

APPEAL NO. 001855

This appeal is brought 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 19, 2000. The hearing officer determined that the respondent (claimant) sustained a compensable injury in the course and scope of her employment in the form of an occupational disease on _____; that the correct date of injury is _____; that the claimant reported the injury to her employer within 30 days of the date of injury; that the claimant filed a claim for compensation with the Texas Workers' Compensation Commission (Commission) within one year of the date of injury; and that the appellant (carrier) is not relieved of liability. The carrier appealed, stated evidence favorable to its position, urged that the great weight and preponderance of the evidence does not support the determinations of the hearing officer, and requested that the Appeals Panel reverse the decision of the hearing officer and render a decision in its favor on all issues. A response from the claimant has not been received.

DECISION

We reform the decision of the hearing officer and affirm the decision, as reformed, and the order.

The claimant worked for the employer, who makes large and small plastic containers, for about 18 years. On _____, she sustained an injury to her left shoulder. On April 22, 1999, Dr. W, an orthopedic surgeon, performed surgery to repair a torn rotator cuff. Dr. W reported that the claimant began having wrist pain with numbness and tingling in July 1999; that conservative care, including wrist splints and Lodine, were started; that the pain and paresthesias continued; and that on _____, the claimant underwent EMG and nerve conduction studies which showed moderate compression of the median nerve at the wrist. In a report dated _____, Dr. T stated that the claimant had mild to moderate compression neuropathy in the left wrist consistent with carpal tunnel syndrome (CTS) and mild left C5-6 degenerative changes without evidence of acute radiculopathy and that her status was post left rotator cuff repair. Dr. T also wrote:

I have not seen any active radiculopathy that would explain the symptoms in her upper arm. However I do see a left [CTS] which can exacerbate these symptoms and cause hand pain that radiates into the forearm. My recommendations are for her to wear a hand splint at night and start Lodine 400 mg BID. If her symptoms do not improve with treatment, carpal tunnel release may be helpful.

The claimant testified that after the _____ injury, she had occasional numbness and tingling in both hands and complained about it; that the April 1999 rotator cuff surgery did not relieve the symptoms; that in July 1999 she told Dr. W about the left wrist pain and numbness; that Dr. W referred her to Dr. T, a neurologist; that tests were

performed; that on _____, Dr. T diagnosed left CTS and gave her a medical report; that that was the first time she was told that she had CTS; that she took the report to the employer that day or the next day; and that on January 20, 2000, Dr. W performed surgery on her wrist. The claimant said that in her job she put lids on containers hour after hour; that she was aware that repetitive trauma could cause CTS; that she did not do anything else that could have caused the CTS; that she did not know that she had CTS until Dr. T told her on _____; and that she did not work on _____.

Ms. R, a nurse working for the employer, testified that employees put products together; that an employee does not perform one specific, repetitive-type motion continuously for an eight-hour shift; that employees do more like a set of the same types of motions to complete a product; that the human resources section advised her that the claimant reported the CTS injury on March 21, 2000; that in January 2000, she, Ms. R, did talk with Ms. S, an adjuster for the carrier, about the claimant's CTS; that Ms. S mentioned the EMG report; that at that time she did not know the CTS was work related; and that she did not know that on January 4, 2000, the carrier denied the left wrist injury.

Ms. S testified that she first learned that the claimant was claiming a left wrist injury on March 9, 2000, when the claimant filed a Employee's Notice of Injury or Occupational Disease & Claim for Compensation (TWCC-41); that she thinks she received Dr. T's _____, report on December 27, 1999; that she did not think that the CTS could be related to the claimant's shoulder injury because the claimant's shoulder injury was the result of a specific event and that CTS results from repetitive trauma; that on December 27, 1999, she filed a dispute of the left wrist injury; that on January 6, 2000, the claimant called her; that she explained to the claimant that she did not think the CTS was related to the shoulder injury and advised the claimant of her options, including filing a new claim; and that the claimant asked if it was not common knowledge that employees of the employer got CTS from repetitive trauma.

The carrier filed a Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) dated January 4, 2000, in which it stated that it disputed that the alleged left wrist injury flowed from or was related to the claimant's March 23, 1999, compensable injury. In a TWCC-21 dated March 22, 2000, the carrier listed the date of a claimed injury as _____, disputed the claimed injury on the bases that the claimant was not injured in the course and scope of her employment, that she was not working on the claimed date of injury, that she did not timely notify the employer of the claimed injury, and that she did not timely file a claim with the Commission.

