APPEAL NO. 001232

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 26, 2000. The hearing officer determined that the respondent (claimant) sustained a work-related injury in the form of an occupational disease; that the date of the injury is _____; that the claimant did not report an injury to the employer within 30 days after the date of the injury and good cause does not exist for the claimant's failure to timely report the injury; that the appellant (carrier) did not specifically contest compensability on the issue of timely reporting the injury to the employer pursuant to Section 409.022 and Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 124.6 (Rule 124.6)); and that the claimant had disability beginning on January 25, 2000, and continuing through the date of the CCH. The carrier has requested our review, asserting that the claimant's medical evidence on causation is insufficient to support the occupational disease determination; that the carrier's Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21), fairly read, did raise the defense of untimely reporting; that because the claimant did not prove she sustained a compensable injury, she cannot have disability; and that even if the claimant had disability, it did not extend beyond March 15, 2000. The appeals file does not contain a response from the claimant.

DECISION

Affirmed.

The claimant testified that she had been working for the employer since _____, performing duties as a sheetrock board quality control tester when around the 1999 Thanksgiving Day period she developed soreness in her left thumb joint and found she could not use that thumb to grip the sheet rock boards as tightly as she had previously. The claimant explained that her daily duties required that she tightly grip the boards selected for quality control testing with her left hand to keep them from flopping around while scoring them with a knife in her right hand so she could then break them into sections. She said she also had to hold a jig tool steady on sections of boards with her left hand while scoring patterns with her right hand. The claimant also said that twice a month, she had to perform these tasks on water-resistant boards and would do so every hour for three-day periods. She said that at first she thought she had arthritis in her left thumb joint but that when she saw Dr. D on _____, an x-ray revealed that her left thumb joint was "worn out" at the base and slipping out of place and that, after discussing her job duties, Dr. D advised her that he felt her left thumb problem was caused by the repetitive use of her thumb at her job for 18 years. Dr. D's January 17, 2000, report states that "[t]he patient's job I expect both precipitates and aggravates the metacarpal thumb arthritis due to the increased repetitive stresses that are placed onto her hand and thumb."

Dr. D's _____, report said that the claimant's condition has been present for some time but has only recently become symptomatic and that his assessment is degenerative joint disease thumb metacarpal trapezial joint left hand and subluxation of thumb metacarpal trapezial joint left hand. The claimant said that Dr. D prescribed a splint to stabilize the thumb joint and told her she could continue to work so long as she used the splint, although suggesting that she do clerical work. The claimant said she did continue to work wearing the splint but that, after a supervisor, Mr. M, noticed the splint on January 24, 2000, and they discussed her injury and use of the splint, (Mr. T), the employer's human resources manager, had her see Dr. M the next day. She stated that Dr. M referred her to Dr. O, whom she saw on January 27, 2000, and that Dr. O also opined that her thumb problem was caused by her work. The claimant also mentioned that Mr. M gave Dr. O a list of the requirements of her job and asked him if the claimant's injury pertained to her work and that Dr. O responded in the affirmative. On March 31, 2000, Dr. O responded to certain written questions from the claimant's assistant, stating his opinion to a reasonable medical probability that the claimant's left thumb condition is related to her work, that a lot of grasping with her left hand would have caused the condition, and that he agrees with Dr. D's statement about the relationship between the claimant's work and her left thumb condition.

The claimant further testified that she did not actually report the thumb injury before discussing it with Mr. M on January 24, 2000, because she needs her paychecks. She stated that Mr. M went with her to the doctor on two occasions and told her he would inform Mr. T. The claimant also said that on the day she saw Dr. O, Mr. T sent her home and told her she could not return to work with the splint; that the employer never called her or offered her any other position; that she took four computer courses to become computer literate; and that she has looked, unsuccessfully, for other work and was interviewed for two clerical jobs but did not get them.

