APPEAL NO. 950192

This appeal is brought pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). On December 6, 1994, a contested case hearing was held in (city), Texas, (hearing officer) presiding. The issues were:

1) what is the date of injury pursuant to **TEX. LABOR CODE ANN.** Sec. 408.007, the date the employee knew or should have known the disease was work-related; 2) is the claimant barred from pursing [sic] Texas Workers' Compensation benefits because of an election to receive benefits under a group health insurance policy; 3) did the claimant notify her employer of a work-related injury on or before the 30th day after the date of injury and, if not, does she have good cause for failing to notify timely; and 4) is the claimant's one year filing requirement under **TEX. LABOR CODE ANN.** Sec. 409.003 extended by the employer's or carrier's failure to file a written report of the injury when the employer or the carrier had been given notice or had actual notice of the injury?

The hearing officer determined that the respondent, claimant, sustained a compensable right carpal tunnel syndrome (CTS) injury on or about (date of injury), which is the date she knew or should have known her condition was work related; that claimant did not report her compensable injury to the employer until July 21, 1993, but that she had good cause for the late reporting; that the one year deadline for the claimant to file a claim with the Texas Workers' Compensation Commission (Commission) is extended to December 13, 1994, since neither the employer nor the carrier filed a TWCC-1 form after receiving notice of the claimant's injury before December 13, 1993, and that claimant did not make an informed election to receive group health insurance benefits for this injury.

Appellant, carrier, appeals eight of the hearing officer's 10 factual determinations and four of six conclusions of law both as to factual sufficiency and erroneous application of the law. Carrier requests that we reverse the hearing officer's decision and render a decision in its favor. Claimant did not file a response.

DECISION

Affirmed.

It is undisputed that claimant suffered from Bell's palsy, diabetes and other medical conditions requiring treatment by (Dr. R) for a number of years. Claimant testified, in response to the ombudsman's questions, that she "sometimes (has) problems in understanding questions" and in making herself understood. This testimony is supported by claimant's supervisor, (Mr. SM), who testified that "It requires extra time" to communicate with claimant, that claimant gets "upset rather quickly," that "she would cry" and that when he sent claimant to the nurse's office "[w]e've had people walk with her

because we were concerned about her being able to get down there to the office." We also find claimant's testimony confusing, contradictory and vague with obvious problems "understanding questions" and communicating responsively.

At the time of the injury claimant had been employed by (employer), employer, for fourteen years or so, working on an assembly line, assembling and packaging pacemakers. Claimant contends, and it is largely uncontradicted, that her job involved repetitive hand movements. Claimant had been seeing Dr. R for other problems and testified that she first became aware that her hand, wrist and arm problems might be work related in (month year), and more specifically on (date of injury), when (Dr. M) did some "electrical tests" on her. Dr. R, at some point apparently in the summer of 1992, referred claimant to Dr. M for Bell's palsy symptoms and complaints of pain and swelling in the right arm. Dr. M performed nerve conduction studies and tentatively diagnosed CTS. Claimant continued to obtain treatment from Dr. R and Dr. M into 1993. Payment for medical care of her Bell's palsy and CTS was apparently made by claimant's group health insurance. In a September 22, 1992, report Dr. M stated that he thought claimant ". . . is probably going to require surgical intervention for her [CTS]" but in a December 1, 1992, report Dr. M stated "I am becoming more optimistic that we will be able to get her [CTS] problems under control without surgery." Claimant testified that Dr. R told her on July 21, 1993, that she would have to have surgery for her CTS and that she then reported the injury to her employer.

Regarding documentary evidence, we note that carrier introduced some 100± pages of largely handwritten personnel records and notes into evidence without specifying which or how those records pertain to the issues. We do not find that particularly helpful in our review of the case. Dr. R's records include handwritten progress notes dating back to 1987. A June 22, 1992, note refers to complaints of facial paralysis and Bell's palsy, a September 14, 1992, note indicates complaints of right forearm swelling, pain in the shoulder and neck and a reference that claimant is being seen by Dr. M. A February 22, 1993, note lists complaints of "tingling sensation [right] hand, fingers. . . ." The first specific mention of CTS we find in Dr. R's progress notes is in a note dated July 13, 1993, which states "c/o - consult re: surgery for carpal tunnel - ." Dr. M's typed records include notation of an office visit of July 24, 1992, where claimant complained of pain in her right hand and forearm, fingers, and "also in the wrists." Dr. M's impression was "1) Bell's palsy, 2) The patient's arm complaints seem to be evolving into a moderately typical carpal tunnel picture. I will set her up for nerve conduction studies."[1] A note of August 7, 1992, gives Dr. M's impression of "1) Bell's palsy, resolving. 2) [CTS]." An August 25, 1992, report expands on Dr. M's findings. Subsequent reports simply say "Continue current treatment of the [CTS]." Dr. R in an October 15, 1993, report comments on causation as follows:

[1] This note would indicate that as of July 24, 1992, Dr. M was not yet sure claimant had CTS.

