APPEAL NO. 941505

This appeal is considered in accordance with the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. §401.001 *et seq.* (1989 Act). A contested case hearing was held on October 11, 1994, in (city), Texas, with (hearing officer) presiding as the hearing officer. The hearing officer concluded that the appellant (claimant), who is the claimant, sustained a compensable repetitive trauma injury in the course and scope of her employment with her employer, (employer); the hearing officer did not expressly find a date of injury, although the insurance coverage and employment status findings of fact recite (date of injury), as the operative date. The hearing officer found that claimant did not give notice within thirty days of her date of injury, and further concluded that she did not have good cause and the employer did not have actual knowledge of the injury.

The claimant has appealed the decision, arguing that it was not until (date), that she realized that she had a work-related carpal tunnel syndrome, and that she promptly gave notice to her employer on May 2, 1994. She points out that one of the hearing officer's findings of fact that posits December 4, 1993, as an apparent alternate date of injury is based upon an incorrect date in a medical report that was corrected to January 4, 1994. The claimant argues that she is not medically trained, and therefore did not know, nor should she have known, that her left arm pain was carpal tunnel syndrome and that it was work-related. She further notes that she may have been prejudiced by a question about her former employment. The carrier, the (employer) through which the employer is self-insured, responds that the hearing officer is the finder of fact on the date of injury, and timely notice, and that the decision should be upheld. Neither party has appealed the hearing officer's determination that claimant sustained a repetitive trauma injury in the course and scope of her employment.

DECISION

We reverse and remand.

The claimant worked as a billing clerk for the employer, and as such was entering or retrieving information, using a computer terminal for approximately six hours of each eight hour day she worked. Claimant said that on (date of injury), her upper left arm, between her shoulder and her elbow, began to hurt. This occurred while she was at work but was not related to any particular incident or accident. Claimant said that when the pain did not resolve, she sought medical attention through the clinic for her employer. She consulted with (Dr. J), who requested that she come in the next day to test if her problems might be related to her heart. Instead, claimant sought treatment beginning December 10, 1993, by (Dr. R), her primary care physician through her Health Maintenance Organization (HMO). Dr. R gave claimant muscle relaxers and injections to relieve her pain, and according to claimant, suggested she was stressed out and needed to relax and take some time off from work. Claimant was off only for a few days, according to her testimony. Dr. R referred her to other physicians, including (Dr. RF), who referred her for physical therapy, and again stated an opinion that claimant was stressed out. By this time, claimant said her pain

radiated into her cervical area. According to claimant, these doctors did not tell her what might be causing her pain, aside from stress.

Claimant was referred to (Dr. G), who in December 1993 ordered an MRI and EMG to help determine what was wrong. Claimant said that she was not told what the results of the test were nor did she see any reports. Claimant also sought assistance from (Dr. RY), a doctor at the (an adjunct of the employer) which had been referred by a co-worker, and stated that she was so concerned about the cause of her continued arm pain that she asked Dr. RY if she had cancer, and he assured her she did not. Claimant returned to Dr. R in April 1994, asking for more pain relief and expressing distress that she did not understand why the pain continued. Dr. R inquired at this time if someone hadn't told her she had carpal tunnel syndrome, and that it was related to what she did at work. Claimant on May 2, 1994, filled out report of injury forms for her employer, after informing (Ms. C), her supervisor, that she had been diagnosed with work-related carpal tunnel syndrome. Claimant has continued to work, although she said she modified her activities to break up her work time on the computer.

Medical records in evidence reveal the following:

-December 1, 1993, notes of the employer's clinic indicate that cardiac concerns should be ruled out. By the next day, there are some notes indicting that claimant's pain seems to be more musculoskeletal.

- A December 13, 1993, report completed by Dr. RF noted that claimant had acute fibromyositis/ fibromylalgia and possible mild left carpal tunnel syndrome. Dr. RF recommended physical therapy.

- December 17, 1993, letter from (Dr. O), assistant professor of neurosurgery for the employer, to Dr. R indicates that claimant began experiencing gradual pain around (date). (Claimant stated this date was an error, and that she had consistently maintained that (date of injury), was the beginning of her pain).

- In a December 17, 1993, letter from Dr. G to Dr. R, thanking him for the referral of claimant, he states his suspicion that claimant has a condition that "sounds like cervical radiculopathy but it very well may be a myofascial pain condition." He states his intent to arrange for MRI and EMG.

- A December 1993, MRI report states impression of slight bulging of C5-6 disc without herniation.

