APPEAL NO. 941072

This appeal is brought pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on June 17, 1994, in (city), Texas, with the record closing on July 12, 1994. (hearing officer) presided as hearing officer. With regard to the issues reported out of the Benefit Review Conference (BRC) and remaining in dispute at the hearing, the hearing officer made the following determinations:

1.The respondent (claimant) sustained a compensable occupational disease (right carpal tunnel syndrome) on (date of injury).

2.(date of injury), is the date of the injury because on this date the claimant knew or should have known of his occupational disease.

3.The claimant without good cause failed to notify his employer of his occupational disease within 30 days of (date of injury).

4.The claimant had disability as a result of his compensable injury from February 9, 1994, to the date of the hearing.

The hearing officer added the following issue because "[t]hough not certified . . . it was actually litigated . . . Did the Employer have actual notice of Claimant's right carpal tunnel [CTS] syndrome." In response to this added issue, the hearing officer found that both the employer and carrier had actual notice of the CTS because they were provided a (date of injury), medical report as part of a designated doctor's report in claimant's unrelated claim regarding a neck and right shoulder injury. Because they had actual notice, the hearing officer concluded the carrier and employer were not relieved of liability.

Though not addressed as an issue, the hearing officer noted in the Discussion portion of her decision and order "[a]s the date of injury is more than one year from the date the claim was filed in this matter, the issue of timely filing will be addressed." She then found the claimant acted as a reasonably prudent person and thus had good cause for failing to timely file his claim.

The carrier appealed only the findings of fact and conclusions of law that it and the employer had actual notice of the CTS on (date of injury), which rendered the claimant's failure to timely report the injury of no legal effect and thus did not relieve them of liability under the 1989 Act; that the claimant had good cause for failing to file his claim within one year of the injury; and that the claimant had disability.

In a letter dated August 16, 1994, and mailed on August 17, 1994, to the Appeals Panel Clerk and received on August 22, 1994, the claimant asserted that the correct date of his injury was February 9, 1994, and that he filed his claim within 30 days of that date. He also expressed disagreement with the conclusion of the hearing officer that he knew or should have known of his occupational disease on (date of injury). In a subsequent letter

to the Commission mailed August 23, 1994, and received on August 25, 1994, the claimant for the first time attached copies of a physician's statement dealing with disability for the period after the date of the hearing.

DECISION

We affirm in part and reverse and render in part.

The claimant worked as an aircraft assembler for the employer and its predecessor company from June 9, 1987, to January 19, 1994, when he was laid off in a labor force reduction. The carrier did not appeal the determinations of the hearing officer that the claimant sustained a compensable occupational disease (CTS); that (date of injury), was the date the claimant knew or should have known of his occupational disease; and that the claimant did not timely report his CTS within 30 days of (date of injury), and did not have good cause for failing to notify his employer of his CTS until after he was laid off on January 19, 1994. In his letter of August 16th, the claimant appears to seek review of the determinations of when he knew or should have known of his occupational disease and whether he timely reported the disease to his employer. To the extent that the claimant's August 16, 1994, letter was intended to be an appeal, we consider it untimely. The decision and order of the hearing officer were mailed to the claimant on July 26, 1994. To be timely, the claimant would have to have mailed his appeal to the Commission no later than August 15, 1994, and it would have had to be received no later that August 22, 1994. *See* Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE §§ 143.3, 102.5(h) and 102.7 (Rules 143.3, 102.5(h) and 102.7). The claimant's letter was mailed on August 17, 1994, and received on August 22, 1994. We will, therefore, consider it a response only to the issues raised by the carrier and not an appeal of other issues. Texas Workers' Compensation Commission Appeal No. 92193, decided July 2, 1992. Since the hearing officer's determinations that the claimant sustained a compensable CTS injury on (date of injury), and that he did not timely report the injury or have good cause for failing to timely report the injury have not been timely appealed by either party, these determinations have become final. Sections 410.169 and 410.204.

The carrier appealed the further determinations of the hearing officer that the failure of the claimant to timely report his injury did not relieve the employer or carrier of liability because both the employer and carrier had actual notice of the claimant's CTS "as they were provided a copy of the (date of injury), EMG report" which was rendered by a designated doctor in an unrelated claim deriving from an unrelated neck and right shoulder injury in 1991. In seeking review of this part of the decision and order of the hearing officer, the carrier argues that the EMG report referred to by the hearing officer did not meet even the minimum standards of notice set out in DeAnda v. Home Insurance Co., 618 S.W.2d 529 (Tex. 1980), which require that only the general nature of the injury and the fact that it is job related be communicated. The 1992 EMG report was prepared by (Dr. HU) in response to the claimant's 1991 neck and shoulder injury. In the report, Dr. HU concludes that the test was "within normal limits" and "there is no electrodiagnostic evidence of a brachialplexopathy or cervical radiculopathy." In a June 30, 1994, letter to the hearing officer, Dr. HU states the claimant "does indeed have a right carpal tunnel entrapment as

evidenced by the nerve conduction study done on (date of injury) . . . The results were not printed in the original report conclusion because I was informed to look for a neck or shoulder nerve pathology." The carrier argues that neither it nor the employer are medical experts "and as such cannot be expected to interpret latency readings on an EMG report" particularly when the physician in charge of the study concludes there are no right wrist abnormalities. The claimant in his testimony asserted that he himself was never told in 1992 that he had CTS which is consistent with his contention that he did not begin to even feel numbness in the fingers of his right hand until May 1993.

