APPEAL NO. 950231

This appeal is considered in accordance with the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held in (city), Texas, on December 12, 1994, before (hearing officer), hearing officer. The appellant (claimant), who is the claimant, worked for over 21 years for (employer), and she contended that she injured her back through repetitive trauma on the job. At issue were whether such an injury occurred, the date of injury (the date that she knew, or should have known, that she had an injury that may be related to her employment), whether she timely notified her employer within 30 days after the date of injury, and, if not, whether she had good cause, whether she had disability, and her correct average weekly wage (AWW). The parties resolved the AWW issue by stipulation at the hearing.

The hearing officer determined that claimant had not proven that she sustained a work-related repetitive trauma injury; that the date she knew, or should have known, that she may have a work-related condition was (date of injury); that she did not timely report her injury to her employer within 30 days after this date, and did not demonstrate good cause for her failure to do so; and that she did not have disability from a compensable injury.

The claimant has appealed the hearing officer's decision. To some extent, evidence that was not brought forward during the hearing is argued in the appeal. Claimant maintains that she did not know her condition could be job related until her treating doctor arrived at that opinion sometime in April 1994, and that she promptly gave notice to her employer soon after that. The findings of fact she appeals are those underlying the conclusions that she failed to prove a compensable injury, timely notice, date of injury, and disability. She argues that the issue of good cause does not arise because she gave timely notice. Claimant asks that the decision be reversed as being against the great weight and preponderance of the evidence. The carrier responds by asking that new evidence be ignored. The carrier points out that claimant's back problems were long-standing and degenerative, and not caused or aggravated by work-related activities. Carrier points out medical evidence throughout the record that determines claimant's condition as not work related.

DECISION

We affirm the hearing officer's decision and order.

Our review is directed at the record developed in the CCH. Section 410.203(a). Claimant worked for over 21 years for the employer; her duties at the time of her contended injury were those of a palletizer operator. There was not extensive testimony concerning claimant's day-to-day work duties. She generally stated that her job required her to operate a machine which would stack cans onto pallets, which could be as high as 21 layers. She stated that a "picture frame", which could weigh 30-35 pounds, would be placed on top of the stack, and that "bringing it around" involved a twisting motion. She stated that when there were problems that she would "sometimes" have to pull or lift pallets into the right

position. Claimant had been laid off prior to her contended date of injury for a period from November 18, 1993, through January 5, 1994. She returned to work, on a schedule that encompassed four twelve hours days in a row, with the next four days off from work. Claimant said she began to have back pain that tended to bother her after her four working days but resolved over her four days off. According to claimant, by February 28, 1994, the pain was bad enough for her to seek medical assistance. Claimant saw (Dr. F) on (date of injury) (her third "off" day in her work cycle).

Dr. F's letter report of that date indicated that claimant, who was 48 years old, had back pain on and off for many years, which had gotten worse during the past three or four months, and that she worked at a job which required a lot of bending, stooping, and lifting. X-rays of that date were reported to show some degenerative changes. Dr. F took her off work for four days, and recommended electromyographic studies. On March 17, 1994, Dr. F examined claimant again, noted that she was markedly overweight, and recommended she have an MRI. On March 24, 1994, a MRI report found mild spondylosis in the thoracic level, and mild disc bulge at L4-5. The recorded impressions of this test were mild degenerative disease and bilateral facet osteoarthritis. Dr. F, on April 4, 1994, ordered a bone scan which was normal.

Claimant testified that it was not until April 10, 1994, that Dr. F told her he felt her condition was work related, and that she reported this on April 15, 1994, to the person in charge of insurance claims. Claimant said she had not worked since February 28th. The first written statement by Dr. F relating to claimant's work activities as a factor is a brief note "To Whom It May Concern" dated September 12, 1994:

> [Claimant] has been followed in this office for mechanical low back pain. The type of job which [claimant] has done for 21 years requires bending, stooping, twisting, lifting frames. This type of repetitive motion is consistent with the cause of her present back problems.

