APPEAL NO. 002404

Following a contested case hearing held on October 2, 2000, pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act), the hearing officer resolved the following disputed issues:

1. Did the claimant [appellant] sustain a compensable injury in the form of an occupational disease?

2. Did the claimant have disability resulting from a compensable occupational disease?

3. What is the date of injury?

4. Is the carrier [respondent] relieved of liability under Tex. Labor Code Ann. § 409.002 because of the claimant's failure to timely notify his employer pursuant to Tex. Labor Code Ann. §409.001?

On the limited issues before him, the hearing officer determined that the claimant did not sustain a compensable occupational disease and did not have disability resulting from the claimed occupational disease, that the date of injury for the claimed occupational disease was _____, and that the carrier is relieved of liability under Section 409.002 of the 1989 Act. The claimant has appealed the hearing officer's determination of each of the disputed issues, asserting that the hearing officer's determinations are against the great weight and preponderance of the evidence. The carrier responded that the hearing officer's decision is supported by the evidence and should be affirmed.

DECISION

Affirmed in part, reversed and rendered in part.

Evidence was adduced that the claimant underwent a preemployment physical on October 28, 1999, prior to beginning his employment with (employer). While lifting weighted boxes during the physical exam, the claimant experienced what has been described by the claimant alternately as pain in his lower back and, at the hearing, as pain in his mid-back. Four days after the preemployment physical, the claimant began work.

The claimant was a motorman on a drilling rig. The crew that the claimant was a part of worked rotations of 12-hour days per day, seven days on and seven days off. Despite the aforementioned schedule, the claimant's first rotation after beginning work for the employer was a 13-day rotation. At the end of the first rotation, the claimant was sufficiently concerned about his back that he scheduled an appointment with his family doctor. There is also evidence that the claimant continued to experience severe pain throughout his employment with the employer and complained to his coworkers about the continuing pain.

When the claimant went to see the doctor after his first rotation, he requested x-rays to determine what could be wrong with his back. The x-rays, taken on November 16, 1999, revealed mild dextroscoliosis of the lumbar spine, but were otherwise normal. The claimant was off a week, then returned to work and worked another seven-day rotation. At the end of the second rotation, the claimant's back was becoming progressively more painful and the claimant returned to his doctor, this time requesting an MRI. The MRI was performed on November 29, 1999. It revealed the existence of a minimal concentric annular bulge, left greater than right, at L5-S1 with minimal encroachment on the left lateral recess and fat containing hemangioma within the L1 vertebral body, but was otherwise normal.

The claimant obtained a copy of the MRI report and took the report to the employer on December 8, 1999. At that time, the claimant took the position that he had been injured while performing the weight test at the preemployment physical. After learning that the claimant had been injured, the employer sent the claimant home. The claimant has been off work since December 8, 1999, as a result of his low back injury.

The cause of the low back injury was the source of the dispute between the parties. The carrier initially disputed the claim, asserting that the claimant was not an employee of its insured at the time of the injury on _____. The claimant continued to assert that he had been injured in the course and scope of his employment while undergoing the preemployment physical until the parties appeared at a Benefit Review Conference (BRC) in January 2000.

After the BRC, the claimant retained counsel. The claimant testified that he visited with his attorney on _____, and at that visit first discovered that he could possibly assert that his injury was a repetitive trauma injury, not an injury arising from the preemployment physical on _____. On May 15, 2000, the claimant filed an Employee's Notice of Injury or Occupational Disease and Claim for Compensation (TWCC-41), asserting that he had sustained a back injury on _____, as a result of continued back strain. The TWCC-41 was signed by the claimant's attorney. On June 22, 2000, an amended TWCC-41 was prepared and signed by the attorney, alleging that the claimant had sustained a back injury as a result of bending, reaching, and lifting. The date of injury on the amended TWCC-41 was December 3, 1999.

At the hearing and on appeal the claimant asserts that the medical evidence can only support one theory, that he sustained a repetitive trauma injury to his low back as a result of his work activities between November 2, 1999, and November 16, 1999. In support of that contention on appeal, the claimant asserts that he was confused about the difference between "soreness" in his back after the preemployment physical and the "injury" caused by the heavy work in the weeks following the preemployment physical. The claimant asserts on appeal that the hearing officer erred by not accepting the conclusion of Dr. M, a chiropractor, who the claimant first saw on May 19, 2000, that there was no injury on _____, and that the claimant's L5-S1 disc was injured as a result of

repetitive trauma while working for the employer between November 2, 1999, and November 29, 1999 (the date of the MRI).

