APPEAL 93178

A contested case hearing was held in (city), Texas, on January 25, 1993, (hearing officer), presiding, to determine three disputed issues unresolved from a benefit review conference (BRC), namely, whether respondent (claimant) sustained an injury in the course and scope of her employment with (employer) on either (date) or (date), and, regarding (date), whether claimant gave timely notice to employer of any injury sustained on that date. The parties stipulated that on (date), employer had workers' compensation insurance coverage with respondent Liberty Mutual Fire Insurance Company (Carrier A) and that on (date) employer had such coverage with appellant Texas Workers' Compensation Insurance Fund (Carrier B). The hearing officer determined that on or about (date), claimant knew or should have known she sustained a repetitive trauma injury while working for employer; that she waived her claim and is not entitled to recover for the injury; that on (date) she aggravated that injury in giving 45 haircuts in a "two and one-half hour period" and sustained a new injury in the course and scope of her employment; and that she has two dates of injury, namely, (date) and on or about (date). The hearing officer ordered Carrier B to pay claimant such medical and income benefits as are due under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-1.01 *et seq*. (Vernon Supp. 1993) (1989 Act). Carrier B asserts on appeal errors by the hearing officer in finding that claimant sustained a second injury and in awarding benefits when claimant failed to give timely notice of a work related injury. Carrier B also asserts that claimant failed to establish a causal link between her injury and her employment, and that she failed to establish she has disability as defined in Article 8308-1.03(16). Claimant's response urges our affirmance and asserts that Carrier B is attempting to raise issues of causation and disability for the first time on appeal. Carrier A's response also urges our affirmance but goes on to contend that should we find April 1st to be "the true date of injury," we should find that claimant waived any claim for an injury of that date, and further find that claimant, without good cause, failed to give timely notice of such injury.

DECISION

Finding error by the hearing officer in his finding that claimant waived her (date) claim and the associated timely notice issue and in failing to determine whether claimant timely reported her (date) injury or had good cause for not timely reporting such injury, we reverse and remand.

Claimant was a hair stylist who became employed by employer on June 12, 1990. At the outset of the hearing, the hearing officer stated there were three disputed issues before him unresolved at the BRC, namely, whether or not claimant was injured in the course and scope of employment on or about (date), whether or not she gave notice of an injury on that date to her employer as provided by law, and whether she was injured in the course and scope of her employment on (date). Some discussion ensued as to whether the injury issues involved only establishing the date of the injury or whether such issues also involved proving the actual occurrence of an injury in the course and scope of

employment. The hearing officer stated he regarded the issues as involving the actual occurrence of such an injury as well as the date. No objection was taken to the hearing officer's articulation of the disputed issues for the hearing. Reference was made to the BRC report and to the fact that Carrier A was not even mentioned in such report. However, the BRC report was not made a hearing officer exhibit (as they normally are) nor otherwise made a part of the record for the benefit of post-hearing review.

The hearing officer next established that claimant was alleging that her injury was an occupational disease in the nature of a repetitive trauma injury. Under the 1989 Act, an insurance carrier is liable for compensation for an employee's injury if the injury arises out of and in the course and scope of employment (Article 8308-3.01); "injury" is defined to include "occupational diseases" (Article 8308-1.03(27)); the term "occupational disease" includes "repetitive trauma injuries" (Article 8308-1.03(38)); and "repetitive trauma injuries" are defined to mean "damage or harm to the physical structure of the body occurring as the result of repetitive, physically traumatic activities that occur over time and arise out of and in the course and scope of employment" (Article 8308-1.03(39)). Article 8308-4.14 provides that "the date of injury in the case of an occupational disease is the date on which the employee knew or should have known that the disease may be related to the employment." Article 8308-5.01(a) provides that an employee shall notify the employer of an injury not later than the 30th day after the date on which the injury occurs, and that "[i]f the injury is an occupational disease, the employee shall notify the employer not later than the 30th day after the date on which the employee knew or should have known that the injury may be related to the employment." Article 8308-5.02 provides that an employee's failure to notify the employer as required by Article 8308-5.01 relieves the employer and the employer's carrier of liability under the 1989 Act unless the employer has actual knowledge of the injury, the Texas Workers' Compensation Commission (Commission) determines that good cause exists for failure to give notice in a timely manner, or the employer or carrier does not contest the claim.

