APPEAL NO. 94200

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 was held on December 30, 1993, in (city), Texas, with (hearing officer)., presiding as hearing officer. The issues at the hearing were whether the respondent (claimant) sustained a shoulder injury in the course and scope of her employment on (date of injury); whether she timely reported such injury, and, if not, whether she had good cause for failing to do so; and whether she has disability as a result of this injury. The hearing officer determined that she did suffer a compensable injury; that she had good cause for not timely reporting the injury; and that she has disability as a result of the injury. The appellant (school district) appeals the determination that the claimant sustained a compensable injury on (date of injury), as contrary to the great weight of the evidence and the result of a misapplication of the law regarding the date of injury. The claimant replies that the school district's appeal is untimely, but if considered timely, that the decision of the hearing officer is supported by sufficient evidence and is correct as a matter of law.

DECISION

The decision and order of the hearing officer are affirmed in part and reversed and remanded in part.

The claimant testified that she worked for the school district as a sign language interpreter, signing for seven to eight hours a day for deaf students since 1987. She said that for several years she had been experiencing pain in her neck which radiated down her shoulders into her arms and lower extremities. In December 1990, (Dr. L) performed a diskectomy and fusion at C5-6. The operation appeared to be successful and she returned to work in February 1991. Medical reports of Dr. L indicate that sometime in May or June of 1992, she began to experience recurrent neck, right shoulder and arm pain and discomfort radiating along the left scapula area. Dr. L referred the claimant to (Dr. RI) for consultation. Dr. RI began a program of conservative treatment including neck exercise and anti-inflammatory medication. An MRI of the cervical spine done on January 19, 1993, showed mild osteophytic ridging at C4-5, C6-7 and C7-T1 without focal disc herniation. In a treatment note of March 9, 1993, Dr. RI records impingement symptoms, no lateral epicondylitis, "but still some tenderness over the vertebral border of the scapula." He writes: "I am at a loss to explain these . . . I think she needs a totally fresh evaluation. . . ." Drs. L and RI then referred the claimant to (Dr. W).

In a progress note for April 20, 1993, Dr. W wrote that the claimant has had right shoulder pain for approximately a year. On June 14, 1993, Dr. W diagnosed stage II subacromial impingement of the right shoulder and performed an arthroscopic decompression of the right shoulder (including debridement of the bursa, coracoacromial ligament resection and acromioplasty) because the subacromial space showed significant ulceration of the rotator cuff. According to the claimant, this operation did not relieve her pain. She testified that when she went back to Dr. W on (date of injury), to have the stitches removed, she asked him if her shoulder condition (rotator cuff tear) was related to her work.

The claimant said he responded "it definitely is" and for the first time she realized there was a connection between her job and her shoulder injury.

The claimant had been on summer break from her teaching job since May 28, 1993. She said she had never been instructed by anyone at the school on how to report an injury, but she did try to let someone know during the summer that she considered her shoulder injury job related after her discussion with Dr. W. She stated that she called the district administration building in early July 1993, but got a recording that said the offices were closed. She knew her supervisor, (Ms. F), would be attending a workshop in (city) on August 3 and 4, 1993, so she met her there, even though the claimant was not required to attend the workshop, and, in her words, told Ms. F:

> that because I could not physically sign during the workshop because of the pain and all, that I probably was not going to be able to return to work and that I thought it was work related.

The claimant insisted that this was the first time she was able to speak to anyone about the injury being work related. The claimant stated she is currently undergoing a pain management program. On October 6, 1993, Dr. W diagnosed post-operative ankylosis of the right shoulder.

On December 28, 1993, the claimant was examined by (Dr. WI) at the carrier's request. He diagnosed chronic right shoulder pain syndrome "exact etiology undetermined." The claimant also introduced into evidence a series of articles from professional journals to support generally the proposition that upper extremity cumulative trauma disorders are a significant occupational hazard among sign language interpreters. In her testimony, the claimant admitted that the symptoms that required the cervical fusion and those leading up to the rotator cuff tear were largely the same. She also conceded that she was aware of a possible connection between her employment and her right shoulder injury as early as March 1993 when she spoke with Dr. RI and that she had discussions with Dr. L as early as 1990 about the possible connection between her job and the pain she felt in her upper extremities, but insisted that (date of injury), was when she first thought her shoulder condition was related to her work and not her previous neck surgery. She could not explain why she listed September 4, 1993, as the "suspect" first date she knew her condition was work related in Block 16 of the "Employee's Notice of Injury or Occupational Disease and Claim for Compensation" (TWCC-41). On this form she also listed for the date of injury "on-going 03-30-93."