- On January 4, 1994, the EMG was performed; a medical report of that date, and a letter from Dr. G to Dr. R, state that the results are "consistent" with mild bilateral carpal tunnel entrapment. However, the letter further states that "my feeling is this patient has myofascial pain." Dr. G states his intent to continue with pain management and injections. None of Dr. G's records or reports link

the condition to claimant's employment. A cover sheet apparently prepared by Dr. G to attach to the EMG report is dated "December 4, 1994". Another copy of this document is also included in the record, in which the final digit in "1994" has a line drawn through it and "3" is written in.

- January 10 and 27, 1994, letters from Dr. RY to Dr. G note treatment for chronic myofascial pain syndrome.

- April 15, 1994, letter from (Dr. JR) at the pain management clinic notes injections for myofascial pain.

- (date), Dr. R's notes indicate that bilateral carpal tunnel syndrome is diagnosed along with myofascial pain.

- May 3, 1994, "off work" slip from Dr. R notes that claimant has bilateral carpal tunnel syndrome, ongoing since December 10, 1993. His initial medical report of May 13, 1994, repeats the diagnosis.

- A May 20, 1994, "To Whom It May Concern" note by Dr. R takes claimant off work until May 23rd for a work-related carpal tunnel syndrome.

- A May 23, 1994, medical report by (Dr. U) states that claimant is most likely experiencing myofascial pain, most likely related to the carpal tunnel syndrome shown as mild on the EMG but "considering her type of work, she is definitely at risk for problems as such."

None of the records prior to (date), (the date that claimant contends she became aware of a work-related occupational disease) link claimant's shoulder pain to her work. On a general information sheet claimant filled out on January 10, 1994, for the Pain Clinic, she indicated the cause of her pain as a question mark. Claimant did say that when she was taken off work for brief periods of time or was off on holidays, the pain would get better, and then worsen again when she returned to work.

Claimant agreed that there was an incident in her home in which she banged her left shoulder on the edge of a table. Although a signed statement of two co-workers attributes this to Thanksgiving, other statements from family members corroborate claimant's testimony that this occurred in mid-December 1993.

Aside from three findings of fact as to insurance coverage and employment status, reflecting underlying stipulations, that denote (date of injury), as the date in question, the only fact finding naming a date from which the hearing officer apparently calculated the thirty day notice is as follows:

10.A reasonable person in the same situation as the claimant would have realized that her problems were related to her duties or aggravated by her

> duties for the employer and would have reported her injury to the employer with thirty (30) days of (date), the date she first noticed the pain, or within thirty (30) days of December 4, 1993, when the problem was diagnosis [sic] by [Dr. G]. [emphasis added].

It appears that the date "(date)" is a typographical error, because the hearing itself was held prior to this date, and (date of injury), is otherwise cited in the decision.

The 1989 Act defines "repetitive trauma injury" as "damage or harm to the physical structure of the body occurring as the result of repetitious, physically traumatic activities that occur over time and arise out of and in the course and scope of employment." Section 401.011(36). The date of injury of such a disease is "the date on which the employee knew or should have known that the disease may be related to employment." Section 408.007. To recover for an occupational disease of this type, one must not only prove that repetitious, physical traumatic activities occurred on the job, but also must prove that a causal link existed between these activities on the job and one's incapacity. Davis v. Employer's Insurance of Wausau, 694 S.W.2d 105 (Tex. App.-Houston [14th Dist.] 1985, writ ref'd n.r.e.).

Section 409.001 requires that the injured employee give notice of a specific injury to a person in a supervisory or management capacity within 30 days. However, the notice given, while it need not be fully detailed, should at a minimum apprise the employer of the fact of an injury and the general area of the body affected. Texas Employer' Insurance Ass'n v. Mathes, 771 S.W.2d 225 (Tex. App.- El Paso 1989, writ denied).

Under the 1989 Act, if the injury is an occupational disease, including a repetitive trauma injury, the employee or person acting on the employee's behalf must notify the employer of the injury 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. Section 409.001(a)(2). In interpreting the occupational disease notice provision under the prior workers' compensation law, the court in Commercial Insurance Company of Newark, New Jersey v. Smith, 596 S.W.2d 661 (Tex. Civ. App.-Fort Worth 1980, writ ref'd n.r.e.), stated that the statutory time period for notice begins to run in an occupational disease case when the claimant, as a reasonable man or woman, recognizes the nature, seriousness, and the work-related nature of the disease, which was not necessarily the date of the first symptom. In the context of an election of remedies, the Court in Bocanegra v. Aetna Life Insurance Co., 605 S.W.2d 848, 853 (Tex. 1980), stated:

"Many diseases do not fit neatly within an either/or distribution, and the dispute whether such a condition is compensable or not is an ongoing one. Uncertainty in many complex areas of medicine and law is more the rule than the exception. It would be a harsh rule that charges a layman with knowledge of medical causes when, as in this case, physicians and lawyers do not know them."

