

APPEAL NO. 93751

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). At a contested case hearing held in (city), Texas, on July 26, 1993, the hearing officer, (hearing officer), considered the following disputed issues, to wit: whether the appellant (claimant) sustained an injury or occupational disease in the course and scope of employment; claimant's correct date of injury; whether claimant has disability as the result of an alleged injury or occupational disease; whether claimant timely reported her alleged injury or occupational disease to her employer; whether claimant timely filed a claim with the Texas Workers' Compensation Commission (Commission); and claimant's average weekly wage (AWW). The hearing officer concluded that claimant did not sustain a hand, wrist, neck, back or leg injury in the course and scope of her employment with (employer); that she failed without good cause to provide employer with timely notice of her alleged hand, wrist, neck, back or leg injuries; that she filed a timely claim for compensation for her wrist, hand and neck injuries but failed without good cause to file a timely claim for her alleged back and leg injuries; that her alleged wrist, hand, neck, back and leg injuries have not caused disability; and that her AWW was \$522.40. Claimant challenges the sufficiency of the evidence to support the adverse findings and conclusions respecting the compensability of her injuries, the timeliness of her notices of injury to employer, the timeliness of her claim for back and leg injuries, and her disability. Claimant particularly challenges the finding that she did not sustain an injury or occupational disease to her wrists, hands, neck, back or leg at any time during (month, year), pointing out that notwithstanding that she had ceased working for employer after (month, year), she was asserting that she sustained repetitious trauma injuries on (date of injury), the date she first knew her condition was work related. In its timely response, the respondent (carrier) urges the sufficiency of the evidence to support the decision.

DECISION

Finding the evidence sufficient to support the findings and conclusions, we affirm.

Claimant testified that she began employment with employer in March 1973 and for about the first eight years worked initially in the mail room sorting mail and subsequently in the print shop typing templates on a machine heavier than a typewriter. During the approximately 10 years before she stopped working on (month, year), claimant worked for about half that period in the active collections department where her duties involved mostly typing and periodically lifting stacks of bills. For about the last five years, she worked in the inactive collections department, a job requiring less typing. Her duties there involved going through stacks of computer printouts, typing names into a computer terminal to call up account files, looking up numbers in the telephone book, calling customers about their accounts, typing letters to those she could not reach by telephone, and placing the computer printout sheets in ledger books. Approximately every other day, claimant would have to pick up and carry a ledger book which she estimated weighed between 10 and 15 pounds. She also estimated, variously, that she spent about one-half of her time on the telephone, about one-half of her time on the computer, and the remaining time performing the various

other tasks. She said she did not, however, type pages of documents into the computer.

Claimant testified that sometime in 1982 she tripped and fell on her tailbone at work injuring her lower back, but did not file a workers' compensation claim. Her back continued to bother her after this injury and got worse after she gave birth to a child in 1985. In 1986 she began to experience problems with her neck, and with her hands and wrists "going dead." These problems, along with her back condition, continued and got worse. She said that throughout this time she continued to have constant back pain and be treated by a doctor. On (month, year), claimant said she experienced a sharp pain and hurt her back while bending over to pick up a heavy ledger book from the floor. She said she reported that incident to her supervisor, (Mr. F). She said she could not even walk later on because of back and leg pain, that she has not returned to work since that date, that she would not be able to do her job even if she did return because her hands still "go dead" and she still has neck and back problems. She testified that her claim does not embrace her accidental back injury of (month, year), however, and appeared to indicate in earlier deposition testimony that she did not know that the filing of a claim for workers' compensation was required. Rather, claimant said, her claim is for repetitive trauma injury to her neck, wrists, and hands which, she said, had not been previously injured and which made her hands "go dead" and slowed her down, and for the aggravation of her prior low back condition by repetitious work activities which also constituted a repetitive trauma injury. She said she missed no work from her wrists and hand problems, and sought no treatment for such before she stopped working.

Claimant also testified that she told Mr. F in November 1990 that she thought "moving the paper" while doing the computer printouts was causing her hands to tire and slow her down. While claimant acknowledged having previously testified in a deposition that she did know her work activities were causing her hands to be painful, tired, and numb, she said she did not know such problems were work related because she was not a doctor. She also acknowledged saying in the deposition that since leaving her employment her hands "seemed to be worse."

The parties stipulated that, if present, Mr. F would have testified that he was claimant's supervisor during the October 1990 - (month, year) period, that he never heard her complain of hand, arm, shoulder, or neck problems, or complain that her work activities were causing or aggravating such problems. While aware of her 1982 back problem, he never heard her complain that her work activities were aggravating her back problem. If present, coworker (Ms. G) would have testified that she worked with claimant from 1987 to (month, year) and never heard her complain of work activities causing problems with her neck, arms, or lower back, and that she, too, knew of claimant's 1982 back injury. Both Mr. F and Ms. G would testify that claimant was slower than the average employee.