(Mr. V), the director of workers' compensation programs for the school district, testified that in the fall of 1992, the school district changed the policy to state that reports of work-related injuries are to be made within 24 hours and that a memo to this effect was issued to all employees. (The claimant denied receiving this memo.) He agreed that the first notice the school district got of this claimed injury was from Ms. F in August 1993. He also said that school district policy required all principals to be on the school premises

through the month of June. He was not aware whether Ms. F or the school principal was available to receive the claimant's report of injury in the 30 days following (date of injury).

As an initial matter for consideration, we determine that this appeal was timely filed. According the appeal, the school district received the decision of the hearing officer on February 7, 1994. Therefore, to be timely, an appeal must be filed with the Texas Workers' Compensation Commission (Commission) central officer no later than 15 days after receipt, or, in this case, February 22, 1994. Section 410.202(a) and Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 143.3(a) (Rule 143.3(a)). Commission records indicate the appeal was received on this day. Although the school district asserts that it served a copy of the appeal on the claimant also on February 22, 1994, a copy of the envelope in which the appeal was received by the claimant reflects a post-mark of February 23, 1994. We consider the critical date for determining if an appeal is timely filed to be the date an appeal is filed with the Commission. A delay in serving a copy of the appeal on the other party serves only to extend the time for providing a timely response.

The school district appeals the decision of the hearing officer that the claimant sustained a compensable injury on (date of injury), urging that the hearing officer applied the wrong law to the facts of this case. The claimant has alleged a repetitive trauma injury to her right shoulder. Section 401.011(26) defines injury to include an occupational disease. Occupational disease is further defined by Section 401.011(34) to include a repetitive trauma injury that causes damage or harm to the physical structure of the body. A repetitive trauma injury occurs as the result of repetitious, physically traumatic activities that occur over time. Section 401.011(36). The date of a repetitive trauma injury is "the date on which . . . the employee knew or should have known that the injury may be related to the employment." (Emphasis added.) Section 409.001(a)(2).

According to the appeal, the hearing officer ignored these provisions of the current law and applied the "old law" of workers' compensation that the date of a repetitive trauma injury is the date of "first distinct manifestation" of the injury, that is, the date a claimant knew or should have known that the injury "was" (not "may be") related to the employment. In support of its position, the school district points particularly to Finding of Fact 14:

> During her (date of injury), post-operative visit with [Dr. W], the Claimant knew for the first time that her pain had been caused by the rotator cuff injury. [Emphasis added.]

and to Conclusion of Law No. 2:

> On (date of injury), the Claimant knew for the first time that she sustained a new injury in the course and scope of her employment with the [school] District. [Emphasis added.]

The school district asserts in effect that the hearing officer found the date of injury not to have occurred "until the claimant was sure of the connection between her condition and her work."

We do not accept the school district's suggestion that the hearing officer failed to make the proper distinction between the old and new workers' compensation law on the question of date of injury of an occupational or repetitive trauma disease. We briefly addressed this question in Texas Workers' Compensation Commission Appeal No. 92589, decided December 14, 1992. There we observed that under the old law, a "first symptom of an occupational disease does not translate necessarily to the first distinct manifestation of the disease. . . ." A first manifestation of an occupational disease could occur over a period of time and the legislature sought some flexibility for determining the date of an occupational injury and that the test for determining the date of such an injury, even under the old law, was "whether the claimant, as a reasonable person, recognized the nature, seriousness and work-related nature of his disease." In Texas Workers' Compensation Commission Appeal No. 92047, decided March 25, 1992, we approved this standard for when the statutory period of notice begins to run in an occupational disease case citing Commercial Insurance Company of Newark, New Jersey v. Smith, 596 S.W.2d 661 (Tex. Civ. App.-(city) 1980, writ ref'd n.r.e.) This, of course, is a factual determination.

In the case under appeal, there was evidence that the claimant sustained a previous injury to her neck, which, though not apparently claimed as work related, was clearly believed by the claimant to have arisen out of her teaching duties. After corrective neck surgery, she again experienced a discomfort in the upper back, shoulder and upper extremities. She continued working, but again sought medical treatment. According to the evidence, both Drs. L and RI were unsure of the source of the claimant's pain and in 1993 referred her to Dr. W. It was not until Dr. W performed arthroscopic surgery that a torn rotator cuff was found and later considered to be the cause of the pain being experienced by the claimant. Although this medical condition was distinct from the earlier cervical problem, it was by no means obvious before or immediately after the shoulder injury that the shoulder problem was caused by the claimant's activities at work. The school district's argument, in effect, is that as soon as this speculative possibility is raised by a doctor in a report in March 1993, the claimant was on notice that the injury "may be" caused by her work and thus the repetitive trauma injury "occurred" for purposes of beginning the 30 day reporting period. While such a conclusion is not necessarily implausible, it ignores the state of mind of the claimant and what, in fact, a person of ordinary prudence would know or should know at the time. What the court said in Bocanegra v. Aetna Life Insurance Company, 605 S.W.2d 848 (Tex. 1980) in the context of the election of remedies also applies in this case:

> 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.