This problem [referring to CTS] is considered to be caused and aggravated by repetitive movement. In her occupation [claimant] does have to continually be doing the same wrist movements repeatedly . . . is due to this repetitive type movement on her job. . . .

After claimant reported her injury to the employer on July 21, 1993, the employer completed an Employer's First Report of Injury (TWCC-1) dated August 3, 1993, which was apparently received by carrier on August 5th. There was no evidence (and carrier does not even allege) the TWCC-1 was ever filed with the Commission. Carrier on a Notice of Refused/Disputed Claim (TWCC-21) dated September 28, 1993, apparently filed with the Commission on October 5, 1993, denied the claim because:

1.Election of Remedies; Claimant has been receiving treatment for years and submitting thru group ins.

2.Claimant never reported this claim to the insured. Claimant did not report claim within 30 days or one year per Article 8307, Sec. 4A.

The hearing officer's challenged determinations are:

FINDINGS OF FACT

3.On and before (date of injury), the claimant worked as a mechanical assembler for [employer], who manufactures pacemakers. Her duties have included assembling and packaging pacemakers, which required the claimant to use repetitive hand movement. As a result of this repetitive hand movement, the claimant became afflicted with CTS in her right arm.

4.The date the claimant knew or should have known that her right CTS was work-related was (date of injury), which is when her doctor [Dr. M] diagnosed her with CTS on the basis of nerve conduction studies.

5.The claimant continued to obtain treatment for her CTS from [Dr. M] and [Dr. R] into 1993. In December 1992, [Dr. M] was optimistic that the claimant's CTS could be managed conservatively. At sometime around July 21, 1993, however, the claimant learned from [Dr. R] that she would need surgery for her CTS.

6.The claimant reported her work-related CTS injury to [employer] on July 21, 1993 once she learned the condition was serious enough to warrant surgical intervention.

7.The claimant acted like an ordinarily prudent person under the same or similar circumstances in not reporting her CTS injury to her employer until July 21, 1993 since prior to July 21, 1993, the claimant did not think the injury was serious.

8.After [employer] received notification of the claimant's CTS injury, it reported the injury to [carrier] on August 5, 1993. Prior to December 13, 1993, neither [employer] nor [carrier] had filed a TWCC-1 form with the [Commission] regarding the claimant's CTS injury. On December 13, 1993, a TWCC-1 form was given to the Benefit Review Officer at a Benefit Review Conference in this case.

9.The claimant filed a claim for compensation with the [Commission] in this case on November 21, 1994.

10.The evidence is insufficient to establish that the claimant made a knowing and informed decision to pursue group health insurance benefits instead of workers' compensation insurance benefits for her CTS injury.

CONCLUSIONS OF LAW

3.On or about (date of injury), the claimant sustained a compensable right CTS (occupational disease) injury while in the course and scope of her employment with [employer].

4.The claimant had good cause for not reporting her compensable injury to [employer] until July 21, 1993.

5.The one year filing requirement under TEX. LABOR CODE ANN. Sec. 409.003 was extended until at least December 13, 1994 since neither the employer nor the carrier had filed with the [Commission] prior to December 13, 1993 a TWCC-1 form after receipt of notification of the claimant's injury.

6.The claimant is not barred from pursing [sic] benefits under the Act since she did not make an informed election to, instead, receive group health insurance benefits.

Carrier argues that "claimant's testimony in this matter is replete with inconsistencies in light of the medical records. Furthermore, the claimant would change her testimony depending upon the examiner." We agree, but we point out that it is the hearing officer who is the sole judge of the credibility and weight to be given to the

