APPEAL NO. 931180
FILED FEBRUARY 14, 1994

This appeal arises under the Texas Workers' Compensation Act TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act) (formerly V.A.C.S. Article 8308-1.01 *et seq*.) On November 2, 1993, a contested case hearing was held. He determined that respondent (claimant) "suffered an injury in the form of the occupational disease silicosis on _____." Claimant was found to have disability from February 25, 1993, to the date of hearing, and appellant, Travelers Indemnity Company of Rhode Island (carrier 1) was ordered to provide benefits. Carrier 1 asserts that the determinations that claimant was injured on _____, and that he gave timely notice are against the great weight and preponderance of the evidence. Carrier 1 also says that the carrier who insured employer on the "date of injury" should be liable, questions whether this claim should be an "old act claim," and disputes that disability exists. Legion Insurance Company (carrier 2) argues that the provisions of Section 409.001(a)(2) and Section 408.007 serve to measure the time from which notice must be given, while Section 409.001(c) which names the employer in an occupational disease case as the one for whom the employee worked in the "last injurious exposure," sets liability. Houston General Insurance Company (carrier 3) states that the hearing officer should be affirmed and in the alternative points to other dates when the claimant knew or should have known the disease may be related to the employment and refers to claimant's admission that he had knowledge of the disease in question as early as 1989, referred to in pleadings filed in state court in 1991.

DECISION

We affirm.

Claimant asserts that he has silicosis based on his work as a sandblaster. Claimant testified that he quit working for (employer) in November 1981; he further testified that prior to working for that employer he had never worked in sandblasting; he also testified that after leaving employer in 1981, he has not worked in a sandblasting job. The parties stipulated (stipulation 3) that claimant worked as a sandblaster for employer from March 1979 through November 1981 and (stipulation 5) that claimant "was last injuriously exposed during the month of November 1981." The parties also stipulated that carrier 1 provided coverage for employer from November 1979 to November 1988; carrier 2 provided coverage for employer from August 1991 to August 1993; and carrier 3 provided coverage for employer from November 1988 to August 1991.

The hearing officer made no finding of fact as to the correct date of injury. Similarly, no finding of fact was made as to the date that claimant "knew or should have known that the injury may be related to the employment." The hearing officer did make a conclusion of law that the date of injury for this claim was the date claimant knew or should have known his condition may be work related, which was stated as _____. (_____, was the date of a letter from (Dr. W) to claimant's attorney stating that claimant "likely" had silica in his lung.)

On _____, claimant filed a lawsuit in (County) Texas, against certain suppliers related to his employment in sandblasting that ceased in 1981. Claimant's petition states:

> On November 21, 1989, the Plaintiff learned that he had contracted the disease of silicosis.

In a deposition claimant gave on April 7, 1993, he stated, in reply to questioning, that he provided the information used in that petition in that lawsuit by his lawyers. He added that the information he gave them was true and correct to the best of his knowledge. He added that he had not read the completed petition.

Claimant filed four separate claims on four different dates against three different insurance carriers, with the first claim dated March 6, 1992, directed at Liberty Mutual Insurance Company. All of these four claims stated that the "date of first knowledge disease was (sic) related" was "July 1991". By letter dated March 31, 1992, claimant filed the first claim dated March 6, 1992, with the Texas Workers' Compensation Commission (Commission) with a date of receipt showing "April [illegible] 1992." (In addition claimant filed another claim with a date of first knowledge said to be February 13, 1992.)

Claimant stated in his deposition that before 1991 he thought he had allergies. On August 7, 1991, a doctor (only the first page of this report is in evidence and the doctor's name is not on that page) wrote that claimant was inquiring if "his lung disease is related to his occupational sandblasting or not." On October 8, 1991, (Dr. V) wrote to Dr. Dr. W who had referred claimant for an "evaluation of silicosis." Dr. V in that letter assessed claimant as "probable dust pneumoconiosis . . . most likely due to silicosis." On _____, as stated, Dr. W wrote to claimant's lawyer, stating that a specimen from claimant's lung was "most likely silica."

Of the various dates set forth by claimant as indicating when he knew or should have known his condition may be work related, the hearing officer chose _____, the date of Dr. W's letter. A doctor's opinion can in some cases be determinative of when a claimant "knew or should have known" but Texas Workers' Compensation Commission Appeal No. 92559, decided December 3, 1992, in dealing with a claimant's lung problem aggravated by fiberglass, with which he worked, said medical evidence was not necessary. In that case the employer ceased using workers' compensation coverage and the employee was trying to show that he gave adequate notice prior to the time he knew the disease <u>was</u> work related, as the TWCC form was worded at that time, and which he filled in with a date subsequent to the cessation of coverage. That case said that a claimant could indicate that "an injury may be related" without verification from a doctor.