Claimant further testified that it was not until (date of injury), when so advised by her attorney, that she first became aware that her repetitive trauma injuries were work related. She said that no doctor had told her that her hand problems were or were not related to her

everyday work activities. On (date of injury), claimant signed an Employee's Notice of Injury or Occupational Disease and Claim for Compensation (TWCC-41). This form was received by the Commission on January 8, 1992. It stated that claimant's wrists and hands were injured by repetitious trauma at work, and that her date of injury was "loss of use began 87(?)." A "first amended" TWCC-41 was signed on July 14, 1992, and received by the Commission on July 15, 1992. It stated the same date of injury as the first TWCC-41, but described her accident thusly: "Repetitious trauma at work caused me to have trouble with and/or aggravated my wrists and hands and my back and legs." According to the benefit review conference report, claimant's position was that her date of injury was "(date of injury)," the date she first knew the disease was work related. Carrier's position was that it was unreasonable for claimant not to have known her problem may have been work related for five years after she started having problems. The benefit review officer's recommendation was that claimant's date of injury was "(date of injury)" and stated that "while no doctor related her problems to her employment, she should have known that the problems may have been work related when she became unable to do her work and had to terminate her employment."

According to an otherwise unidentified "Initial Consultation" sheet dated "(week)," claimant complained of constant low back pain, occasional pain and weakness in her left leg, occasional tingling in her left hand, and also, apparently, of neck pain. The history included the 1982 fall treated by (Dr. S), and post-partum low back pain since delivering her fourth child in 1985. Dr. S's records indicated that claimant, then 40 years of age, was hospitalized for a week in September 1982 for the fall at work. Her discharge diagnosis was radiculopathy of the right fifth lumbar nerve root, resolving, and an osteophyte at the L5-S1 level. She was treated conservatively. Claimant saw (Dr. D) on August 25, 1988, complaining of left low back and hip pain for three weeks, and denied prior episodes and trauma. Dr. D noted a history of L5 right radiculopathy. On September 19, 1988, Dr. D stated that an MRI showed moderate bulging of the L4-5 disc and his assessment was "back and leg pain apparently due to herniated L4-5 disc." On August 4, 1989, Dr. D noted that claimant's back and left leg pain had been "intermittent" but became worse two weeks previously. He continued medications.

An X-ray report of "(date)" obtained for (Dr. JS), reflected, in part, that claimant had osteophyte formation at the C5, C6, C7, T2 through T6, and L3 through L5 levels, degenerative joint disease at the C6/7, C7/T1, L4/5, and L5/S1 levels, and severe degenerative disc narrowing at L5/S1. A consultative report from (Dr. C) to Dr. JS, dated "2-06-91," stated that claimant began to have severe back, left hip and left leg pain, and some pain in her foot, about two weeks earlier, that she fell in 1982 hurting her tail bone but "never had any problems since then," that in 1985 she delivered a baby and "started having bouts of low back pain," and that her back pain has never been so severe. Dr. C noted that electrophysiologic findings were consistent with L4/5 radiculopathy. A consultative report to Dr. JS from (Dr. WO), a physiatrist, dated "3-6-91," stated that claimant complained of back and neck pain "subsequent to an industrial injury" and he diagnosed chronic, persistent cervical dorsal and lumbodorsal syndromes with intermittent myalgia and muscle spasm

without evidence of peripheral neuropathy, myopathy or radiculopathy on neurodiagnostic evaluation. On April 1, 1991, Dr. WO discontinued claimant from a rehabilitative strengthening program for noncompliance.

(Dr. B) performed an independent medical evaluation of claimant on April 5, 1991, for employer. After noting her 1982 fall, Dr. B's report states that claimant had a baby in 1985 and "she says that ever since she has had problems off and on with lower back pain as well as numbness in her hand and her left leg." Dr. B noted that claimant reported being on sick leave from employer for episodic back pain "perhaps ten times a year" over the course of time she saw Dr. D (March 1986 - (month, year)). He found no evidence of permanent impairment, noted that her 1988 MRI showed probable disc herniation at L4-5 and disc degeneration at L5-S1, felt claimant needed a work hardening program, and stated that her symptoms are "far out of proportion to the mild abnormality demonstrated" by the MRI.

In May 1991, employer terminated claimant for repeated failure to respond or keep appointments with employer and with the Texas Rehabilitation Commission involving employer's efforts to get claimant through a rehabilitation program so she could return to work.

On September 17, 1991, claimant was examined by (Dr. W) who diagnosed chronic lumbar syndrome with degenerative disc disease at L5/S1 and chronic coccydynia.

