APPEAL NO. 002302

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 September 12, 2000. With respect to the issues before him, the hearing officer determined that the respondent's (claimant) compensable injury of _____, is a producing cause of her current bilateral wrist problems, bilateral elbow conditions, cervical spine facet syndrome, and myofascial pain syndrome; and that the first certification of maximum medical improvement (MMI) and impairment rating (IR) assigned by Dr. J did not become final pursuant to Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.5(e) (Rule 130.5(e)). In its appeal, the appellant (carrier) argues that the hearing officer erred in failing to apply Section 406.031(b) to determine that the claimant's last injurious exposure to the hazards of the disease came in employment after she stopped working for the employer where she sustained her _____, compensable injury. The carrier also contends that the hearing officer erred in determining that the first certification did not become final under Rule 130.5(e) because his determination that the treating doctor was acting on behalf of the claimant in disputing Dr. J's certification is against the great weight of the evidence. The appeals file does not contain a response to the carrier's appeal from the claimant.

DECISION

Affirmed.

The parties stipulated that the claimant sustained a compensable injury to her neck and both hands, wrists, and forearms on _____; that on February 23, 1999, Dr. J certified that the claimant reached MMI on that date with an IR of zero percent; and that Dr. J's certification of MMI and IR was the first such certification given to the claimant. The claimant testified that the injury to her neck and both hands, wrists, and forearms was the result of having performed repetitively traumatic computer work over a 30-year period with the employer. The claimant stated that she left her employment with the employer in late January 1997. In March 1997, the claimant became self-employed as a courier. She stated that she performed no data entry work in that job; that she primarily delivered letters and small packages; and that the business lasted for six to nine months. She did not work in the period after her self-employment ended until September 1998 when she began to work at a fast-food restaurant. The claimant stated that her duties varied at the restaurant and that she primarily worked as a cashier, did light cooking (making french fries and tacos), and filled drinks. She acknowledged that on occasion she was asked to do some sweeping and mopping; however, she denied that it was a regular requirement of her job. The claimant stated that she quit working at the restaurant in February 1999, when she got a job as a salesclerk at a shipping company, where she sells stamps, weighs packages and letters, and does some minimal wrapping of packages. The claimant maintained that there was a "big difference" between the use of her hands at her job with the employer, where she sustained her compensable injury, and her subsequent jobs, and that while her pain continued after she stopped performing constant data entry work, her condition did not worsen.

The claimant's initial treating doctor was Dr. W. In a progress note dated April 28, 1997, Dr. W noted that the claimant's problems continued but that she was working steadily delivering packages and that her work "is not very stressful and she can do a variety of different activities rather than key all day and she is quite happy with that." Dr. W referred the claimant to Dr. P, a hand specialist, who subsequently became her treating doctor. In a May 8, 1998, note from an office visit, Dr. P noted that the claimant's complex problem with her hands continues; however, he noted that her symptoms of bilateral carpal tunnel syndrome "have settled down following multiple injections." On January 13, 1999, Dr. P recommended surgery stating that the claimant "has multiple problems of chronic pain involving the hand. She has persisted with intractable pain. This is dated back to her original injury of June 1995." In a letter dated June 23, 1999, Dr. P again opined that the claimant's "symptoms still relate to her previous problems she had at her previous employment." Dr. L examined the claimant at the request of the Texas Workers' Compensation Commission (Commission). In a report received by the Commission on October 15, 1999, Dr. L stated:

> After reviewing the chart data, and given the exam today, I do not believe that [claimant] has suffered a new injury, but rather continues to suffer from problems of initial work related case caused by repetitive nature of her work and the associated poor posture. I find no compelling evidence to suggest that her complaints have ever been fully addressed or resolved, and too, it appears that the patient has been compliant with the orders of her doctors. I believe, that given the history, all of these issues are related (the neck and the upper extremities).

With respect to the 90-day rule issue, the claimant acknowledged that in February 1999 she had an appointment with Dr. J. She further testified that Dr. P knew of her appointment with Dr. J and that Dr. P advised her to make an appointment with him when she received the report from Dr. J. The hearing officer made an unappealed finding that on March 8, 1999, the claimant received Dr. J's Report of Medical Evaluation (TWCC-69) in which Dr. J certified that the claimant reached MMI on February 23, 1999, with an IR of zero percent. On March 29, 1999, the claimant had an appointment with Dr. P and she testified that at that meeting she and Dr. P discussed Dr. J's rating and both expressed there disagreement with the rating. Dr. P completed the bottom portion of Dr. J's TWCC-69 expressing his disagreement with both the certification of MMI and the assigned zero percent IR. In his office note from the March 29, 1999, visit, Dr. P stated that he did not believe that Dr. J had performed a "complete, adequate hand evaluation" and that the "zero percent disability is inappropriate." In a letter addressed to a Commission ombudsman, dated July 16, 1999, Dr. P stated that the claimant "specifically asked me to review this because she was concerned about the disability report given."