A medical report of the same date repeats this assessment. Dr. F's reports before this date do not comment on any work-related aspect. It appears from Dr. F's notes that claimant's treatment consisted primarily of pain relief measures and therapy.

Claimant applied for disability insurance coverage through her employer. On August 23, 1994, (Dr. H), a doctor for disability insurance carrier, examined claimant and reported that her symptoms began in August 1993, and that this was not a workers' compensation injury. Dr. H detailed claimant's treatment and conditions, and stated that she could not return to her previous occupation, which would be classified as heavy duty work. Claimant testified to her understanding that disability insurance benefits would not be due for work-related injuries. Claimant was still receiving such benefits on the date of the CCH. The record contains a disability claim form that was completed on March 17, 1994. On this form, Dr. F checked that her condition did not arise out of her employment.

There is sufficient evidence to support the hearing officer's decision that claimant did not prove a repetitive trauma injury. The burden is on the claimant to prove that an injury occurred within the course and scope of employment. Texas Employers Insurance Ass'n v. Page, 553 S.W.2d 98 (Tex. 1977). Although claimant argues in her appeal that she gave credible evidence of her work activities, we note that there is in fact very little testimony to shed light on what went on, day to day, in claimant's job that could be considered a repetitive trauma. We have stated before that, at a minimum, a claim of injury by repetitive motion should be supported by evidence of the extent and nature of work performed, and some description of the alleged repetitive traumas that would affect that worker in a way not common to the general population. *See* Texas Workers' Compensation Commission Appeal No. 950202, decided March 23, 1995; Texas Workers' Compensation Commission Appeal No. 92272, decided August 6, 1992. Although claimant's medical records refer, generally, to stooping, bending, and lifting, claimant indicated in her testimony that most of her long work day was spent operating her machine. There was medical evidence that claimant's condition was attributable to things such as the aging process or her weight, more in the nature of ordinary disease of life than repetitive trauma. It was for the hearing officer, as trier of fact, to resolve the inconsistencies and conflicts in the evidence. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701, 702 (Tex. Civ. App.-Amarillo 1974, no writ).

Section 401.011 (16) defines "disability" as: ". . . the inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage." Because there was no compensable injury established, one of the underpinnings of the definition of disability is not present.

Regarding the findings and conclusions as to the date of injury and timely notice to the employer, we cannot say that the hearing officer's findings are against the great weight and preponderance of the evidence. Dr. F's (date of injury), report of his initial examination indicates that claimant's work activities were a topic of discussion at that time. He reported that claimant described that she did a lot of lifting, bending, and stooping. The hearing officer evidently believed that this was evidence that claimant felt her back condition was related to her work. Section 408.007 states that the date of injury for an occupational disease (which includes a repetitive trauma injury) is "the date on which the employee knew or should have known that the disease may be related to the employment." This will not, in every case, mean the date on which a concrete diagnosis is rendered, (which claimant asserted was April 10, 1994). There is sufficient evidence to support the hearing officer's (date of injury), date of injury holding. As notice was not given within 30 days after this date, it would not be timely in accordance with Section 409.001(a)(2). Because it was claimant's position that she gave timely notice, and not that she had good cause for untimely notice, there was not much testimony going to good cause; based upon the record, the hearing officer's decision is not against the great weight and preponderance of the evidence.

The decision of the hearing officer will be set aside only if the evidence supporting the hearing officer's determination is so weak or against the overwhelming weight of the

evidence as to be clearly wrong or manifestly unjust. Atlantic Mutual Insurance Co. v. Middleman, 661 S.W.2d 182 (Tex. App.-San Antonio 1983, writ ref'd n.r.e.). That is not the case here, and the record sufficiently supports the hearing officer's decision and order, which we affirm.

Susan M. Kelley
Appeals Judge

CONCUR:

Philip F. O'Neill
Appeals Judge

Thomas A. Knapp
Appeals Judge