APPEAL NO. 950362

In Texas Workers' Compensation Commission Appeal No. 941484, decided December 16, 1994, the Appeals Panel affirmed that part of the decision and order of the hearing officer that the respondent (claimant herein) sustained a compensable repetitive trauma back injury and that she had disability as a result of that injury. We reversed and remanded that portion of the decision and order which determined that the date of injury was (date of injury), and that the claimant timely reported the injury on (date), for further consideration of these issues based on the evidence presented and any other evidence that may be developed.

On remand, (hearing officer), the hearing officer, conducted a further hearing and found that the claimant's date of injury was (date of injury), and that she timely gave notice of this injury on (date). The appellant (carrier herein) seeks review of the of the determination of the date of injury arguing that it is erroneous as a matter of law and not based on sufficient evidence. No response was received from the claimant.

DECISION

We affirm.

The evidence in this case was extensively discussed in our earlier decision and we will only supplement that account as necessary from the evidence introduced at the rehearing.

It was not disputed at the rehearing that the claimant's notice of injury for purposes of Sections 409.001 and 409.002 was (date). The critical question for this appeal is what was the date of the claimant's repetitive trauma injury. See our discussion of this issue in Appeal No. 941484, *supra*.

At the rehearing, the claimant took the position and testified that she did not know that her repetitive trauma back injury was work related until (Dr. A) so advised her on (date of injury), and gave her a two week light duty excuse. She said that at this appointment, Dr. A asked her what kind of work she did. She said she told him it included lifting 40 pound boxes and at this point he related her injury (lumbar herniation) to her job. The claimant also testified that she suffered from diabetes since 1982, which became worse in 1992 and 1993, as well as from high blood pressure. She said the diabetes affected her whole body and caused general pain. For this reason, she said, she may have suspected a possible connection between her back injury and her work, but all she knew was that she had pain, and did not know the source. When confronted with the statement in a report of an emergency room (ER) visit on April 28, 1994, that described her complaint of a "slowly progressing backache" as "may have been related to stacking `lids' in tray at work" she denied ever saying this to the ER personnel and insisted that no medical person at this visit or several appointments (recounted in Appeal No. 941484, *supra*) ever asked her about the cause of her pain, but only where she worked and where it hurt. She also testified that in

connection with the payment of medical bills she was never asked if she was contending that her condition was work related.

Based on the evidence presented at the initial hearing and the rehearing, the hearing officer concluded that the claimant was confused and had no idea what the date of her injury was. He therefore applied a reasonable person test and concluded that the claimant should not have known that her back condition may have been work related until (date of injury). Thus, he found her notice timely.

In its appeal, the carrier argues that the hearing officer erred in applying the "should have known" standard because this test applies only "if there is no evidence that the Claimant knew that her occupational disease may be related to employment." Carrier then posits that the only possible interpretation of the evidence in this case was that the claimant actually knew her back injury may be work related as early as the Fall of 1993 and no later than the ER visit of April 28, 1994. We disagree insofar as the carrier is suggesting that Section 408.007 sets up sequential tests for date of injury for an occupational disease and that the "should have known" test is used only in the absence of actual knowledge. This section provides that ". . . the date of injury for an occupational disease is the date on which the employee knew or should have known that the disease may be related to the employment."It establishes two separate ways of establishing the date of injury. Both tests are applied and the one that results in the earlier date becomes the date of injury. For this reason, we find no fault in the hearing officer using the "should have known" test. In this case, based on his evaluation of the evidence, the hearing officer found as fact that the claimant did not know her date of injury (in his words, "understand or appreciate the origins of her pain or realize that she may have sustained a work related injury.") He therefor looked to the "should have known test and found the date of injury to be (date of injury).

The carrier also argues on appeal that the hearing officer's finding that the claimant did not know her injury may be work related is so against the great weight and preponderance of the evidence as to be clearly erroneous, and points to the statement in the April 28, 1994, ER report and the claimant's testimony to support a conclusion that she was well aware of the possible connection between her back pain and her work. Certainly another fact finder may have been more skeptical of the claimant's comment that no health care provider before (date of injury), ever asked her what she thought the cause of her pain was and less willing to believe that information in the ER report which goes so far as to describe an essential part of the claimant's job, and which was made contemporaneously with the visit to the ER, came from some source other than the claimant. However, the hearing officer is the sole judge of the relevance and materiality of the evidence and of its weight and credibility. Section 410.165. To this end, the hearing officer as fact finder may believe all, part or none of the testimony of any witness, including that of the claimant. An appeals level body is not a fact finder, and does not normally pass upon the credibility of witnesses or substitute its own judgment for that of the trier of fact, even if the evidence would 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 observed the demeanor of the claimant as she testified and judged the inherent plausibility of her testimony, including her surmise that her diabetes may have induced her not to associate her back injury with her job, and the other evidence. He found her credible. Given our standard of review, we are unwilling to conclude that his decision is supported by no evidence, or is so against the great weight of the evidence as to be clearly erroneous.

The decision and order of the hearing officer are affirmed.

Alan C. Ernst
Appeals Judge

CONCURRING OPINION:

I feel compelled to state that if I were the fact finder, I would not have made the determination that the hearing officer made. However, I find the evidence to be minimally sufficient to support the hearing officer's determination.

Tommy W. Lueders
Appeals Judge

DISSENTING OPINION:

I respectfully dissent from the majority opinion in this case. In my opinion, the evidence in support of the hearing officer's determination that the date of injury (should have known) is too weak to be sustained. From the evidence of record, I cannot reconcile this finding with the evidence pointing to knowledge of the work relationship at an earlier date, and certainly no later than the visit to the ER on April 28th. While the claimant, in somewhat contradictory testimony, denied she mentioned that her injury might be work related, the medical report entry of April 28th could, in my mind, only have come from the claimant. There is no plausible way the person making the entry would have independent knowledge of "stacking lids in a tray at work" as the potential source of the back pain. Recognizing that a hearing officer is the fact finder, his findings of fact must be based upon the evidence of record. The claimant's denial of providing this information to someone in the ER finds no support in the evidence as I review the record. I believe the overwhelming weight of the evidence supports an earlier date of injury and an untimely notice of the injury.

Stark O. Sanders, Jr.
Chief Appeals Judge