The claimant had the burden to prove that her compensable injury is a producing cause of the current problems with her neck and both upper extremities. Johnson v. Employers Reinsurance Corp., 351 S.W.2d 936 (Tex. Civ. App.-Texarkana 1961, no writ). That issue presented a question of fact for the hearing officer to resolve. The hearing

officer is the sole judge of the relevance and materiality of the evidence and of its weight and credibility. Section 410.165(a). The hearing officer resolves conflicts and inconsistencies in the evidence, decides what weight to give to the evidence, and determines what facts the evidence has established. Texas Employers Ins. Ass'n v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). To this end, the hearing officer as fact finder may believe all, part, or none of the testimony of any witness. When reviewing a hearing officer's decision we will reverse such decision only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and manifestly unjust. Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986); Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

The carrier argues that the hearing officer erred in finding that the claimant's compensable injury was a producing cause of her current bilateral wrist problems, bilateral elbow conditions, cervical spine facet syndrome, and myofascial pain syndrome. Specifically, the carrier argues that the hearing officer erred in failing to apply Section 406.031(b) to find that the claimant had her "last injurious exposure" to the hazards of her repetitive trauma injuries in the job she held after leaving her job with the employer where she sustained her _____ compensable injury. The carrier cites Texas Workers' Compensation Commission Appeal No. 960285, decided May 10, 1996, and contends the case necessitates that we reverse and render the challenged determination. We cannot agree that Appeal No. 960285 necessitates reversal in this case because, unlike in that case, the great weight and preponderance of the evidence did not establish that the claimant's last injurious exposure occurred in her subsequent employment. To the contrary, the hearing officer specifically determined that the claimant was not injuriously exposed to the hazards of repetitive trauma injuries in the jobs she held after January 1997. We have previously recognized that the "issue as to when the last injurious exposure occurred is a question of fact and to be injuriously exposed requires more than merely being employed in any job." Texas Workers' Compensation Commission Appeal No. 951949, decided December 29, 1995 (quoting Texas Workers' Compensation Commission Appeal No. 941358, decided November 23, 1994). In this instance, the hearing officer's determination that the claimant was not injuriously exposed to the hazards of her repetitive trauma injuries in the jobs she held following her data entry job was supported by the claimant's testimony and the evidence from Dr. W and Dr. P which indicated that her condition did not deteriorate and in fact improved somewhat after she left her job where she sustained her _____ compensable injury. In addition, both Dr. P and Dr. L opined that the claimant's ongoing problems were related to her _____ compensable injury and that she did not sustain a new injury. That evidence also supports the conclusion that the claimant was not injuriously exposed to the hazards of her repetitive trauma injuries in her employment after January 1997. As such, Appeal No. 960285 does not dictate reversal in this instance. Our review of the record does not reveal that the hearing officer's determination that the claimant's _____ compensable injury is a producing cause of the current problems with her wrists, her elbows, her neck, and the myofascial pain syndrome is so against the great weight of the evidence as to be clearly wrong or manifestly unjust. Accordingly, no sound basis exists for us to reverse that determination on appeal.

The hearing officer also determined that the first certification of MMI and IR did not become final because it was disputed by Dr. P within the 90-day dispute period. The TWCC-69 with Dr. P's dispute of Dr. J's certification of MMI and IR is date-stamped as having been received by the carrier on April 20, 1999. Thus, the question becomes one of whether Dr. P was acting on behalf of or with the involvement of the claimant in disputing Dr. J's certification. The claimant testified that when Dr. P learned of her appointment with Dr. J he advised her to make an appointment with him as soon as she received Dr. J's report; that she discussed Dr. J's certification with Dr. P at the March 29, 1999, appointment; that she and Dr. P disagreed with the certification; that she instructed Dr. P to dispute the rating; and that he acted on her behalf in doing so. In his July 16, 1999, letter, Dr. P stated that the claimant specifically asked him to review the IR because she disagreed with it and that he disagreed with it as well. On appeal, the carrier contends that there was no dispute until the July 16, 1999, letter where Dr. P indicated that he acted on behalf of the claimant and that that letter came more than 90 days after March 8, 1999, the date the claimant received written notice of Dr. J's certification of MMI and IR. We find no merit in the assertion that the fact that Dr. P memorialized the claimant's involvement in the decision to dispute the first certification of MMI and IR after the 90-day period expired defeats the effectiveness of that dispute, as a matter of law. Rather, the question of whether Dr. P was acting on behalf of the claimant in disputing Dr. J's certification presented a question of fact for the hearing officer. Texas Workers' Compensation Commission Appeal No. 992227, decided November 22, 1999; Texas Workers' Compensation Commission Appeal No. 990046, decided February 25, 1999.

As the fact finder the hearing officer has the responsibility to determine what facts the evidence has established. As an appeals body, we will not substitute our judgment for that of the hearing officer when the determination is not so against the overwhelming weight of the evidence as to be clearly wrong and unjust. Cain, *supra*; Pool, *supra*. The claimant's testimony and the evidence from Dr. P sufficiently support the hearing officer's determination that the first certification did not become final under Rule 130.5(e) because it was timely disputed by Dr. P, who was acting on behalf of, and with the involvement of, the claimant in disputing. Our review of the record does not demonstrate that the hearing officer's determination that the first certification did not become final because it was timely disputed is so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Accordingly, no sound basis exists for us to reverse that determination on appeal.

The hearing officer's decision and order are affirmed.

Elaine M. Chaney
Appeals Judge

CONCUR:

Tommy W. Lueders
Appeals Judge

Judy L. Stephens
Appeals Judge