In the case under appeal, the claimant had a pre-existing condition that apparently resolved itself and then later similar pain returned. The claimant testified that it was not until a conversation with Dr. W on (date of injury), that she knew of the job connection. Whether it was reasonable to have expected her to have known this earlier, as the carrier

suggests, was for the hearing officer to decide. We do not read the language in his decision about when she "knew" this to mean that the hearing officer applied the wrong legal standard in his determination of the date of injury. In fact, in his discussion, the hearing officer refers to (date of injury), as the "earliest date on which the Claimant might have known her injury was work related," and that before this date, the claimant "could reasonably conclude . . . that her pain was related to an old injury." Regardless of the similarities or differences between the old and new act on the issue of the date of a repetitive trauma injury or occupational disease, we conclude that the hearing officer correctly applied the law to the date of injury in this case, in determining that (date of injury), was the first date that the claimant knew or should have known that her injury may have been caused by repetitive trauma at work. We will not substitute our judgment for that of the hearing officer where, as here, the findings are supported by sufficient evidence. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986).

The school district in its appeal also disputes the remaining findings of fact and conclusions of law on the issue of timely notice of injury and disability, but articulates no bases for its appeal of these issues other than to say that since the correct date of injury should have been March 1993, the claimant's evidence on good cause for failure to provide notice of injury within 30 days of this date did not address the period up to (date of injury), and that since there was no injury on (date of injury), as claimed there was no disability.

The failure to notify an employer of an injury within 30 days may be excused for good cause. The test for the existence of good cause is whether the claimant prosecuted this claim with ordinary prudence, that is with the degree of diligence that an ordinarily prudent person would have exercised under the same or similar circumstances. Hawkins v. Safety Casualty Company, 146 Tex. 381, 207 S.W.2d 370 (1948); Texas Workers' Compensation Commission Appeal No. 93102, decided March 22, 1993. This, too, is ordinarily a question of fact. The claimant contended that she called the administrative offices of her employer in July 1993 and got only a telephone notice that the offices were closed for the summer vacation. She said she then sought out her supervisor to report her injury at a teacher's workshop on August 3 and 4, 1993. There was no testimony that her immediate supervisor and school principal were otherwise available at the work site to receive the report of injury. In Texas Workers' Compensation Commission Appeal No. 93677, decided September 21, 1993, the issue of timely notice in the context of a school vacation was also raised. In that case the school offices were closed, and though we did not dismiss as unreasonable the suggestion that a person of ordinary prudence would call the supervisor at home, we did not demand such action in that case. In the case under appeal, the claimant believed, not without reason, that she could not contact a supervisor at her place of employment, so she made special arrangements to see them at a conference a few weeks later. The hearing officer found that the claimant had good cause for not reporting her injury until August 3 or 4, 1993. We believe there is sufficient evidence to support this decision.

Disability is defined as the "inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage." Section 401.011(16). The Appeals Panel has in the past addressed the question of whether a school district employee has disability during the summer vacation months and the impact of being paid on a nine or

12-month basis. Texas Workers' Compensation Commission Appeal No. 92649, decided January 6, 1993. Although the claimant testified she was paid on a 12-month basis, there was insufficient evidence developed at the hearing as to whether the claimant continued in normal pay status over the summer, whether she was required to work summer sessions for this pay, or whether she was no longer employed by the school district at the start of the new school year on or about August 12, 1993. There was no evidence whether claimant worked for any other employer during the period claimed for the extent of disability. There was, however, testimony of the claimant that she was unable to work as a result of her medical condition. There is also a statement of Dr. W which excuses her from work based this condition. The focus of the school district's appeal was on the nonexistence of an injury on (date of injury), and it presented no evidence on the disability issue other than to say "[s]ince the claimant did not have an injury on (date of injury), there can be no finding of disability." However, the burden of proof is on the claimant to establish by a preponderance of the evidence a specific period or periods of disability. Texas Workers' Compensation Commission Appeal No. 93953, decided December 7, 1993. We are unable to conclude from the evidence presented at the hearing whether the claimant continued at her full salary up to the start of the new school year, and beyond. If so, her compensable injury may not have resulted in disability at least up to August 12, 1993, as defined by the 1989 Act because she was able to obtain and retain employment at the pre-injury wage. We therefore remand this case for the development of further evidence as appropriate and a determination of what periods, if any, the claimant, as a result of her compensable injury, was unable to obtain and retain employment at the pre-injury wage, taking into account the nature of her employment agreement with the employer.

The decision and order of the hearing officer are affirmed on the issues of whether the claimant sustained a compensable injury on (date of injury), and whether the claimant had good cause for failing to give timely notice of this injury, and reversed and remanded on the issue of disability for further proceedings consistent 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 Section 410.202. *See* Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

Alan C. Ernst
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Susan M. Kelley
Appeals Judge