APPEAL NO. 000282

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 January 18, 2000. The issues involved whether the appellant, who is the claimant, sustained a compensable repetitive trauma injury/occupational disease injury to her lower back, the date of her injury, whether she reported her injury to her employer within 30 days, and whether she had disability resulting from her occupational disease.

The hearing officer found that the claimant did not sustain a disc herniation or occupational disease to the low back while in the course and scope of employment for the employer; that she knew or should have known that her injury may be related to her employment on _____; and that she failed to timely notify her employer of her injury. The hearing officer found good cause for the failure to timely notify in that the claimant trivialized her injury. Finally, the hearing officer found that the back injury prevented the claimant from obtaining and retaining employment equivalent to her preinjury average weekly wage for the period beginning March 18, 1999, through the date of the CCH.

The claimant has appealed the determination against the compensability of her back injury, arguing that the hearing officer used common knowledge rather than the medical evidence upon which to base her decision. The claimant further argues that if she trivialized her injury, then the correct date of injury should be _____, when she first requested medical treatment for her back. She asks that the finding related to disability should be revised to show that disability ended on August 9, 1999, and thereafter was due to surgery for another compensable injury, her hand. The respondent (carrier) responds that the hearing officer's decision on the existence of any injury is correct. The carrier points out that there is no disability if there is not a compensable injury. Finally, the carrier responds that trivialization has nothing to do with finding a date of injury, which is the date one knows, or should know, that one's injury may be related to the employment. The carrier appeals the determination that the claimant had good cause for not giving timely notice of injury and that she did not have good cause continuing to the date she gave notice. There is no response to this appeal from the claimant.

DECISION

Affirmed.

The claimant testified that she worked for (employer), which has since shut down its operation. The claimant said that in sewing certain garment items, she had to forcefully press down on a pedal in order to properly fix one of the parts of a buckle. It was the claimant's theory that this forceful, repetitive pressing caused a back injury. The claimant said she was paid by the piece and that she worked rapidly because she needed the money.

The claimant said that while she had some mild back pain before _____, it became much worse that day and she sought medical treatment from the employer. She said that pain radiated down her leg. She was sent to Dr. B, who gave her a release to light duty and diagnosed a lumbar strain.

Upon further questioning, the claimant agreed that she had felt, and complained about, back pain to her family doctor, Dr. C, in November 1998 but that she did not think much of it since aches and pains were common for her. However, she said that she began to think it was related to her work because it was better on the weekends when she was not working. Notes of Dr. C's record complaints on February 9, 1999, of lumbar back pain, and an ovarian cyst as well. The claimant testified that she also had a right hand injury in January 1999 and that she was out of work due to surgery on this hand beginning August 9, 1999. She said that her back was not the reason she was out of work beginning on this date.

The claimant's treating doctor of her choice was Dr. R, D.C., who told her not to use the pedal at work at all and it was after this that the claimant said that her employer had no more work available for her. She further testified that the employer closed its Texas location where she worked. The claimant said that Dr. C had told her that her back problems could be due to being overweight, but she did not necessarily believe this because of personal acquaintances with other overweight people who did not have back problems.

A statement from a coworker, Ms. A, given to the adjuster on February 24, 1999, set out that the claimant had told Ms. A the day before that she injured her back while lifting aquariums in the course of cleaning them out. Ms. A says she responded that the claimant should not do that, but should bail the water out of the aquarium first. The claimant said that Ms. A misunderstood what she was telling her.

A lumbar MRI from May 3, 1999, was reported as showing degenerative disc disease and a slight bulge at L1-2, causing some indentation on the thecal sac.

While the hearing officer's stated reason (common knowledge) for disbelieving Dr. R's reports may indicate a reaction to the awkward wording of Dr. R's report rather than his misunderstanding of what radiculopathy is, the fact is that the hearing officer was not required to believe any witness. An alternative cause of the claimant's back injury was brought out that was not related to work and the hearing officer could choose to find Ms. A's statement about the aquariums to be more credible.

The hearing officer is the sole judge of the relevance, the materiality, weight, and credibility of the evidence presented at the hearing. Section 410.165(a). The decision should not be set aside because different inferences and conclusions may be drawn upon review, even when the record contains evidence that would lend itself to different inferences. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). 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, accordingly, affirm the determination that the claimant did not have a compensable injury. While we understand that the claimant testified that her inability to work after August 9, 1999, was related to her hand, the hearing officer pointed out that the claimant's back, while not the sole cause of inability to work after that date, was still a cause.

Section 408.007 states that the date of injury for an occupational disease (which includes a repetitive trauma injury) is "the date on which the employee knew or should have known that the disease may be related to the employment." This will not in every case mean the date on which concrete diagnosis is rendered. The claimant identified November 1998 (the hearing officer specified November 30th for purposes of her decision) as the point at which she perceived a link between her work and her back pain. We affirm that decision.

Section 409.001(a)(1) and (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 apprize the employer of the fact that an injury occurred 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). Belief that an injury is trivial can constitute good cause for failure to give timely notice. Farmland Mutual Insurance Company v. Alvarez, 803 S.W.2d 841 (Tex. App.-Corpus Christi 1991, no writ). Good cause must continue up to the time that notice was actually given. Texas Workers' Compensation Commission Appeal No. 94975, decided September 2, 1994. We believe, however, that the hearing officer can determine continuity of good cause with some reasonable leeway allowed for a worker to react to the point where they believe an injury is more serious than first appreciated. Furthermore, the February 9th date that the carrier argues in its appeal was the date that the claimant should have appreciated her pain was serious also indicates some linkage with an ovarian cyst. In this case, the claimant identified _____, as the day when the pain was such that she had to stop work to request medical treatment, and the hearing officer's determination that there was good cause for the failure to give timely notice was sufficiently supported by the record.

We affirm the hearing officer's decision and order.

_____
Susan M. Kelley
Appeals Judge

CONCUR:

_____
Joe Sebesta
Appeals Judge

_____
Thomas A. Knapp
Appeals Judge