified, he recalled claimant telling him on _____, that he was going to the doctor to have his hands checked out. When asked specifically, "[d]id you tell him that he couldn't file a workers' comp claim because he would have three or four other employees after him because he couldn't get a bonus--or they couldn't get bonuses?", Mr. B answered, "[w]ell, maybe joking, but nothing serious, you know." Claimant's testimony, together with Mr. B's acknowledgment quoted above, along with the reasonable inferences that may be drawn from it, provide sufficient evidence to support the finding of fact that claimant notified his employer on _____. As fact finder, the hearing officer could choose to give more weight to the testimony of claimant than she did to that of Mr. B.

On May 13, 1999, Dr. D performed an electromyogram and nerve conduction study; he reported that it was positive for carpal tunnel syndrome, but that there was no evidence of cervical radiculopathy. On November 9, 1999, Dr. D reported that CTS surgery had been done, that claimant needed six weeks of physical therapy, and that his occupation involving "work with his hands, especially turning, flexion/extension . . . is what caused the CTS." (The surgery was performed on September 20, 1999.) Dr. D again tied claimant's CTS to his work in a note in December 1999 and stated that claimant did not undergo physical therapy because of insurance problems.

Carrier did not provide a medical opinion from any physician who examined claimant or examined claimant's medical records. Carrier did provide two articles about CTS, neither of which is identified. The first is entitled, "Obesity as a Risk Factor for Slowing of Sensory Conduction of the Median Nerve in Industry"; it does indicate it is from "volume 34, number 4, April 1992," but perhaps because of the way copied, it does not show its source, whether that is the New England Journal of Medicine, the Journal of the American Medical Association, or some other publication. This article relies heavily upon a "body mass index" and concludes that health habits are more important to CTS than are workplace activities.

The other excerpt is from a document whose layout appears to be more like a law book format than a medical review; it too is not identified; it lists various diseases such as diabetes, cancer, and Paget's disease as underlying CTS. As stated, no physician applied any of these generalities to claimant's specific condition. Whether or not Dr. D should have ruled out each of the listed possible conditions underlying CTS was a matter for the hearing officer to decide. Dr. D's opinions could be, and were, relied upon by the hearing officer and, together with other evidence of claimant's work activities, provide sufficient evidence to support the determination that claimant developed CTS in the course and scope of employment.

Carrier states that there was a period of time after surgery in which claimant did not come to work; Dr. D had released claimant to light work as of October 18, 1999, but claimant did not return to work until November 17, 1999. In answer to questioning from the hearing officer, claimant stated that he had asked Dr. D to return him to work and the October light-duty release resulted from that; however, claimant testified that just before he was to return on October 18th, he "tried to cut something at the house, and I realized I couldn't go back . . . and I called the doctor up and told him, and he told me to come back in . . . ." Claimant then saw Dr. D on November 9, 1999, as set forth earlier, at which time Dr. D noted claimant's pain, "soreness" and weakness in his hands and said claimant should have physical therapy (which did not occur). The hearing officer specifically queried claimant as to why he did not work from October 18th to November 17th and apparently accepted his answer, which is somewhat substantiated by Dr. D's note of November 9, 1999, because she said in her Statement of Evidence that claimant could not work from September 17th through November 17, 1999. We cannot say that this determination is against the great weight and preponderance of the evidence. The hearing officer also stated that claimant could not work beginning on December 23, 1999. At that time Dr. D said that claimant could do limited work, but claimant testified that employer did not provide him limited work so he could not work. Employer said that it did provide limited work. There is no written offer of a specific limited-duty job in evidence. The hearing officer was sufficiently supported in her finding that claimant had disability from December 23, 1999, through the date of the hearing.

While claimant testified that he had sought unemployment compensation, he said that he filled out the applicable forms saying that he could do limited work, not that he could do any work; no forms were introduced into evidence and no evidence was presented that indicated claimant did not represent that he could only do limited work.

The hearing officer also found that claimant did not make an informed choice to initially use his health insurance to obtain medical treatment; her Statement of Evidence shows that she believed claimant used his health insurance because of fear of losing his job or having an adverse effect on the "bonus" program. There is evidence in the record that supports this observation and that situation provides sufficient evidence to support the determination that claimant was not barred from seeking workers' compensation because of an informed choice to use his health insurance as opposed to workers' compensation. In addition, the hearing officer found that carrier did not have newly discovered evidence of an

election of remedies (at the benefit review conference preceding this hearing) because carrier did not show that it could not have reasonably discovered earlier that claimant had used his health insurance for medical care including surgery in September 1999. The hearing officer's reasoning is not in error and the evidence sufficiently supports the fact that no dispute was raised by carrier concerning election of remedies prior to the benefit review conference on November 30, 1999.

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:

Alan C. Ernst
Appeals Judge

Judy L. Stephens
Appeals Judge