Not properly using words defined in the 1989 Act resulted in some confusion in this case. Repetitive trauma injury is defined 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." Section 401.011(36). A compensable injury is "an injury that arises out of and in the course and scope of employment for which compensation is payable under [the 1989 Act]." Section 401.011(10). The date of injury for an occupational disease "is the date on which the

employee knew or should have known that the disease may be related to the employment.” Section 408.007. The 1989 Act contains provisions for a carrier's being relieved of liability for a claimant's not timely notifying the employer of an injury, Sections 409.001 and 409.002, and not timely filing a claim with the Commission, Sections 409.003 and 409.004.

The Appeals Panel has pointed out the differences between an injury in the course and scope of employment and a compensable injury. It has encouraged the proper use of those terms to avoid confusion. This is especially important in cases such as the one before us in which the issue of injury in the course and scope of employment and the issue of whether a carrier is relieved of liability because a claimant did not timely notify the employer of an injury or did not timely file a claim with the Commission, resulting in an injury sustained in the course and scope of employment not being a compensable injury are before the hearing officer. The Appeals Panel has also stated that a repetitive trauma injury is not sustained on a specific day, but that the determination of the date of injury is essential for resolving disputes over timely notifying the employer of an injury and timely filing a claim with the Commission. For example, in the case before us, the carrier pointed out that the claimant did not work on _____, that was determined to be the date of the injury. However, since by definition a repetitive trauma injury occurs over time and the date of such an injury is the date on which the employee knew or should have known that the disease may be related to the employment, it was not required that the claimant worked on the date of injury for the occupational disease for the injury to have arisen out of and in the course and scope of employment.

The hearing officer is the trier of fact and is the sole judge of the relevance and materiality of the evidence and of the weight and credibility to be given to the evidence. Section 410.165(a). The trier of fact may believe all, part, or none of any witness's testimony because the finder of fact judges the credibility of each and every witness, determines the weight to assign to each witness's testimony, and resolves inconsistencies and conflicts in the evidence. Taylor v. Lewis, 553 S.W.2d 153 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.), Texas Workers' Compensation Commission Appeal No. 93426, decided July 5, 1993. In a case such as the one before us where both parties presented evidence on the disputed issues, the hearing officer must look at all of the relevant evidence to make factual determinations and the Appeals Panel must consider all of the relevant evidence to determine whether the factual determinations of the hearing officer are so against the great weight and preponderance of the evidence as to be clearly wrong or unjust. Texas Workers' Compensation Commission Appeal No. 941291, decided November 8, 1994. An appeals level body is not a fact finder, and it does not normally pass upon the credibility of witnesses or substitute its own judgement for that of the trier of fact even if the evidence could 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). That different factual determinations could have been made based upon the same evidence is not a sufficient basis to overturn factual determinations of a hearing officer. Texas Workers' Compensation Commission Appeal No. 94466, decided May 25, 1994. The hearing officer considered the conflicting evidence on whether the claimant sustained a compensable injury, the date of injury of the claimed repetitive

trauma injury, and when the claimant reported the CTS injury to the employer and resolved those disputes in favor of the claimant. Only were we to conclude, which we do not in this case, that the hearing officer's determinations resolving those disputed issues are so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust would there be a sound basis to disturb those determinations. In re King's Estate, 150 Tex. 662, 224 S.W.2d 660 (1951); Pool v. Ford Motor Company, 715 S.W.2d 629, 635 (Tex. 1986). It is undisputed that the claimant filed a claim with the Commission in March 2000. Since we have found the evidence sufficient to support the determination that the claimant's date of injury is _____, we also find the evidence to be sufficient to support the determination that the claimant timely filed a claim with the Commission. Since we find the evidence sufficient to support the determinations of the hearing officer, we will not substitute our judgement for hers. Texas Workers' Compensation Commission Appeal No. 94044, decided February 17, 1994.

We reform Finding of Fact No. 2 to state "[t]he claimant sustained an injury to her left hand due to repetitive trauma while working in the course and scope of her employment." We reform Conclusion of Law No. 3 to state "[t]he claimant sustained a compensable injury in the form of an occupational disease." We renumber Conclusion of Law No. 3 to No. 6, and renumber Conclusions of Law Nos. 4, 5, and 6 to Conclusions of Law Nos. 3, 4, and 5 so that the conclusion of law that the claimant sustained a compensable injury follows the conclusions of law that the carrier is not relieved of liability because of the failure of the claimant to timely notify the employer of the injury and to timely file a claim with the Commission. We reform the decision of the hearing officer by deleting "on _____" from the statement concerning compensable injury so that it states "[t]he claimant sustained a compensable injury in the form of an occupational disease."

We affirm the decision, as reformed, and order of the hearing officer.

Tommy W. Lueders
Appeals Judge

CONCUR:

Kathleen C. Decker
Appeals Judge

Thomas A. Knapp
Appeals Judge