APPEAL NO. 001752

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 July 7, 2000. The hearing officer found that the respondent (claimant) sustained a compensable right upper extremity injury on _____, which included a right hand, right wrist, right elbow, and right carpal tunnel syndrome (CTS); and that the appellant (carrier) should not be allowed to reopen the issue of compensability. The carrier appealed the inclusion of CTS as part of the compensable injury and the determination that it could not reopen this issue based on newly discovered evidence. The appeals file does not contain a response from the claimant.

DECISION

Affirmed.

The claimant testified that from January to April 1999 she worked for PCS (employer 1), a mail order pharmacy, filling prescriptions. She denied ever being injured in the course and scope of this employment. For approximately nine months preceding _____, she worked for Michael's (employer 2) in the warehouse moving stock as an order puller. She said she worked 10-hour days and on _____, she felt a burning sensation and pain inside her right hand. She said she reported this and saw Dr. K on _____. He diagnosed a right wrist sprain and returned the claimant to work.

On February 29, 2000, the claimant began treating with Dr. R. His diagnoses on this date were right wrist sprain/strain, rule out CTS, tenosynovitis, and lateral epicondylitis. In an unappealed finding, the hearing officer found that the carrier received written notice of the claimed injury on _____. The carrier apparently accepted liability for these diagnoses with the exception of CTS. On April 18, 2000, Dr. B for the first time provided a diagnosis of right CTS based on EMG testing. Also on April 18, 2000, Dr. S examined the claimant for the carrier to determine an impairment rating and date of maximum medical improvement. In the history portion of the report of this examination, Dr. S wrote that the claimant said she felt pain in her right hand on _____, while working for employer 1. The carrier completed a Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) on April 28, 2000, disputing an injury in the course and scope of employment with employer 2, asserting the sole cause defense that the injury occurred while working for employer 1. As noted above, the carrier conceded it accepted a strain type injury but was disputing a CTS injury.

The carrier has appealed the following findings of fact and conclusion of law:

FINDINGS OF FACT

4. On _____, as Claimant was lifting a box as part of her job duties for Employer, she felt a burning and hurting sensation in her right

hand for the first time and sustained an injury, which includes right [CTS], to her right hand, right wrist, and right elbow.

5. The medical evidence is generally consistent with Claimant's testimony to the effect that she sustained a right hand, right wrist, and right elbow injury that includes right [CTS] on _____.

* * * *

9. Because Carrier did not contest compensability based on the April 18, 2000, record from [Dr. S] on or about April 18, 2000, but instead delayed making the contest until April 28, 2000, Carrier should not be allowed to reopen the issue of compensability.

CONCLUSION OF LAW

4. Carrier should not be allowed to reopen the issue of compensability.

Not appealed is Conclusion of Law No. 3 that "Claimant sustained a compensable injury on _____."

Our review of this case is hampered by the paucity of evidence below. In any case, the claimant contended that the reference by Dr. S to employer 1 was in the nature of a typographical error or simple mistake because he associated the facts of her claimed injury with the prior employer. She also relied on a repetitive trauma theory of liability to prove her case. The hearing officer found her credible in assertions both of a mistaken reference by Dr. S and of repetitive trauma while employed by employer 2. The carrier appeals the finding that the compensable right upper extremity injury included CTS, arguing the "[t]he medical evidence and claimant's testimony is not consistent with the injury which produced [CTS]." How or why it is inconsistent is not further explained.

Section 410.165(a) provides that the hearing officer is the sole judge of the weight and credibility of the evidence. 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). Applying this standard of review to the record of this case, we find the claimant's testimony about her lifting activities at work together with a medical diagnosis of right CTS sufficient to affirm the determination that the compensable right upper extremity injury included right CTS.

The finding of the hearing officer that Dr. S's report constituted newly discovered evidence which gave the carrier the opportunity to reopen the question of liability has not been appealed. The hearing officer also found that the carrier waited too long to dispute based on the newly discovered evidence. The Appeals Panel has held that a carrier must use reasonable or due diligence in proceeding to dispute compensability once it possesses

newly discovered evidence. Texas Workers' Compensation Commission Appeal No. 962596, decided March 27, 1997. Whether such due diligence is shown is determined by the hearing officer and is reviewed on an abuse of discretion standard. Texas Workers' Compensation Commission Appeal No. 94616, decided June 30, 1994. One may well question whether the carrier delayed too long in disputing compensability of the injury on April 28, 2000, based on a report dated April 18, 2000, because it was unlikely that the carrier received the report on the date it was signed. Nonetheless, we have affirmed findings of lack of due diligence in delays of as little as two weeks. Appeal No. 962596, *supra.* In the case now before us, the question of due diligence is of less significance in light of our affirmance of the compensability findings. The carrier presented no evidence to account for its inaction between April 18 and 28, 2000. Under these circumstances, we cannot conclude that the finding of undue delay in disputing on the basis of newly discovered evidence was an abuse of discretion.

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

Alan C. Ernst
Appeals Judge

CONCUR:

Kathleen C. Decker
Appeals Judge

Philip F. O'Neill
Appeals Judge