The hearing officer then asked if claimant was alleging a repetitive trauma injury as to both dates and claimant responded that she would "file an amendment to the notice with the date of (date)." The hearing officer then asked if filing an amendment would affect the participation of either carrier and Carrier A responded that if an amended notice was filed it would have no obligation to participate indicating that amending the notice date would be "a significant change." At this point, the hearing officer took the proceedings "off the record" and when the hearing resumed on the record, he stated there had been "extended off-the-record conversations with--nothing really has changed much as a result," that he was going through the stipulations, and at that point recited four stipulations dealing with venue, employment status, and carrier coverage on April 1st and August 31st, respectively, which were agreed to by the parties. We have repeatedly stressed that "off the record" proceedings are discouraged and may result in error when substantive matters are discussed. The Appeals Panel must have an accurate record of

the proceedings to fulfill its statutory functions. We find the "extended off-the-record" proceeding here to be particularly egregious since the date of the injury was the very crux of the case.

Claimant then made her opening statement contending she suffered a repetitive trauma injury, that she did not know nor should she have known it was job related until (date), and that she timely reported it to employer on or about (date). Carrier A then asserted that if claimant's contention was that her date of injury was (date) that Carrier A "has no business being here" because its coverage of employer ended on July 31st. The hearing officer responded thusly:

> I'm not speaking to the claimant, but I'm saying de facto we--just let the record reflect there was some off-the-record discussions with regard to, you know, which, if either or both, the dates of injury the claimant wanted to pursue, because there was some question about this. She's entitled, of course, to make up--when, in fact, party admission in opening statement that--it's her contention that the injury occurred on (date), which means, of course, that she's--you know, would not prevail on the other two issues, that she was injured in the course and scope on (date)and that the question of notice would, you know--both of those would by virtue of those admissions no longer be the issues. So whether you care to participate or not, I guess, is up to you.

A stipulation that the injury date was (date) was briefly discussed and refused by Carrier B. This was followed by a brief discussion about the nature of claimant's contention in her opening statement for the (date) injury date as being either a "party admission," as the hearing officer viewed it, or a "judicial admission," as Carrier A viewed it. Without further clarification of the issues or resolution as to whether the three disputed issues initially articulated by the hearing officer were still before him, and with no mention whatsoever of the taking of "official notice" of any "waiver" of the (date) claim, or "waiver" of the issues relating to the (date) claim, the parties proceeded to put on their evidence.

When claimant stated she would file an amendment to her "notice," it was not clarified as to what "notice" she had reference to although she appears to have been referring to the Employee's Notice of Injury or Occupational Disease and Claim for Compensation (TWCC-41) she signed on September 15, 1992, which stated that her date of injury was "on or about (date)" and that the first time she hurt bad enough to miss work was "(date)." Carrier B later offered this exhibit to establish that claimant's date of injury was on or about date, a date when Carrier B was not employer's insurer. In contrast, claimant later offered three forms entitled Employer's First Report of Injury Or Illness (TWCC-1), all three of which forms stated her injury date as "(date)." Claimant had been asked by employer's manager to fill out a portion of and sign one of these

reports. The obvious purpose of claimant's offering these exhibits was to support her contention that her injury date was date and not on or about date. Carrier B explained that one of the three TWCC-1s had been generated by its own claims processing procedures and noted it was not "an official TWCC-1." Aside from that explanation, however, neither carrier had objection to claimant's introduction of these forms at the hearing nor has an appealed issue been lodged as to claimant's use of these forms. Article 8308-5.05 provides, in part, that if an employee notifies the employer of an occupational disease, the employer shall file a written report with the Commission and the insurance carrier, and that "[t]his report and any report made under Section 7.03(b) of this Act may not be considered admissions or evidence against the employer or the insurance carrier in any proceeding before the commission or a court in which the facts set out in that report are contradicted by the employer or insurance carrier."

As for contradiction of the facts in the TWCC-1 reports by carriers, Carrier B introduced a form entitled Payment of Compensation Or Notice of Refused/Disputed Claim (TWCC-21) dated September 18, 1992 which reflected an injury date of "date," and which stated:

> Carrier controverts this alleged occupational disease. [Claimant] knew or should have known in date this problem was work related. Carrier's coverage did not begin until 8-1-92. Therefore, Carrier had no coverage.
> In additional (sic) [claimant] fail (sic) to report her occupational disease no later 30 days after she knew or should have known. Therefore the Carrier is released of liability under the [1989 Act, article 8308-5.02].

Carrier A introduced a TWCC-21 dated September 28, 1992, which reflected an injury date of date, and which refused or disputed the claim for the reasons that claimant did not report her injury to employer within 30 days (Article 8308-5.01) and because "no medical indicating injury or disability work related."