In a May 12, 1993, supplemental report to carrier, Dr. B said that his April 5, 1991, exam revealed no evidence to suggest either a "repetitive use disorder" or carpal tunnel syndrome (CTS), that claimant had dated her numbness in her hands to her 1985 pregnancy, that her symptoms of hand numbness since her 1985 pregnancy "could indeed have been [CTS] related to pregnancy which is a well described phenomenon," and that at the time of his exam he found no evidence of wrist nerve entrapment. He also said that repetitive motion disorders improve on their own over a period of rest and that it would not be medically plausible that such a problem would arise at a later date when the patient had not been working regularly.

At the hearing, Dr. B testified that when he examined claimant in April 1991 she did not complain of her work activities, did not relate her neck, hand, and back symptoms to her work, and made poor spinal flexion efforts during his physical exam. In Dr. B's opinion, her sedentary, clerical work would not be expected to cause repetitive trauma injuries. He did not think she had any repetitive use disorder of her back, neck, and upper extremities in April 1991 because such injuries occur with certain repetitious movements and patients are aware of a causal relationship between such repetitious movements and their symptoms. He agreed that prolonged sitting could aggravate low back pain. He also said he would be "very surprised" if a patient who had repetitious use disorder for five years claimed not to know of its causal relationship with the work because laypersons can relate their work activities to either the causing of or aggravation of medical conditions. Also, Dr. B said that

when a patient ceases repetitious activities, he would expect their condition to improve.

Under the 1989 Act, the term "injury" includes an "occupational disease" (Section 401.011(26)), and the latter term includes "repetitive trauma injury" (Section 401.011(34)). Claimant had the burden to prove she sustained the compensable repetitive trauma injuries she alleged. The hearing officer concluded (Conclusion of Law No. 2) that claimant did not sustain a hand, wrist, neck, back or leg injury in the course and scope of her employment for employer. In Finding of Fact No. 3, the hearing officer found that "[c]laimant did not sustain an injury to her wrists, hands, neck, back or legs or an occupational disease to her wrists, hands, neck, back or legs at any time during (month year) while performing duties for the Employer." Both the conclusion and the finding are sufficiently supported by the evidence, though we note that neither the original nor amended TWCC-41 referred to a neck injury. Claimant contends on appeal that by alluding to (month, year) in Finding of Fact No. 3, and by failing to make a finding concerning the injury date of (date of injury), asserted by claimant, the hearing officer addressed "a different claim." Section 408.007 provides that "[f]or purposes of this subtitle, 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," and one of the disputed issues was claimant's "correct date of injury." *And see* Section 409.001(a)(2).

In his discussion of the evidence, the hearing officer notes that claimant last worked for employer "on (date)," did not file a claim for wrist and hand injuries until January 8, 1992, and amended her claim on July 5, 1992, to include a back and leg injury. The hearing officer further notes that claimant contended she was not aware of the work-related nature of her wrist and hand injuries until January 1992, and was not aware of the work-related nature of her back injury until July 1992. He also notes claimant's theory that she was only required to provide notice of her repetitive trauma injuries not later than the 30th date after she knew or should have known of the work-related nature of her injuries.

We read Finding of Fact No. 3, in the context of Conclusion of Law No. 2 and the hearing officer's discussion of the evidence, to be saying that claimant did not sustain compensable repetitive trauma injuries before she stopped working on or about (date), but that had she sustained such injuries, her date of injury would be the last day she worked in (month, year). The evidence sufficiently supports such finding. Since the hearing officer was satisfied claimant failed to prove she sustained any compensable repetitive trauma injuries whatsoever before she ceased working, it follows that she also failed to prove she had disability under the 1989 Act. See Section 401.011(16) and Texas Workers' Compensation Commission Appeal No. 92217, decided April 13, 1992.

Though mooted by his threshold determination that claimant did not sustain any compensable repetitive trauma injuries while working for employer, the hearing officer nevertheless went on to find that claimant did not provide notice to her employer of her wrist and hand injuries until January 1992, or of her back and leg injuries until July 1992 (the dates of her original and amended TWCC-41 forms), and concluded that she failed without

good cause to provide notice of her injuries to her employer timely under the 1989 Act. The hearing officer further found that the employer did not have actual knowledge "of any of the alleged work-related nature of any of the Claimant's injuries until January of 1992." See Sections 409.001 and 409.002. As for the timely filing of her claim(s) (see Sections 409.003 and 409.004), the hearing officer found that claimant filed a claim for her wrist and hand problems less than one year after she knew or should have known that her wrist and hand problems were work related, and that she filed a claim for her back and leg problems more than one year after she knew or should have known they were work related. These findings also clearly demonstrate that the hearing officer considered claimant's last day of work as her date of injury, albeit he was persuaded she had proved no compensable injuries whatsoever.

The challenged findings and conclusions are not so against the great weight and preponderance of the evidence as to be manifestly unjust. In re King's Estate, 150 Tex. 662, 244 S.W. 660 (1951); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986).

The decision of the hearing officer is affirmed.

Philip F. O'Neill
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Joe Sebesta
Appeals Judge