APPEAL NO. 001495
FILED AUGUST 7, 2000

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on May 4, 2000, in _____, Texas, with _____ presiding as hearing officer. She determined that the appellant (claimant) did not sustain a compensable injury in the form of an occupational disease; that the claimant did not have disability; and that the claimant failed to timely notify her employer of the alleged injury.

The claimant appeals and argues facts that support her claim. She disputes that she was told prior to _____, that her back condition was work related. The respondent (self-insured) responds by highlighting inconsistency in the claimant's case and asks that the decision be affirmed.

DECISION

We affirm the hearing officer's decision.

The claimant testified that she went to work in _____ for the self insured as a transportation attendant. As such, she assisted with wheelchair-bound students and other special education students. She said that three times a week, she would have to assist in loading wheelchairs on buses and strapping them to the floor.

The claimant said that around _____, she began to have back and leg pain and numbness. The claimant first sought medical treatment in November 1998. She was referred to (Dr. A) and she testified that at her first visit with Dr. A on January 18, 1999, they discussed what she did at work and Dr. A told her that this might be work related. The claimant said that they did not discuss the fact that she did anything repetitive. She could not recall whether they discussed that it would be faster for her to receive surgery if she did not go through workers' compensation.

The claimant had back surgery on February 3, 1999, which was filed through her group health insurance. She said that these filed claims were eventually rejected because of the contention that her back condition was work related. The claimant first notified the self-insured on _____, that the claimant's back condition was related to her work; she said that she contacted (Ms. M) about filing a claim after she realized this day that her condition was probably the result of her work activities. Asked what triggered this knowledge, the claimant said that it was a combination of talking to Dr. A and getting rejection letters from her group health insurance.

The claimant had not worked since December 8, 1998. She said that her previous job had been with the (school district) and she acknowledged that she had filed a claim for a _____ back injury against this school district in _____. The

mechanism of injury claimed against the school district was similar to the claim against the self-insured. The claimant asserted that her back had been fine in between this injury and her pain in _____.

The claimant was treated on November 23, 1998, for sciatica. She reported no recent trauma. A December 16, 1998, report from the same medical clinic recorded the gradual onset of discomfort beginning six months before. An MRI was reported as showing a protrusion at L5-S1 and general degenerative disc dessication in that area. A letter from Dr. A dated March 28, 2000, confirmed that he discussed the possible work-relatedness of her injury with her in January 1999 and it was felt at the time that due to her pain it was best to "proceed in the most expedient fashion."

Section 409.001(a)(2) requires that the injured employee give notice of an occupational disease (including repetititve trauma injury) to a person in a supervisory or management capacity within 30 days of the date the employee knew, or should have known, that the injury may be related to the employment. The failure of the employee to give such notice relieves the carrier of liability for the injury. Section 409.002. In this case, it was undisputed that the claimant did not notify her employer of her injury until _____. The hearing officer determined from the evidence that the claimant knew, or should have known, that her injury was related to her employment on January 18, 1999, when the likelihood was discussed with Dr. A. The evidence fully supports the hearing officer's determination. The hearing officer had found by implication that none of the exceptions set out in Section 409.002 exist, but we note that none of them were advanced as theories by the claimant, who maintained that her first knowledge of the injury occurred on the date she gave notice.

We likewise affirm the hearing officer's determination that the claimant did not sustain a compensable injury or have disability. Section 401.011(36) defines repetitive trauma injury as "damage or harm to the physical structure of the body occurring as the result of repetitious, physically traumatic activities that occur over time and arise out of and in the course and scope of employment." To recover for an occupational disease of this type, one must not only prove that repetitious, physically traumatic activities occurred on the job, but also must prove that a causal link existed between these activities on the job and one's incapacity; that is, the disease must be inherent in that type of employment as compared with employment generally. Davis v. Employers Insurance of Wausau, 694 S.W.2d 105 (Tex. App.-Houston [14th Dist.] 1985, writ ref'd n.r.e.). The hearing officer is the sole judge of the relevance, 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 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.).

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 cannot agree that this was the case here and affirm the decision and order.

Susan M. Kelley
Appeals Judge

CONCUR:

Gary L. Kilgore
Appeals Judge

Philip F. O'Neill
Appeals Judge