In the case before us, the hearing officer has chosen not to find that the claimant knew or should have known that the injury may be work related on either November 21, 1989, as stated in claimant's lawsuit, or in July 1991, as stated in claimant's signed claims (4), or on October 8, 1991, when a referral doctor notified claimant's doctor that the problem was "most likely due to silicosis". (We point out that claimant's assertion in the

lawsuit petition can not constitute a judicial admission that would be conclusive as to this fact unless under oath; in addition, this proceeding does not involve the same parties. While not conclusive, the admission in the petition could still be weighed and found to constitute the date of injury. *See* Aetna Life Ins. Co. v. Wells, 557 S.W.2d 144 (Tex. Civ. App.-San Antonio 1977, writ ref'd n.r.e.).) Rather, the claimant was found to first "knew or should have known that the condition may be work related" when a specimen was found to contain silica. While the Appeals Panel may draw different conclusions from the evidence, we will not substitute our judgment for that of the trier of fact unless the great weight and preponderance of the evidence is contrary to the hearing officer. *See* In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). We find sufficient evidence to support the hearing officer's conclusion of law that the date of injury is _____.

While carrier 1 attacks the conclusion of law that notice was timely given of the injury, the attack is related to its argument that _____, is not the correct date of injury. It does not assert that the notice provided to the employer (stipulation 11 made by all parties stated that the first notice to employer occurred on November 21, 1991, when employer was served with a copy of the petition in the lawsuit, previously described) was inadequate. With that stipulation and no assertion at the hearing or on appeal that pleadings in a lawsuit indicating knowledge in 1989 of a work related injury could not constitute adequate notice of a date of injury of _____, the determination of the hearing officer that notice was timely is sufficiently supported by the evidence.

Carrier 1 also states that the claim should be viewed as an "old act claim". Section 409.001(a) provides that notice shall be given to an employer no later than the 30th day after the date that the "claimant knew or should have known that the injury may be related to the employment" when the injury is an occupational disease. Similar language is found in Section 408.007 which states 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." The first section obviously provides a point from which is measured the time period for notifying the employer. Section 408.007 identifies the "date of injury," not just for notice, but for the purpose of Section 408.083 which provides for termination of employee's eligibility for certain income benefits 401 weeks "after the date of injury." In addition, this section serves to impart jurisdiction in certain occupational disease cases, notwithstanding the provisions of Texas Workers' Compensation Act, Acts 1989, 71st Leg., 2nd C.S., Ch. 1, §17.18(d) which provides "(t)he Texas Workers' Compensation Commission created under this Act shall process claims for injuries occurring before January 1, 1991, in accordance with the law in effect on the date that the injury occurred, and the former law is continued in effect for this purpose." The quoted section is interpreted not to be creating a criterion (relative to "old law" claim or "new law" claim) for injuries to be considered under a date different from that of "date of injury" found in Section 408.007; rather use of the phrase, "date that the injury occurred," merely restates the "date of injury" criterion set forth by Section 408.007. The claim clearly qualifies for processing under the provisions of the 1989 Act.

Carrier 1 also states that if the date of injury is found to be _____, then the

carrier who insures the employer at that time should be ordered to pay any award. Section 406.031(b) does not address the carrier but does address which employer should be selected by saying that the employee's employer when the employee was last "injuriously exposed" is the chosen one. (We note that Section 406.031(a) places liability on a carrier for an injury if "at the time of injury, the employee is subject to this subtitle;" this language does not create new criteria relative to whether a claim is "old law or new law" either, by using the words "time of injury" rather than "date of injury" or by indicating that at the time the employee was injured he had to be "subject to this subtitle.") We do interpret identification of a particular employer at a stated time as implying that the carrier for that employer at such stated time should be the responsible carrier.

Finally, carrier 1 takes issue with the award of disability from February 25, 1993, to the date of hearing. Claimant's exhibit 2, a Physician's Statement to the Texas Employment Commission, signed by Dr. W on February 25, 1993, states that claimant cannot do any manual labor because of an occupationally acquired disease. While it is possible to find disability even without medical evidence (*See* Texas Workers' Compensation Commission Appeal No. 92167, decided June 11, 1992), this medical statement in this case provides sufficient evidence of disability to support the finding of fact and conclusion of law that address that issue.

The decision and order of the hearing officer are affirmed.

Joe Sebesta
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Thomas A. Knapp
Appeals Judge