APPEAL NO. 94197

This appeal arises under the Texas Workers' Compensation Act of 1989, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). On December 30, 1993, a contested case hearing was held in (city), Texas, with (hearing officer) presiding. He closed the record on January 11, 1994, and determined that respondent (claimant) was compensably injured on (date of injury), and (date of injury). Appellant (carrier) asserts that the first date of injury was (date of injury), not (date of injury), and that claimant's claim was not timely filed. Claimant replied that the hearing officer should be affirmed. Respondent 2 (Carrier 2) replied that the appeal was not timely filed because appellant did not timely serve a copy of the appeal on Carrier 2; in the alternative, Carrier 2 states that the hearing officer should be upheld.

DECISION

We affirm.

Claimant worked as a secretary for (employer). Claimant testified that in (date of injury), her employer was converting computers and she was required to do more regular typing as a result. Her hands hurt and she said, "I told them that my hands were hurting. And that I thought it was because we were doing so much typing." She first went to the doctor about this in October (year). Her doctor at that time, (Dr. K) diagnosed "overwork syndrome" and prescribed medication and exercises, which claimant stated helped her. She was pain free from January through March 1993. Then in April 1993, a solicitation drive to alumnae was undertaken which entailed more typing and caused pain in her hands again. She saw (Dr. B) on (date of injury), who diagnosed bilateral carpal tunnel syndrome. She again reported the problem to her employer. She filed her claim for the (year) injury on November 8, 1993, and for the 1993 injury on December 30, 1993.

On cross-examination, claimant stated that the pain that began in (month) (year) continued in September and October of that year. Claimant was asked whether the pain was trivial, and she replied that she did not think it was serious, later stating that she saw the doctor in October, "because the pain did not go away." She did not say the pain became worse, but acknowledged that she had said she "didn't know it was an injury" agreeing that discomfort, because of heavy work, was a possibility, even though she had not had such pain before. She had told her employer in September that she was going to see a doctor about her hands.

(HH) testified that he filled out the employer's first report of injury on July 21, 1993, when claimant's supervisor talked to him about claimant's injuries. He entered the words, "first pain" and "(date of injury)" in the block for date of injury after talking with the supervisor.

There was no issue as to notice to the employer in regard to either of the two claimed injury dates. The issues were whether claimant had compensable injuries on (date of injury), and (date of injury); what is the date of injury; was claimant's claim timely filed; or did she have good cause for untimely filing. No issue is raised on appeal that claimant

sustained either injury, both of which were found to be occupational diseases. The date of injury issue is raised in the form of assertion that (date of injury), should be the first date of injury because that is when claimant received a diagnosis from her doctor as to what her injury was - overwork syndrome. (Carrier ceased its coverages after (date of injury) but before (date of injury).)

Carrier refers to criteria under the law prior to the 1989 Act as calling for "first distinct manifestation" which was controlled by when the employee knew the disease was work related. It cites the case of Commercial Ins. Co. of Newark, N.J. v. Smith, 596 S.W.2d 661 (Tex. Civ. App.-Fort Worth 1980, writ ref'd n.r.e.). Carrier cites Texas Workers' Compensation Commission Appeal No. 93165, decided April 14, 1993 (Unpublished) and Texas Workers' Compensation Commission Appeal No. 93299, decided June 2, 1993 (Unpublished), both of which looked upon the hearing officer's determination of date of injury as a factual question to be disturbed only if against the great weight and preponderance of the evidence. Carrier also cited Texas Workers' Compensation Commission Appeal No. 92687, decided February 2, 1993, which primarily dealt with whether a compensable injury occurred, finding sufficient evidence therefore.

Texas Workers' Compensation Commission Appeal No. 92559, decided December 3, (year), also affirmed a hearing officer who found a date of injury in (Month year), when the claimant in that case saw his family doctor in early March for persistent cough and "flu" and then was referred to a specialist to diagnose the problem. Claimant also told his supervisor (fiberglass plant) in March that his breathing problem may be connected to the work. He saw the specialist in April, who in May reported a firmer connection between the plant and the lung condition. In upholding the date of injury in March, Appeal No. 92559 said that past cases did not say a claimant could only "knew or should have known that the injury may be related to the employment" after verification of a doctor, although many cases did involve a factual finding of claimant's knowledge based on a doctor's opinion. *See also* Texas Workers' Compensation Commission Appeal No. 92047, decided March 25, (year), which cited Smith, *supra*, without indicating that its criteria controlled cases under the 1989 Act. There was sufficient evidence to support the hearing officer's finding that the first injury occurred on (date of injury), when claimant told her employer that she thought her hands were hurting from the work. (We note that the diagnosis given in October by Dr. K (overwork or overuse syndrome) is not overly specific in clarifying what claimant thought she had.)

Carrier states that the employer did not file its first report of injury until it had notice of the injury and appears to be suggesting an issue of timely notice to the employer as within the issue of timely claim. There was no issue of timely notice to the employer, and the hearing officer found the employer agreed that claimant reported the injury in (month) (year). This is not raised as an issue on appeal. Section 409.008 states that failure to file the employer report of injury delays the one year limitation for filing a claim until such report is furnished if the employer has been given notice or has knowledge of the injury. The finding that the first report of injury was not filed until July 21, 1993, was sufficiently supported by the evidence. The conclusion of law that claimant timely filed her claims with the Texas

Workers' Compensation Commission because the end of the one year period was tolled until July 21, 1994, was sufficiently supported by the findings of fact and the evidence of record.

Carrier 2's assertion that carrier's appeal was not timely because a copy of the appeal was not timely served on it is without merit. Texas Workers' Compensation Commission Appeal No. 91120, decided March 30, (year), stated that an appellant's failure to serve respondent did not affect the timeliness of the appeal but extended the time of the deadline for the response.

Finding that the decision and order are not against the great weight and preponderance of the evidence, we affirm. *See* In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951).

Joe Sebesta
Appeals Judge

CONCUR:

Gary L. Kilgore
Appeals Judge

CONCURRING OPINION:

I concur in the decision of Judge Sebesta. However, this decision should not be taken as precedent for the proposition that "overwork syndrome" necessarily constitutes an occupational disease under the workers' compensation law of this state. The carrier that appealed the hearing officer's decision did not contest the conclusions that the claimant sustained occupational diseases in (year) and (year). It contests, among other things, the date of injury of the (year) occupational disease. In fact, the carrier states in its appeal that the evidence supports a finding of occupational disease on two occasions, and asserts that those occasions were (date of injury), and (date of injury). Given the carrier's acquiescence in the hearing officer's determination of occupational disease in (year), the question of the sufficiency of the evidence to support that determination is not before us on appeal.

Robert W. Potts
Appeals Judge