APPEAL NO. 001010

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 March 28, 2000. The hearing officer determined that the appellant (claimant) did not sustain a compensable repetitive trauma injury of bilateral carpal tunnel syndrome (BCTS); that the date of the claimed injury was _____; that the claimant, without proper excuse, failed to give her employer timely notice of the injury; that the respondent (carrier) timely disputed the compensability of the BCTS; and that the claimant did not have disability. The claimant appealed all but the date of injury determination, asserting that the appealed determinations were against the great weight and preponderance of the evidence. The carrier replies that the decision is correct, supported by sufficient evidence, and should be affirmed. The determination of the date of injury of _____, has not been appealed and has become final. Section 410.169.

DECISION

Affirmed.

The claimant worked as a long distance truck driver. In addition to driving, she said her work involved some unloading of cargo. She contends that her work activities involved repetitive trauma to her hands and wrists, thereby causing her BCTS, but offered little information about precisely what the nature of the repetitive trauma was. Dr. M, her treating doctor for a prior right shoulder compensable injury, answered on November 23, 1999, "yes" to the questions of whether this condition "can be caused by driving over the last year" either by way of direct injury or aggravation of a preexisting condition. Dr. B, a referral physician, wrote on December 23, 1999, that "[p]atients who are involved in activities requiring prolonged grip and repeated arm use are at risk for the development of carpal tunnel. The development of carpal tunnel as a complication of his [sic] occupation as a truck driver is a well known phenomenon." Other medical evidence consisted of the December 9, 1999, report of an examination by Dr. K, a carrier-selected independent medical examination doctor, in which he described the claimant and wrote: "One has to understand that in a 5' 4" 223 pound, 40-year-old female, the most common cause of carpal tunnel syndrome is spontaneous in relation to extra weight and being female."

The claimant had the burden of proving that her BCTS was caused by repetitious traumatic activity at work. Johnson v. Employers Reinsurance Corporation, 351 S.W.2d 936 (Tex. Civ. App.-Texarkana 1961, no writ). Whether repetitious traumatic activity at work caused the BCTS presented a question of fact for the hearing officer to decide. Texas Workers' Compensation Commission Appeal No. 94266, decided April 19, 1994. Section 410.165(a) further provides that the hearing officer is the sole judge of the weight and credibility of the evidence. In his decision and order, he commented that he did not find Dr. B or Dr. M persuasive on the question of causation and that the claimant failed to prove the particular activities at work that created the repetitive trauma. Rather, he found the work activities "not repetitive and not traumatic." 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). Given the vagueness of the claimant's testimony about her work activities and the conflicting medical opinions on causation, we find the evidence deemed credible by the hearing officer sufficient to support his findings and conclusion that the claimant did not sustain a compensable repetitive trauma injury.

Section 409.001 requires an injured worker to report an occupational disease injury to the employer by the 30th day after the date of injury. Failure to do so, absent actual knowledge of the injury by the employer or carrier, or absent good cause, relieves the employer and carrier of liability for benefits. Section 409.002. The claimant does not rely on the good cause or actual knowledge justifications for late notice but asserts that the day after _____, she gave Ms. R, the human resources director, notice of her BCTS injury, and did so again within a week. The question of notice of a distinct BCTS injury in this case was complicated by the existence of a right shoulder compensable injury on _____, for which the claimant was still seeing a doctor and which was accepted as compensable by the carrier. In her testimony, the claimant said she did not tell Ms. R on August 21, 1999, that her BCTS was related to her employment but that her right shoulder was bothering her again. There was other evidence that she had a conversation with Ms. S, the adjuster, on September 28, 1999, that the BCTS was a new injury and not a continuation or extension of her prior injury. The claimant also said that she tried to get the employer to report her BCTS as a new injury so that the carrier would pay for the prescriptions she was given on _____; and that as regards her prior injury, the employer took care of everything. Ms. R testified that the claimant initially told her she was having problems with her wrist and that the claimant's doctor told the claimant this was related to her prior shoulder injury. Ms. R further testified that not until December 1999 did the question of a new BCTS injury come up and she then emailed Ms. S to ask if it should be reported as a new injury. In a memo of record, Ms. R stated that this conversation occurred on December 8, 1999. She also testified that she had no recollection of the claimant leaving phone messages in October 1999 about the need to file a new claim.

Whether and when notice is given is also a question of fact for the hearing officer to decide. Texas Workers' Compensation Commission Appeal No. 94114, decided March 3, 1994. He commented in his decision and order that he found Ms. R[1] "a very credible witness" and that notice of the BCTS injury was given on December 1, 1999, well beyond 30 days of the date of injury.[2] From our review of the record, we must conclude that the evidence on the notice question was extremely confusing. It was the responsibility of the hearing officer to sort through this confusion to evaluate the evidence and determine what facts had been established. He relied on the evidence of Ms. R for his conclusion that the claimant failed to give timely notice of her injury. Under our standard of review, we affirm

[1]The hearing officer refers to Ms. R as Ms. D, another name for the same person.

[2]He also found no good cause and no actual knowledge.

that determination and only comment that another hearing officer may well have found good cause for an untimely notice in the confusion surrounding the two injuries and evidence of seemingly continuing efforts by the claimant to resolve the confusion.

Section 409.021(c) provides that a carrier must dispute the compensability of an injury by the 60th day after receiving notice. Failure to do so waives the right to contest compensability. We have held that the 60-day period begins on the date of written notice of the injury is received. Texas Workers' Compensation Commission Appeal No. 952232, decided February 8, 1996. The claimant in her appeal appears to rely on oral notice for triggering the time to dispute. Thus, much time was devoted at the CCH to establish when the carrier was aware of a new BCTS injury. The earliest written notice of the claimed BCTS as a separate injury was a fax from Ms. S to the carrier on December 7, 1999. In evidence was a Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) with a date-filed stamp of December 17, 1999, which disputed the compensability of a BCTS injury. This was clearly within 60 days of December 7, 1999, and amply supports the hearing officer's determination of a timely dispute.

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:

Elaine M. Chaney
Appeals Judge

Judy L. Stephens
Appeals Judge