The purpose of notice to the employer is to allow the insurer an opportunity to investigate the facts, and to fulfill that purpose the employer need know only the general nature of the injury and the fact that it is work-related. DeAnda v. Home Insurance Co., 618 S.W.2d 529 (Tex. 1980).

The uncontroverted testimony in the record is that claimant first knew she had a work-related injury on (date). The hearing officer has apparently concluded that she "should have known" at either of two dates prior to this. Either date found by the hearing officer is, in our opinion, against the great weight and preponderance of the evidence in this record. First of all, we find nothing to indicate that claimant should have known she had a work-related injury on (date of injury), the date she first had pain. There was no incident at work that occurred, and claimant did not seek medical treatment until a few days later. Second, when claimant sought medical treatment on December 1st and 2nd, the clinic doctor was concerned with cardiac conditions. We are unwilling to impose a standard that would require that a lay person should have known of a repetitive trauma injury not even alluded to by the first physician that consulted with her. We note that the hearing officer found that the employer, which employed many of the doctors who treated claimant in the ensuing months, did not have "actual knowledge" of her condition. (We would agree that diagnosis of the specific nature of an injury as carpal tunnel syndrome was not required in order for claimant to be charged with knowledge of a work-related injury, DeAnda, cited above).

As to the December 4, 1993, date, the claimant's contention that the date is incorrect and does not reflect the evidence is well-taken. We are not willing to simply substitute a January 4, 1994, date when Dr. G's suspicion of carpal tunnel was first recorded, for two reasons: It is incumbent upon the hearing officer to find a date of injury for the occupational disease, and simply substituting such date takes this Appeals Panel into the area of fact finding as opposed to clerical correction of the record. We would note that Dr. G's letter of January 4, 1994, does not apparently regard carpal tunnel syndrome as his primary diagnosis for the claimant's condition, nor is the condition he diagnosed tied to claimant's work.

We have repeatedly stated, most especially when timely notice is in issue, that it is essential for the hearing officer to find a date of injury as defined in the act for the type of injury. *See, most recently*, Texas Workers' Compensation Commission Appeal No. 941374, decided (date).

We note that the Commission can determine that good cause existed for failure to give notice in a timely manner. Section 409.002(a)(2). The test for the existence of good cause is that of ordinary prudence, that is, whether the claimant prosecuted his claim with that degree of diligence that an ordinarily prudent person would have exercised under the same or similar circumstances, which is ordinarily a question of fact to be determined by the trier of facts. Hawkins v. Safety Casualty Co., 146 Tex. 381, 207 S.W.2d 370 (1948). A mistake as to the cause of an injury or disability may constitute good cause. Baca v. Transport Insurance Company, 538 S.W.2d 814 (Tex. Civ. App.-El Paso 1976, writ ref'd n.r.e.).

The claimant in this case was employed by a medical branch of the University of Texas. The record indicated that the numerous physicians, many affiliated with this institution, were in disagreement as to the exact cause of claimant's ailment. Her uncontroverted testimony was that a diagnosis of work-related carpal tunnel syndrome was not disclosed to her until (date). We recognize that the trier of fact may chose to disbelieve the claimant's testimony, even if undisputed. Taylor v. Lewis, 553 S.W.2d 153, 161 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.). However, in light of the medical evidence indicating some ongoing questioning over the nature, and cause, of claimant's ailment, the belated attribution of her condition to her work, and given the liberal construction that this Panel has stated should be given to issues of notice and exceptions thereto, Texas Workers' Compensation Commission Appeal No. 93379, decided July 1, 1993, we cannot affirm the hearing officer's determination that claimant should have known she had a work-related injury on the date of her first symptom for purposes of giving notice, or on December 4, 1993, a date for which there is no evidentiary support.

The decision of the hearing officer will be set aside only if the evidence supporting the hearing officer's determination is so weak or against the overwhelming weight of the evidence as to be clearly wrong or manifestly unjust. Atlantic Mutual Insurance Co. v. Middleman, 661 S.W.2d 182 (Tex. App.-San Antonio 1983, writ ref'd n.r.e.). That is the case here.

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 Section 410.202. *See* Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

Susan M. Kelley
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Philip F. O'Neill
Appeals Judge