We agree that DeAnda, *supra*, establishes the standard for adequacy of notice of an injury. *See* Texas Workers' Compensation Commission Appeal No. 93512, decided August 2, 1993. Whether sufficient notice has been give is a question of fact for the hearing officer to decide. We will overturn a factual finding of a hearing officer only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Company, 715 S.W.2d 629 (Tex. 1986). In this case, we conclude that Dr. HU's 1992 EMG report as originally written provided no notice of right CTS either expressly or by implication. Any suggestion to the contrary from the raw data in the report on nerve conduction latency delay of the median nerve at the right wrist is, we believe, overcome by the express conclusion of Dr. HU that his test "was within normal limits." There being no other evidence to support the finding of fact and conclusion of law that the carrier and employer had actual knowledge of the claimed CTS within 30 days of (date of injury), we reverse and render a decision that neither carrier nor employer had actual knowledge of the claimant's occupational disease within 30 days. Because there was no timely notice by the claimant, nor good cause for failure to give timely notice, nor actual knowledge by the employer or carrier of the otherwise compensable occupational disease, the carrier and employer are relieved of liability for benefits under Section 409.002

The carrier also appeals the determinations of the hearing officer that the claimant acted "as a reasonably prudent person when he failed to file his claim with the Commission until 1994, as he was asymptomatic until May 1993" and for this reason that the claimant had good cause for failure to file a claim "until more than one year after the (date of injury), date of injury . . . . " The claimant's claim for compensation (TWCC-41) was signed on March 3, 1994. Sections 409.003 and 409.004 provide that, absent good cause, a claim for compensation must be filed not later than one year after the date of injury which, in the case of an occupational disease, is the date the employee knew or should have know that the disease was related to the employment. The carrier contends on appeal that any good cause the claimant may have had for failing to timely file a claim lasted only until May 1993 when his CTS was no longer asymptomatic and that there was no good cause for a continued delay in filing for approximately another ten months. We need not decide this question because we believe the issue of timely filing of a claim was not properly before the hearing officer.

In her discussion, the hearing officer stated:

> As the date of injury is more than one year from the date the claim was filed in this case, the issue of timely filing will be addressed . . . In the present case, the Claimant was asymptomatic until May 1993, and as such, Claimant had good cause for his failure to file prior to that time. Claimant filed within one year of developing symptoms in May 1993. Accordingly, it is concluded that Claimant's claim was timely filed as he had good cause for failing to file within one year of the date of injury. The hearing officer need not address the issue of whether the Employer's Report of Injury (TWCC-1) was timely filed as it was not first raised or actually litigated by the parties.

The report of the BRC nowhere mentions an issue of timely filing of a claim. Section 410.151 of the 1989 Act provides that an issue not raised at the BRC may not be considered at a CCH except in limited circumstances. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 142.7(a) (Rule 142.7(a)) provides in part that "[a] dispute not expressly included in the statement of disputes will not be considered by the hearing officer." Since a dispute about the timeliness of the claim was not reported out of the BRC, or otherwise added as a dispute in a response to the BRC report, or by agreement of the parties, or upon a finding of good cause by the hearing officer,[1] the hearing officer was without authority to decide it. Texas Workers' Compensation Commission Appeal No. 91007, decided August 28, 1991. According to our review of the record, we do not believe this issue was litigated. The only evidence of an untimely claim is the TWCC-41 itself. The hearing officer also advised the claimant at the close of the hearing that timely filing of his claim was not an issue "so you don't have to worry about responding to it." We, therefore, disregard Finding of Fact No. 12 and Conclusion of Law No. 6 dealing with the timely filing of a claim.

The carrier also appeals the decision of the hearing officer that the claimant had disability from February 9, 1994, to the date of the CCH. The carrier argues that this determination is contrary to the great weight of the evidence which showed that the claimant continued working until January 19, 1994, when he was laid off in an employer restructuring and the claimant himself admitted that he never told the Texas Rehabilitation Commission (TRC) that his CTS prevented him from working. The claimant testified that he did not believe he was able to work because of his CTS. He also introduced a statement of (Dr. HN), whom the claimant saw on February 8, 1994, at the request of the TRC. Dr. HN was of the opinion that the claimant's CTS prevented him from doing his former job and that the claimant "should be considered disabled from February 9, 1994, for right [CTS]."

Under the 1989 Act the claimant has the burden of proving that he has disability as a result of his compensable CTS. Texas Workers' Compensation Commission Appeal No. 94248, decided April 12, 1994. Whether disability exists is a question of fact for the hearing officer to decide and may be proven by the testimony of the claimant alone. Texas Workers' Compensation Commission Appeal No. 93560, decided August 19, 1993. In this case, we believe the statement of Dr. HN and the testimony of the claimant were sufficient evidence

[1]We observe that the hearing officer also added the issue of actual notice of the injury "because it was actually litigated." She did not similarly justify addressing the issue of timely filing of the claim.

to support the decision of the hearing officer on disability and we will not disturb them under our standard of appellate review. Pool, *supra*; Cain, *supra*. However, in view of our determination that the claimant did not provide timely notice of his compensable injury, the carrier and employer are relieved of liability for this injury under Section 409.004 of the 1989 Act.

We affirm in part the decision and order of the hearing officer. We reverse that portion which finds that the carrier and employer had actual knowledge of the claimed injury in this case and render a decision that neither the carrier nor the employer had actual knowledge of the claimed injury. Because the claimant failed without good cause to timely notify the employer or carrier of his injury, carrier and employer are relieved of liability for medical and income benefits.

Alan C. Ernst
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Gary L. Kilgore
Appeals Judge