Claimant introduced two letters from Texas American Insurers (TAI), identified by employers' owner as his insurance agent. TAI's September 23, 1992 letter to Carrier A enclosed "a First Report of Injury form" for employer and stated that claimant told employer her injury date was date, but that when a doctor's office called TAI to verify coverage, an injury date of date was indicated which, said TAI, would come under Carrier A's coverage. The TAI letter of October 15, 1992, to both Carriers A and B, and to a third carrier, stated, in part, that claimant originally alleged an April 1st injury date, but that employer was not notified until September 1st, that employer filed its first report of injury with Carrier A which denied the claim because it was not reported by claimant within 30 days, that claimant then "apparently tried to change her story" and state an injury date of date, that the claim was then refiled with Carrier B which denied coverage because it felt the original injury date was date, and that at least one of the carriers needed to defend

the claim.

Claimant testified she began her employment with employer in June 1990, transferred to another of employer's stores in January 1992, and in date experienced numbness, tingling, and pain in her right arm and shoulder, and loss of grip strength. She said she had no prior problems with her arm and shoulder but noticed the pain was worse when she was busy at work or worked long hours, and that while she was not sure of the cause she suspected it was related to her work. Sometime in date she went to an emergency room because of the pain but was told she had no emergency and to see an orthopedic specialist, which she did not do. Claimant continued to work and sometime in the August 17-19, 1992 period, when school commenced, she gave 45 hair cuts in a 10½ hour period. When she left work she couldn't move her arm. She missed a few days of work that week and next, and told her manager, (Ms. W), she was going to the doctor as she could no longer cut hair. While she said she suspected her problem was work related, she did not know such to be the case.

Claimant saw (Dr. B) on date and he told her she had severe damage to her right arm and shoulder, that it was definitely job related, and he took her off work. After seeing Dr. B, claimant told Ms. W on date that her injury was work related and that she needed to file a workers' compensation claim. She and Ms. W then together filled out and signed a TWCC-1 on which Ms. W stated the injury date as "date." Claimant was cross-examined about a statement she gave an adjuster when interviewed on September 17, 1992, during which she stated she believed her injury to be work related in date but had been afraid to say anything about it because of her job; and that by the time she reported it, her arm had gotten so bad she could do nothing but see a doctor and report it to her employer. She said she was in pain when she was interviewed and without legal representation. She also explained that what she meant when she told the adjuster she knew her arm problems were job related was that she knew she was having the problems while working, but not that she knew it was the work that was causing such problems.

Other witnesses testified that claimant had complained of having "bursitis" since February 1992. Ms. W testified she knew in February 1992 that claimant had "bursitis," and that claimant had complained of "bursitis" but did not say it was work related, nor did Ms. W know it was work related. She said that claimant told her the injury was job related on August 31st and that she made a report of it on that date.

Claimant first saw and commenced treatment with Dr. B on date and he eventually ceased treatment because of claimant's problems with workers' compensation insurance coverage. Dr. B's records contain statements pertaining to claimant's onset of pain which vary widely, i.e., from as recently as a month before her first visit to as far back as the commencement of her employment with employer. Dr. B's date record reflects that claimant did a lot of work with her arms held high above her head, and that her right arm

had hurt and cramped since working for employer. He indicated a diagnosis of carpal tunnel syndrome (CTS) and lateral epicondylitis right arm. A report by Dr. El, whom claimant saw at employer's request on September 2nd, stated "there were no signs of CTS on the exam." A report of an evaluation on November 20th by Dr. K (Dr. K) diagnosed neck, wrist, forearm and/or elbow "sprain/strain." Dr. K's report mentioned that claimant began having pain in her right shoulder, elbow and wrist in approximately April 1992. A report of Dr. G to Dr. C (currently treating claimant) stated that electrodiagnostic studies demonstrated a mild right medial nerve sensory condition consistent with a mild right CTS. In the history portion, Dr. G reported that claimant gave a history of first having symptoms in date, which gradually increased until August when the symptoms became almost constant and she began dropping things.

In his "Statement of the Case," the hearing officer states the following:

> Immediately prior to the hearing, the Claimant decided to waive her claims against the second carrier related to the alleged date, injury and associated notice question. Accordingly, official notice was taken of her waiver and its effect of barring against the Second Carrier [Carrier A] regarding the issues related to that date. Accordingly, there was one remaining issue: Did the Claimant sustain an injury in the course and scope of her employment with [employer] on date?

The pertinent findings and conclusions of the hearing officer are as follows:

FINDINGS OF FACT

5. On or about date, the claimant knew she had sustained an injury while working for the Employer.

6. The condition referred to above continued until the Claimant performed 45 haircuts in a 2½ hour period on or about (date), which aggravated it.

