APPEAL NO. 001945

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 August 1, 2000. The issues at the CCH were the date of injury of the claimant's alleged occupational disease, whether he sustained an injury in the form of an occupational disease, whether he had disability from a compensable injury, whether the appellant (carrier) was relieved of liability by the respondent's (claimant) failure to timely notify his employer of his injury under Section 409.002, and whether the claimant made an election of remedies by receiving benefits under his regular health insurance policy.

The hearing officer found that the claimant first knew, or should have known, that his injury may be related to his employment on _____, and that he gave notice to his employer of that injury on January 26. The hearing officer further found that the claimant had not made an election of remedies. However, he further held that the claimant had not proven that he sustained a compensable injury in the form of repetitive trauma at work and that, although he had the inability to obtain and retain employment due to his alleged injury, this did not constitute disability due to the finding that there was no compensable injury.

The claimant has not appealed the determination that he did not sustain a compensable injury. However, the carrier has appealed (and not styled this as a conditional appeal) the findings that claimant gave timely notice of injury and the date of injury determination. There is no response to this appeal.

DECISION

We affirm the hearing officer's decision.

Because the carrier is not aggrieved by the hearing officer's decision, it has filed in effect a conditional appeal. However, we have reviewed the record and determined that the hearing officer's opinion is sufficiently supported by the testimony of the claimant, who said that he was initially told by his doctor on December 9, 1999, that he had arthritis, and it was not until _____, when he met with referral doctor Dr. H, and Dr. H told him that an MRI showed a more serious condition than arthritis, that he knew that he had a condition that might be related to driving his forklift at work. It was undisputed that the claimant gave notice to his employer two days later, which is within the 30-day period provided in Section 409.001(a)(2). While there as conflicting evidence presented on these points, we will not act as a second-tier fact finder where, as here, the great weight and preponderance of the evidence is not against the hearing officer's decision. *See* Atlantic

Mutual Insurance Company v. Middleman, 661 S.W.2d 182 (Tex. App.-San Antonio 1983, writ ref'd n.r.e.). Accordingly, we affirm the hearing officer's decision and order on the points appealed.

Susan M. Kelley
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Judy L. Stephens
Appeals Judge