APPEAL NO. 93054

This appeal arises under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-1.01 *et seq*. (Vernon Supp. 1993) (1989 Act). A contested case hearing was held in (city), Texas, on December 15, 1992, (hearing officer) presiding, to determine whether appellant (claimant) timely notified his employer of his injury and timely filed his claim for compensation under the 1989 Act. The hearing officer concluded that while claimant sustained an injury (carpal tunnel syndrome) in January (year) (prior to the effective date of the 1989 Act), which arose out of the course and scope of his employment with Champion International (employer), he neither timely reported the injury to employer nor timely filed his claim for compensation with the Texas Workers' Compensation Commission (Commission). The hearing officer further concluded that while claimant had good cause for not timely reporting his injury until (date), he did not have good cause for not filing his claim until (date). Claimant has requested our review of the sufficiency of the evidence to support the hearing officer's determination that his claim was not timely filed. Respondent (carrier) urges our affirmance.

DECISION

The decision of the hearing officer, as modified, is affirmed.

Claimant testified he commenced employment with employer in November 1979 as an assistant recovery operator. His duties included pounding slag out of boilers with an iron bar, pounding open boiler port holes, turning valves, and operating a jackhammer. Sometime prior to January (year), claimant said he began to experience numbness and circulation problems in his wrists. He suspected his symptoms were related to his work as his work constituted the only hard things he did with his hands. He stated he saw Dr. R, a chiropractor, in (year) for these symptoms and was treated over an approximate two year period. He testified, variously, that he and did discuss whether his wrist problems were work related but that "we didn't know for sure;" that thought it "was maybe something I did 40 years ago;" and that he did not recall discussing with Dr. R whether his wrist problems were work related because he filed "under the other claim that it wasn't work related." In his answers to carrier's interrogatories claimant said he and Dr. R "may have suspected" his condition was work related. He said he thought it was something minor that would go away in a year or so, that they were both hoping the wrists would get better, and that neither he nor Dr. R knew the diagnosis of carpal tunnel syndrome (CTS). Dr. R records indicate claimant was first seen on January (year), complaining of wrist pain and stiffness which began approximately eight years earlier; that x-rays revealed "DJD" for both wrists; and that claimant received diathermy and muscle stimulation treatments over a course of nine visits. The records contained no reference to CTS. In answer to a question in his deposition upon written questions, Dr. R stated that he first advised claimant his pain was work related on January 28, (year).

Claimant also testified that sometime in 1988 he saw Dr. H on one occasion for an eye problem, mentioned his painful, swollen wrists, and was told to seek medical treatment

if they got worse.

Because his wrist problems did become progressively worse as he punched out boilers, used a jackhammer, and tightened bolts, claimant saw A J M.D., an orthopedic surgeon, on May 18, 1992. Dr. J obtained an EMG and nerve conduction studies on May 21st which confirmed his initial diagnosis of bilateral CTS in claimant's wrists and bilateral ulnar nerve entrapment in claimant's elbows. Dr. J performed surgery on claimant's right wrist on June 16th and released him to return to work on August 17th. Claimant testified he returned to his prior duties at that time and continues to work for employer. Dr. J records reflected his opinion that claimant's condition was work related due to "lots of hard work with his hands," and that claimant's symptoms became progressively worse over a period 10 to 12 years and were related to cumulative trauma.

Dr. J told claimant on May 18, 1992 that he had CTS and that his condition was caused by his work. Claimant said he notified his supervisor and employer's nurse on either May 19th or 20th, apparently orally, that he was going to have right wrist surgery. His Employee's Notice of Injury or Occupational Disease and Claim for Compensation (TWCC-41) was dated June 23, 1992 and received by the Commission on June 24th. He also said he spoke to an employee about a health insurance form which had a question concerning whether his condition was work related. He said he would just leave that decision to the doctor although he himself felt it was work related. Claimant did not say when this conversation occurred. He did not have the assistance of a Commission ombudsman at the hearing and toward the end of the hearing told the hearing officer he did not really understand why he was there or what was being decided because he had already been paid benefits. (The Benefit Review Conference Report indicated that claimant lost time from work during the period from "6/14/92" to "8/15/92," that temporary income benefits (TIBS) in the amount of $428.00 per week had been paid for nine weeks, and that an Interlocutory Order was signed on September 1, 1992, ordering carrier to pay TIBS for that period at $438.00 per week.) The hearing officer then explained the disputed issues. She also advised claimant that her prospective decision could impact claimant should he have future problems and could also have implications concerning carrier's reimbursement from the subsequent injury fund.

The hearing officer found that claimant sustained CTS in both wrists as a result of his employment; that he first notified employer of his job-related injury on or about (date); that he filed his claim on June 24, 1992; and that he knew or should have known in January (year) that his symptoms were caused by his employment, but that he held a reasonable, good faith belief that his injury was not serious until (date). The hearing officer further found that while claimant's belief that his injury was not serious continued until he provided notice of the injury to his employer on May 20th, it did not continue until he filed his claim for compensation on June 24th. Based on these factual findings, the hearing officer concluded that while claimant sustained an injury arising out of the course and scope of his employment

in January (year), and while he had good cause for not timely reporting such injury, he had no good cause for not timely filing his claim and, thus, that benefits are not payable under the 1989 Act.

Though not alluded to by the hearing officer, we are confronted at the outset with the threshold issue as to whether claimant's injury is covered under the 1989 Act, whose effective date was January 1, 1991. Article 8308-3.01(a)(1) provides that an insurance carrier is liable for compensation for an employee's injury without regard to fault or negligence if, "at the time of the injury, the employee is subject to this Act." We have noted that the 1989 Act applies only to injuries occurring on or after January 1, 1991. Texas Workers' Compensation Commission Appeal No. 92168, decided June 12, 1992. *See* Texas Workers' Compensation Act, Acts 1989, 71st Leg., 2nd C.S., Ch. 1, § 17.18(c), eff. Jan. 1, 1991. The hearing officer concluded, with sufficient support in the evidence, that claimant's date of injury was in January (year) and that the time period within which he was required to notify employer of his injury commenced in January (year). Since the hearing officer neither found nor concluded that claimant sustained an injury on or after the effective date of the 1989 Act, the claim must be adjudicated under the prior workers' compensation laws. Texas Workers' Compensation Act, Acts 1989, 71st Leg., 2nd C.S., Ch. 1, § 17.18(d).

Accordingly, the hearing officer's decision is modified by striking the second and third sentences to wit:

> Although Claimant had good cause for failing to report his injury, he did not have good cause for failing to timely file his claim for compensation with the Texas Workers' Compensation Commission. It is therefore ORDERED that Claimant take nothing.

and inserting that claimant's claim should be adjudicated pursuant to the provisions of Vernon's Ann. Civ. Stat. art. 8306 *et seq*., to require that claimant's claim be adjudicated as an "old law" claim under the prior workers' compensation law and Commission rules. Because this claim should not have been adjudicated under the 1989 Act in view of the hearing officer's determination that the date of injury was January (year), we need not resolve the validity of the challenged finding and conclusion to the effect that claimant did not have good cause for failing to timely file his claim. However, we by no means intend that this modification of the decision and order be interpreted as signifying our agreement with such determination.

The decision of the hearing officer, as modified, is affirmed.

Philip F. O'Neill
Appeals Judge

CONCUR:

Lynda H. Nesenholtz
Appeals Judge

Thomas A. Knapp
Appeals Judge