

APPEAL NO. 011302
FILED JULY 13, 2001

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 May 9, 2001. With respect to the issues before her, the hearing officer determined that the appellant/cross-respondent (claimant) sustained an occupational disease, bilateral vocal nodules, in the course and scope of her employment; that the date of injury is _____; that the respondent/cross-appellant (carrier) is relieved of liability pursuant to Section 409.002 because the claimant did not timely report her injury to her employer in accordance with Section 409.001; and that the claimant did not have disability because she did not sustain a compensable injury. In her appeal, the claimant asserts error in the determinations that the date of injury in _____; that she did not timely report her injury to her employer and, thus the carrier is relieved of liability; and that she did not have disability because she did not sustain a compensable injury. In its response to the claimant's appeal, the carrier urges affirmance. In its cross-appeal, the carrier asserts error in the hearing officer's determination that the claimant sustained an occupational disease injury in the course and scope of her employment. The appeals file does not contain a response to the cross-appeal from the claimant.

DECISION

Affirmed in part and reversed and rendered in part.

Initially, we will consider the carrier's assertion that the hearing officer erred in determining that the claimant sustained an occupational disease injury, bilateral vocal nodules, in the course and scope of her employment as a music director for a church. The claimant testified as to the nature and duration of the vocal activities required for her to perform her job as a music director. She stated that she worked 40 to 70 hours per week depending on what special events were planned at the church and estimated that she spent 70% or more of her time at work using her voice to sing, rehearse, instruct, and talk. In addition, the medical evidence all supports the causal connection between the claimant's development of vocal cord nodules and over use and misuse of her voice at work. Specifically, Dr. R, an ear, nose, and throat specialist, attributed the claimant's vocal nodules to "daily overuse of her voice" at work. Dr. B stated that "[b]ased on the patient's history and my examination these nodules are likely caused by a combination of her vocal misuse and her vocal strain associated with her job." Finally, Dr. W, the carrier's required medical examination doctor, stated that the claimant "has a history that is compatible with overuse of the voice and possibly incorrect use of the voice that is contributing to her recurrent hoarseness." The claimant's testimony and the medical evidence provide sufficient evidentiary support for the hearing officer's determination that the claimant sustained an occupational disease injury in the course and scope of her employment. Nothing in our review of the record reveals that the hearing officer's determination in that regard is so against the great weight of the evidence as to be clearly wrong or manifestly unjust; therefore, no sound basis exists for us to reverse the challenged determination on appeal. 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 claimant's challenge to the date of injury and timely notice determinations will be considered together. The hearing officer determined that the date of injury of the claimant's occupational disease under Section 408.007, the date the claimant knew or should have known that the disease may be work related, is the date of the claimant's first visit with Dr. R, which the hearing officer determined was December 8, 1999. The carrier had urged an earlier date of injury at the hearing; however, it did not continue to pursue that argument on appeal. Thus, the only challenge to the date-of-injury determination on appeal, is whether the date of the claimant's first visit with Dr. R was December 8, 1999, or December 20, 1999. The claimant testified that her first appointment with Dr. R was on December 20, 1999, and her references to the date of that visit in the documentary evidence she submitted also consistently identify December 20, 1999, as the date of the initial appointment with Dr. R. The progress notes from Dr. R are purportedly dated December 8, 1999. In those notes Dr. R diagnoses voice nodules and has a plan of prescribing Humibid and Prevacid and referring the claimant for voice retraining. The prescription for the Humibid and Prevacid is dated December 20, 1999. On February 9, 2000, Dr. R completed a letter of medical necessity for the voice retraining. In that letter, Dr. R states that he saw the claimant for waxing and waning hoarseness on December 20, 1999. Thus, although the progress notes from Dr. R appear to be dated December 8, 1999, we note that the balance of the other evidence in the record indicates that the actual date of that visit was December 20, 1999. It defies logic to suggest that a doctor would decide to prescribe medication at a December 8, 1999, appointment and not write the prescription for that medication until December 20, 1999. In addition, in his February 9, 2000, letter, Dr. R notes that he began seeing the claimant on December 20, 1999. When those factors are considered in conjunction with the consistency in the evidence from the claimant that the first appointment was on December 20, 1999, we believe that the hearing officer's determination that the date of that appointment, and the date of injury is December 8, 1999, is so against the great weight of the evidence as to be clearly wrong or manifestly unjust. *Pool, supra; Cain, supra*. As such, we reverse the determination that the date of injury is December 8, 1999, and render a new decision that the date of injury is December 20, 1999. Having rendered a new decision that the date of injury is December 20, 1999, we likewise reverse the determination that the carrier is relieved from liability pursuant to Section 409.002 because the claimant's January 13, 2000, reporting was made within the required 30-day period established for reporting the injury in Section 409.001. A new decision is rendered that the claimant timely reported her injury to her employer and that the carrier is not relieved of liability in this case.

Lastly, we consider the claimant's challenge to Finding of Fact No. 8 and Conclusion of Law No. 5 concerning disability. In Finding of Fact No. 8, the hearing officer states that the claimant was not unable to obtain and retain employment equivalent to her preinjury wage from January 1 to March 31, 2000. This finding is based upon the hearing officer's determination that the claimant "was kept on the payroll and received three months salary after she left on December 31, 1999." The claimant testified that the church paid her \$5,200.00, two months salary, after she left. There is a document in evidence entitled a "Personnel Agreement" between the claimant and the church which states that "[i]n appreciation of service in the interim period during the search for a full time Director of Music," the church will pay the claimant two month's salary. That document is signed by

the claimant; however, she has crossed out two months and written in three months and initialed that change. The hearing officer resolved the conflict in the evidence by determining that the claimant was paid three months salary December 31, 1999, and as the fact finder she was free to do so. The hearing officer appears to have applied Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 129.2 (Rule 129.2) and determined that the claimant's post-injury earnings for those months equaled her average weekly wage. Thus, she further determined that the claimant did not have disability because she did not have any lost wages for that period. Our review of the record does not demonstrate that the hearing officer erred in applying Rule 129.2 and in finding that the claimant did not have disability from January 1 to March 31, 2000. In Finding of Fact No. 9, which was not appealed, the hearing officer determined that the claimant was unable to obtain and retain employment as a result of her injury from April 1 to May 8, 2000. Thus, we reverse the legal conclusion that the claimant did not have disability and render a new decision that she had disability from April 1 to May 8, 2000.

The hearing officer's injury determination is affirmed. Her date-of-injury, notice and disability determinations, are reversed and a new decision rendered that the date of injury is _____; that the claimant timely reported her injury to her employer and, thus, the carrier is not relieved of liability; and that the claimant had disability from April 1 to May 8, 2000, as a result of her compensable injury. Accrued and unpaid benefits, if any, are to be paid in a lump sum with interest.

Elaine M. Chaney
Appeals Judge

CONCUR:

Judy L. S. Barnes
Appeals Judge

Gary L. Kilgore
Appeals Judge