

APPEAL NO. 001065

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 April 25, 2000. The hearing officer determined that the respondent/cross-appellant (claimant) sustained a compensable injury in the form of an occupational disease; that the date of injury was _____; that the claimant gave the employer timely notice of the injury; and that the claimant had disability from November 15, 1998, through January 11, 1999. The appellant/cross-respondent (carrier) appeals the finding of compensable injury; the date of injury; and the timely notice, contending that these determinations are against the great weight and preponderance of the evidence. The claimant appeals the disability determination, asserting that she had a recurring period of disability beginning on April 30, 1999, and continuing through the date of the CCH. The carrier replied to the claimant's appeal that, while no disability existed because there was no compensable injury, the refusal to find disability on and after April 30, 1999, was correct.

DECISION

Affirmed.

The issues in this case presented questions of fact for the hearing officer to resolve and are subject to reversal on appeal only if contrary to the great weight and preponderance of the evidence. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Company, 715 S.W.2d 629, 635 (Tex. 1986).

The claimant has worked for approximately 19 years as a pharmacist. She said that because her days involved constantly bending over the counter from the waist and often talking with a phone cradled between her neck and shoulder while she prepared prescriptions, she developed, over time, pain and stiffness in her neck. She also had prior low back problems which she did not attribute to work. She said that in late July 1998, her symptoms radically worsened and she obtained the first available appointment with Dr. M on _____. According to the claimant, Dr. M diagnosed bone spurring in the neck and said this was work related due to repetitive trauma. The parties agreed that the next day, the claimant reported her injury as work related.

Medical records of Dr. T, going back to November 1996, reflect complaints of neck soreness with work, but that the claimant was able to "bounce back." Dr. M's report of September 10, 1997, reflects a history of seven years of stiffness in the shoulder and neck and that the claimant "attributes a lot of this to standing for 40 to 45 hours per week . . . having to use the phone and write at the same time, etc." Degenerative cervical disk disease was noted by Dr. M. On December 10, 1998, Dr. M wrote that the claimant's condition "is probably related to on the job stress as much as anything." On December 15, 1999, Dr. D, the claimant's primary care physician, wrote that the symptoms "appear to be due to postural repetitive trauma from working as a pharmacist for many years. . . ." Dr. H, a Texas Workers' Compensation Commission-selected doctor, agreed that the claimant's

condition was related to her "overuse in her job as a pharmacist beginning in the summer of 1998."

The hearing officer considered the evidence and found a repetitive trauma injury as claimed. In its appeal, the carrier argues that this is, at best, a "continuation of a condition that she has had for a number of years." While this may be true, it is also consistent with the concept of a repetitive trauma injury. We find the evidence sufficient to support the finding of a work-related injury.

More troublesome is the date of injury determination and its impact on timely reporting. Section 408.007 provides that the date of injury in this type of claim is the date the claimant knew or should have known that the disease (a repetitive trauma injury) may be related to the employment. Clearly, the medical records are replete with references to neck pain long before _____, the date found by the hearing officer to be the date of injury. While the only logical source for this history would be the claimant, the claimant insisted that she did not relate her condition to her work until the pain became severe and Dr. M told her she had a work-related injury. The ombudsman offered the hearing officer the alternative theory that, if an earlier date was found, the claimant trivialized the injury until about the time she saw Dr. M. Unfortunately, the hearing officer makes no mention of the trivialization theory of good cause, even though this appears to have been the sounder course to take. Instead, the hearing officer found that "the doctor," i.e., Dr. M, "does not relate the Claimant's condition to her job." The provisions of Section 408.007, of course, are in terms of the claimant, not the doctor, relating the condition to the employment. In any case, the hearing officer goes on to say that "a reasonable person might not have known that her neck injury was work-related at that time." (Emphasis added.) Presumably "at that time" meant all of the time up to _____. We will affirm a determination of a hearing officer on any theory of law reasonably supported by the evidence. Texas Workers' Compensation Commission Appeal No. 91002, decided August 7, 1991. Because the hearing officer found the claimant credible, we accept her testimony that she trivialized the injury up to the time she saw Dr. M and, on this theory, we find good cause for an otherwise untimely notice of injury.

There remains the question of disability. We find no merit in the carrier's appeal to the extent it was based on the lack of a compensable injury. In a report of March 30, 1999, Dr. M found full cervical range of motion. He released her to return to work with no restrictions and reissued this release on April 14, 1999. In June 1999, he found her improved and, in August 1999, her symptoms were increasing. The claimant said she stopped working full time on April 30, 1999, because she could no longer work with the pain. Since then, she has worked part time as a pharmacist and on her own antique business. While her testimony alone could have established disability again on April 30, 1999, the hearing officer found Dr. M's opinion more credible on this issue, along with that part of the claimant's testimony dealing with her activities after April 30, 1999. Under our standard of review, we affirm this determination.

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

Alan C. Ernst
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Dorian E. Ramirez
Appeals Judge