7. As a result of the aggravation of her preexisting condition on or about (date), the Claimant sustained a new injury.

8. Claimant waived her claim against the second carrier regarding any injury occurring on date.

CONCLUSIONS OF LAW

2. The Claimant has two dates of injury: the first is date, and the second is on or about (date).

3.The Claimant knew, or should have known, on date, that she had sustained an injury in the course and scope of her employment as a result of repetitive trauma.

4.On or about (date), the Claimant sustained a second injury in the course and scope of her employment.

5.Because she waived her claim, Claimant is not entitled to recover for the injury occurring on date.

Carrier B appeals from Findings of Fact Nos. 6 and 7 and Conclusions of Law Nos. 2 and 4 and maintains that claimant did not suffer two separate injuries but only the date injury which she allowed to continue or progress to August 19th, that she failed to provide timely notice to employer of the date injury, that she showed no good cause for her untimely notice, that the hearing officer failed to make a finding as to good cause for the untimely notice, that claimant failed to prove her work caused her injury, and failed to prove she had disability therefrom. As to the latter issue, it was not a disputed issue at the hearing and need not be further discussed. Carrier A's response seeks affirmance, as does the claimant's response. However, Carrier A also requests that if the Appeals Panel finds date to be the "true date of injury," we go on to find that claimant did not provide timely notice from such date of injury.

Though the hearing officer alluded to "extensive discussions" off the record, the record itself, to which our review is restricted (Article 83086.42(a)), fails to reveal any discussion of the hearing officer with the parties regarding claimant's "waiver" of her claim along with its "associated notice issue," nor does the record reveal the hearing officer's having taken "official notice" of such waiver. The content of the parties' record discussions regarding claimant's unilateral decision to "file an amendment to the notice" and to proceed to prove an August injury date has already been set forth. The record discussion mentioned notions of "party admission" and "judicial admission," but not waiver. The parties may have viewed claimant's statement about amending the notice as simply an allegation or the statement of an alternative theory of her case. Not only did Carrier B expressly refuse to stipulate the date injury date and notice issues out of the case, but the carriers presented evidence and argument for their respective positions on all three disputed issues articulated by the hearing officer. The mention of "waiver" appears for the first time in the hearing officer's decision and order and without reference to any provision in the 1989 Act or in the Commission's Rules (Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 102.2 *et seq*.).

By the apparent post-hearing application of a waiver doctrine, the hearing officer attempted to dispose of two of the three disputed issues, including the defensive issue of

untimely notice of injury to employer. We find error in such action and are constrained to reverse the decision below and remand. Further, although the timeliness of claimant's notice of injury was a disputed issue, the hearing officer made no factual findings on that issue or on the subsumed issues of good cause for untimely notice or the actual knowledge of employer or the carrier. *See* Article 8308-5.03; Texas Workers' Compensation Commission Appeal No. 92386, decided September 8, 1992.

Respecting the hearing officer's determination that claimant sustained a new injury on or about (date), by aggravating her repetitive trauma injury of date, the hearing officer did not develop the evidence sufficiently concerning the nature of the aggravation which constituted a new injury. While the hearing officer found that claimant performed 45 haircuts in a "2½" hour period [claimant testified to a 10½ hour period] on or about (date), he did not develop the record as to the number of haircuts the claimant regularly gave during a regular work day. We are unable to ascertain whether the hearing officer determined that claimant sustained a new repetitive trauma injury on or about (date) by the aggravation of her date repetitive trauma injury, or whether he found claimant sustained a separate, accidental injury on (date) which aggravated the April 1st injury. *Compare* Texas Workers' Compensation Commission Appeal Nos. 92654 and 92655, decided January 22, 1993, where the hearing officer determined that a subsequent dermatitis condition caused by the claimant's repetitive dipping of her hands in a solution was not a new injury but rather a continuation of her original injury. *And see* Texas Workers' Compensation Commission Appeal No. 92589, decided December 14, 1992, where we reversed the determination that timely notice of injury was not given and remanded for further development of the evidence concerning the date the claimant knew or should have known he had an aggravated repetitive trauma injury. In that case, the medical evidence reflected that the claimant's original back injury was sciatica whereas his subsequent back injury was a herniated disc. *See also* Texas Workers' Compensation Commission Appeal No. 92681, decided February 3, 1993, and Texas Workers' Compensation Commission Appeal No. 92518, decided November 16, 1992.

Based on all the foregoing, the decision of the hearing officer is reversed and the case is remanded for the expedited development of such additional evidence as is appropriate, and for such additional consideration and findings as are appropriate and not inconsistent with this opinion.

Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Texas Workers' Compensation Commission's division of hearings, pursuant to Article 8308-5.41. *See* Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

Philip F. O'Neill
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Susan M. Kelley
Appeals Judge