evidence. Section 410.165(a). Whether claimant was trying to be deceptive or was only honestly confused and did not understand the questions or was unable to give accurate answers were matters for the hearing officer to resolve. It is the hearing officer that resolves inconsistencies and conflicts in the evidence, Garza v. Commercial Insurance Co. of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ), and the hearing officer may believe all, part, or none of the testimony of any witness. Taylor v. Lewis, 553 S.W.2d 153 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.); Aetna Insurance Co. v. English, 204 S.W.2d 850 (Tex. Civ. App.-Fort Worth 1947, no writ). In this case, the hearing officer determined that claimant knew or should have known that her CTS was work related after Dr. M conducted his studies and diagnosed CTS on (date of injury). The hearing officer found claimant continued treatment (facts which are supported by claimant's testimony and Drs. R's and M's reports). Although at one point Dr. M thought surgery might be necessary there was no evidence this was communicated to the claimant or that the claimant understood what Dr. M meant. Later Dr. M (in December 1992) thought the CTS could be managed conservatively. Even carrier's witness admits that it takes "extra time" to communicate with claimant. How much the claimant knew or understood from (date of injury), to July 21, 1993, was a matter for the hearing officer's determination and we find her determinations to be supported by the circumstances (claimant requires extra time and effort for communication), claimant's testimony and the medical records.

We do not disagree with the carrier's analysis of what constitutes good cause citing Texas Workers' Compensation Commission Appeal No. 94050, decided February 25, 1994, and Farmland Mutual Insurance Company v. Alvarez, 803 S.W.2d 841, 843 (Tex. App.-Corpus Christi, 1991, no writ). Where we disagree with carrier is the statement that "We know that the claimant was informed of the possible need for surgery in September of 1992." As previously indicated, Dr. M did make reference in a September 22, 1992, note that claimant "is probably going to require surgery" but there is no evidence or testimony that this was discussed with the claimant or that the "extra time" was taken to explain the seriousness of the condition with claimant. Carrier merely draws a conclusion that "claimant was informed in September 1992 of the possibility of surgery" with no evidence she knew of or understood the doctor's progress note. We find the hearing officer's determinations on this point supported by sufficient evidence.

Carrier objects to the hearing officer's finding and conclusion that the one year filing requirement under Section 409.003 was extended until at least December 13, 1993, since neither the employer nor carrier had filed a TWCC-1 form after receipt of notification of the claimant's injury on July 21, 1993. Carrier points out, and we agree, that carrier had filed a TWCC-21 form with the Commission on October 5, 1993. Interestingly enough the carrier only states "an Employer's First Report of Injury (the TWCC-1) [was] completed on August 3, 1993." As we have previously indicated there was no evidence that the TWCC-1 was filed with the Commission prior to December 13, 1993. In fact we note that this issue was not specifically litigated at the CCH and only passing reference was made

to it. Carrier argues that there was no requirement to file a TWCC-1 because "There was no evidence introduced . . . that the claimant missed any time from work as a result of her alleged on-the-job injury before December 13, 1993." We disagree and interpret claimant's testimony that she did miss an occasional day or so, that there are doctor's release to work slips dated July, August, and December 1992, indicating claimant missed some time from work (albeit in 1992) before realizing the seriousness of her injury. Further we note that Section 409.005(a)(2) requires an employer to file a TWCC-1 with the Commission if "an employee of the employer notifies the employer of an occupational disease. . . ." regardless of whether claimant had missed at least one day of work. Clearly claimant was claiming an occupational disease and equally clearly neither the employer nor carrier had filed a TWCC-1 with the Commission. Nor do we read Texas Workers' Compensation Commission Appeal No. 93611, decided August 25, 1993, as saying that filing a TWCC-21 precludes or substitutes for filing a TWCC-1. In any event there was very little evidence regarding how much, if any, time was missed from work between July 21 and December 1993. Carrier's TWCC-21 merely recites that claimant has been receiving treatment for years and "submitting thru group ins." Mr. SM, claimant's supervisor, acknowledged that he sent claimant to the nurse's station for complaints of weakness and dizziness but said he thought that was due to the Bell's palsy and denies discussing claimant's CTS with her. The hearing officer was free to believe that testimony or believe that claimant had discussed CTS with Mr. SM after July 1993 and that was the reason claimant was sent to the nurse's station. We find that clearly, by carrier's own inferences, the hearing officer's determination that carrier had not filed a TWCC-1 to be supported by the evidence. Whether claimant did not lose time from work is unclear from the evidence presented but regardless the employer was required to file a TWCC-1 within eight days after receiving notice of the occupational disease claim. We are unwilling to say that the great weight and preponderance of the evidence is contrary to the hearing officer's determinations on this point.

Upon review of the record submitted, we find no reversible error and we will not disturb the hearing officer's determinations unless they are so against the great weight and preponderance of the evidence as to be manifestly unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). We do not so find and consequently the decision and order of the hearing officer are affirmed.

Thomas A. Knapp
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Lynda H. Nesenholtz
Appeals Judge