Mr. M testified that he regarded the claimant's job duties as "varied" and said he did not think the job stresses "his" left thumb. Mr. M also stated that neither he nor Mr. T told the claimant she could not work while wearing the splint; that Dr. O did state that the claimant could not perform her current job duties; and that Dr. O felt the claimant needed surgery on the thumb and said it was "impossible" to say what caused the condition. He also testified that he just learned at the hearing that the claimant could do her job with the splint; that she was the longest-term employee in that position; and that he regards her as still employed.

The carrier's TWCC-21, in block 43, states as follows:

> Carrier respectfully disputes in accordance with Tex. Lab. Code Ann. 409.0004 that carrier is relieved of liability of the injury since the claimant failed, without good cause, to timely file a claim for compensation with the Texas Workers Compensation Commission within 30 days of the date of injury. Medical treatments began on 11-20-99 and was [sic] reported to

employer on 01-24-2000. There has been no medical evidence of an injury. Claimant elected to file medical treatments on her group insurance carrier.

The carrier challenges findings that the claimant knew or should have known that she sustained a repetitive trauma injury at work on _____, when Dr. D diagnosed her thumb injury and told her it was caused by her work; that the claimant's repetitive trauma job duties caused damage or harm to the physical structure of her body, *"e.g.,* injury to her left thumb metacarpal trapezial joint"; that the carrier filed a TWCC-21 on February 29, 2000, disputing compensability of the claimant's left thumb joint but did not adequately specify failure to timely report the injury to the employer as a basis for the dispute; and that the claimant was unable to "obtain or [sic] retain" employment at wages equivalent to her preinjury wage beginning on January 25, 2000, and continuing through the date of the hearing. The carrier does not specifically dispute the conclusion of law that the date of injury is _____.

The hearing officer is the sole judge of the weight and credibility of the evidence (Section 410.165(a)) and, as the trier of fact, resolves the conflicts and inconsistencies in the evidence (Garza v. Commercial Insurance Company of Newark, New Jersey), 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). The Appeals Panel, an appellate reviewing tribunal, will not disturb the challenged factual findings of a hearing officer unless they are so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust and we do not find them so in this case. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951).

On the injury issue, the hearing officer could consider the type and repetitive nature of the claimant's work for 18 years as well as the opinions of Dr. D and Dr. O on the relationship between the claimant's work and her left thumb injury. As for disability, defined in Section 401.011(16), the hearing officer could consider the claimant's testimony that the employer would not take her back wearing the splint and did not offer her other duties and that the claimant was seeking other employment she felt she could do with her left thumb joint condition.

As for the adequacy of the TWCC-21 to raise the defense that the claimant failed to timely provide the employer with notice of the claimed injury, Sections 409.022(a) and (b) provide that a carrier's notice of refusal to pay benefits must specify the grounds for the refusal and that the grounds so specified in the notice constitute the only basis for the carrier's defense on the issue of compensability in a subsequent proceeding unless the defense is based on newly discovered evidence that could not reasonably have been discovered at an earlier date. Rule 124.6(a)((9) requires a full and complete statement of the grounds for the carrier's refusal to begin payment of benefits. Although urging both below and on appeal that "a fair reading" of the block 43 paragraph in the TWCC-21 does reflect that the timely notice defense was raised, the carrier acknowledged below that the language is "a bit confusing" and "incorrectly" referred to Section 409.004 providing for the failure to file a claim rather than Section 409.001 providing for notice of injury to the employer. The hearing officer's discussion characterizes the carrier's language as

confusing and ambiguous at best, states that the language contains substantive and not merely clerical errors, and concludes that the language did not adequately notify the claimant of the specific grounds upon which the carrier bases its dispute. *Compare with* Texas Workers' Compensation Commission Appeal No. No. 951165, decided August 31, 1995, in which the Appeals Panel reversed and rendered a new decision that the reference to Section 409.001 in the TWCC-21 did raise the defense of untimely notice of injury.

The decision and order of the hearing officer are affirmed.

Philip F. O'Neill
Appeals Judge

CONCUR:

Elaine M. Chaney
Appeals Judge

Robert W. Potts
Appeals Judge