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). While a claimant's testimony alone may be sufficient to prove an injury, the testimony of a claimant is not conclusive but only raises a factual issue for the trier of fact. Texas Workers' Compensation Commission Appeal No. 91065, decided December 16, 1991. The trier of fact may believe all, part, or none of any witness's testimony. 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. This is equally true regarding medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). Although the claimant testified that he had only some transitory soreness in his mid-back after the preemployment physical and that the low back pain began only after working for the employer for 10 days, there was evidence adduced by the carrier in the form of statements from the claimant's supervisor and coworkers to the contrary.

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). The hearing officer could find from the evidence presented that the claimant did not sustain a repetitive trauma injury while working for the employer. A finding of disability cannot be made without the finding of a compensable injury. Since the hearing officer found that the claimant did not sustain an occupational disease injury, we find no error in the conclusion that there was no disability arising from the alleged occupational disease. Only were we to conclude, which we do not in this case, that the hearing officer's determinations were so against the great weight and preponderance of the evidence as to be manifestly unjust would there be a sound basis to disturb those determinations. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951); Pool v. Ford Motor Company, 715 S.W.2d 629, 635 (Tex. 1986). Since we find the evidence sufficient to support the determinations of the hearing officer, we will not substitute our judgement for his. Texas Workers' Compensation Commission Appeal No. 94044, decided February 17, 1994.

The hearing officer also determined that the claimant had not given timely notice of the alleged occupational disease injury to his employer and that the date of the alleged occupational disease was _____. Since timely notice is intimately tied to the date of an injury, the hearing officer's determination of the date of injury will be discussed first.

We find that the hearing officer erred in finding that the date of the alleged occupational disease was _____, the date on which the claimant's attorney advised him that such a theory of recovery existed. The date of an occupational disease is the date an injured employee knew or should have known that an injury may be related to his employment. *See* Section 408.007 of the 1989 Act. It is uncontroverted that the claimant believed that he may have sustained a back injury well before the date he first saw a doctor, _____. While the claimant may not have believed that the injury was caused by repetitive trauma, the test is not whether an injured employee believes that he has sustained a specific type of injury in the course and scope of his employment, nor even that he know either the diagnosis of the injury nor the mechanics of the injury. It is enough that the employee knows, or should know, that he has an injury which may be related to his employment. The hearing officer's determination that the claimant knew or should have known that he had an occupational disease which might be related to his employment only on _____, when his attorney advised him of this possible theory of recovery is clearly wrong and is so against the great weight of the evidence as to be manifestly unjust. We hold that the claimant knew, or should have known, that he had an injury which might be related to his employment on _____.

On the issue of timely notice, the claimant asserts that he gave timely notice of an injury to his employer by giving notice that he was asserting an injury arising out of the preemployment physical. The claimant asserts that notice of the specific injury is notice of the repetitive trauma injury because the claimant took the MRI results to his employer. We note that the MRI report does not attempt to state the cause of the injury, just that the claimant had injured his back four weeks before the MRI and that the claimant had low back pain and left leg pain. It is undisputed that on December 7, 1999, the claimant notified his employer that he believed that he had sustained a work-related injury. It is noted that only one injury is involved in this matter, despite the fact that the theory of recovery advanced by the claimant evolved over a period of time. In light of our holding that the date of injury for the alleged repetitive trauma injury is _____, the claimant's December 7, 1999, notice to his employer that he believed that he had sustained a work-related injury constitutes timely notice. The hearing officer's determination that the claimant failed to give notice of a work-related injury to the employer within 30 days of the date of the injury is against the great weight and preponderance of the evidence.

We reverse the hearing officer's determination that the date of the alleged repetitive trauma injury is _____, and render a new decision that the date of injury for the claimed occupational disease is _____. We also reverse the hearing officer's determination that the claimant failed to give timely notice of the alleged injury to the employer. We affirm the hearing officer's determinations that the claimant did not sustain a compensable occupational disease, and that the claimant did not have disability resulting from the occupational disease. Since we affirm the determination that the claimant did not

sustain a compensable occupational disease and did not have disability, we affirm the hearing officer's order that the carrier is not liable for the payment of benefits.

Kenneth A. Huchton
Appeals Judge

CONCUR:

Kathleen C. Decker
Appeals Judge

Thomas A. Knapp
Appeals Judge