APPEAL NO. 001370

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 May 23, 2000. The hearing officer determined that the respondent (claimant) did sustain a compensable injury in the form of an occupational disease; that the claimant had good cause for untimely reporting of the injury to the employer; and that the correct date of injury is _____. The appellant (carrier) files a request for review, challenging a number of the hearing officer's findings of fact and essentially arguing that the claimant failed to prove that she suffered an injury due to repetitive trauma at work. The claimant responds that the findings and the decision of the hearing officer were sufficiently supported by the evidence.

DECISION

Finding sufficient evidence to support the decision of the hearing officer and no reversible error in the record, we affirm the decision and order of the hearing officer.

The hearing officer summarizes the evidence in his decision and we adopt his rendition of the evidence. We will only briefly summarize the evidence most germane to the appeal. This includes the fact that the claimant testified that she had worked as an airline reservationist for the employer since 1996. The claimant described her duties as taking calls and making flight arrangements for customers. There was conflicting testimony from the claimant and the employer's manager of administration concerning how much the claimant's job involved repetitive tasks. The claimant initially pursued a claim for an injury to her right wrist due to repetitive trauma, with a te of injury of _____. The claimant now contends that she also has suffered a repetitive trauma injury to her neck and shoulders as a result of her work, as well as headaches. On June 25, 1999, Dr. B, the claimant's treating doctor, informed her that she had a separate and distinct injury to her neck and shoulders due to work-related activities. Dr. B testified at the CCH and expressed the opinion that the claimant suffered a n injury to her neck and shoulders due to repetitive trauma at work.

The carrier challenges the following findings of fact and conclusions of law in the hearing officer's decision as not being supported by the evidence:

FINDINGS OF FACT

3. The Claimant's duties included sitting at a monitor for eight hours per shift, receiving phone calls from customers making flight arrangements.

4. The Claimant sat with her head flexed forward looking at the monitor for most of the eight hour shift.

5. The Claimant also made repetitive head movements to the left, right, up, and down, during her shift. The repetitive head movements along with

the forward flexed head position during the Claimant's shift constituted repetitive traumatic work activities that caused damage or harm to the physical structure of her neck and shoulders.

6. These repetitive traumatic activities occurred over time and arose out of and in the course and scope of the Claimant's employment.

7. The Claimant knew or should have known that her pain in her upper back and headaches may be work related was _____ but believed these symptoms were related to her carpal tunnel diagnosis.

* * * *

10. A prudent person exercising due diligence would not have reported the neck and shoulder injury before June 30, 1999.

CONCLUSIONS OF LAW

3. The Claimant did sustain a compensable injury in the form of an occupational disease.

4. The Carrier is not relieved of liability under the Texas Labor Code, Section 409.002 because the Claimant had good cause for untimely reporting of the injury to her Employer.

The question of whether an injury occurred is one of fact. Texas Workers' Compensation Commission Appeal No. 93854, decided November 9, 1993; Texas Workers' Compensation Commission Appeal No. 93449, decided July 21, 1993. Section 410.165(a) provides that the hearing officer, as finder of fact, is the sole judge of the relevance and materiality of the evidence as well as of the weight and credibility that is to be given the evidence. It was for the hearing officer, as trier of fact, to resolve the inconsistencies and conflicts in the evidence. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701, 702 (Tex. Civ. App.-Amarillo 1974, no writ). This is equally true regarding medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286, 290 (Tex. App.-Houston [14th Dist.] 1984, no writ). The trier of fact may believe all, part, or none of the testimony of any witness. Taylor v. Lewis, 553 S.W.2d 153, 161 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.); Aetna Insurance Co. v. English, 204 S.W.2d 850 (Tex. Civ. App.-Fort Worth 1947, no writ). An appeals level body is not a fact finder and does not normally pass upon the credibility of witnesses or substitute its own judgment for that of the trier of fact, even if the evidence would support a different result. National Union Fire Insurance Company of Pittsburgh, Pennsylvania v. Soto, 819 S.W.2d 619, 620 (Tex. App.-El Paso 1991, writ denied). When reviewing a hearing officer's decision for factual sufficiency of the evidence we should reverse such decision only if it is so contrary to the overwhelming weight 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 Co., 715 S.W.2d 629, 635 (Tex. 1986). Applying this standard, we find sufficient evidence to support the hearing officer's finding of injury in the testimony of the claimant and Dr. B.

The date of injury for purposes of an occupational disease (which by definition includes repetitive trauma injuries) is "the date on which the employee knew or should have known that the disease may be related to the employment. [Emphasis added.]" Section 408.007. The date of injury is when the injured employee, as a reasonable person, could have been expected to understand the nature, seriousness, and work-related nature of the disease. Commercial Insurance Co. of Newark, N.J. v. Smith, 596 S.W.2d 661 (Tex. Civ. App.-Fort Worth 1980, writ ref'd n.r.e.). In Texas Workers' Compensation Commission Appeal No. 941374, decided November 23, 1994, we noted that the date of injury in an occupational disease case presents a question of fact for the hearing officer to resolve. We have previously recognized that while the date of injury in an occupational disease case is not necessarily the date of diagnosis, it can be that date. Texas Workers' Compensation Commission Appeal No. 951666, decided November 20, 1995; Texas Workers' Compensation Commission Appeal No. 950411, decided May 2, 1995. The key question is when the claimant knew or should have known that her work activities may be causing her injury. Again, applying our standard of review, we find sufficient evidence to support the date-of-injury finding of the hearing officer.

The 1989 Act generally requires that an injured employee or person acting on the employee's behalf notify the employer of the injury not later than 30 days after the injury occurred. Section 409.001. The 1989 Act provides that a determination by the Texas Workers' Compensation Commission that good cause exists for failure to provide notice of injury to an employer in a timely manner or actual knowledge of the injury by the employer can relieve the claimant of the requirement to report the injury. Section 409.002. We have held that good cause for failure to timely report an injury must be based upon a reasonable or ordinarily prudent person standard. Texas Workers' Compensation Commission Appeal No. 91030, decided October 30, 1991; Texas Workers' Compensation Commission Appeal No. 93184, decided April 29, 1993; Baker v. Westchester Fire Insurance Co., 385 S.W.2d 447 at 449 (Tex. Civ. App.-Houston 1964, writ ref'd n.r.e.). Here, the hearing officer found that the claimant exercised due diligence in that she initially believed that her neck and shoulder symptoms were related to the diagnosis for another injury. We find no abuse of discretion by the hearing officer in determining the claimant had good cause for not timely reporting her injury.

The carrier also posits the argument that since the claimant sustained a wrist injury on _____, that she cannot have a separate injury to her neck and shoulders or that the two cases must be combined into one. We note this was not an issue before the hearing officer. Nor are we aware of any provision precluding pursuing two separate claims of injury with the same date of injury.

The decision and order of the hearing officer are affirmed.

Gary L. Kilgore
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Kathleen C. Decker
Appeals Judge