APPEAL NO. 94713

Pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. §401.001 *et seq*. (1989 Act), a contested case hearing was held on May 13, 1994. He (hearing officer) determined that the appellant (claimant) failed to prove, by a preponderance of the evidence that she sustained a compensable repetitive trauma injury on (date of injury), and therefore did not have disability. Claimant appeals urging that she proved that she had a work-related repetitive trauma injury and that she reported it when she realized it was work related and that she had disability for 4 weeks. The respondent (carrier) argues that the determinations of the hearing officer are not against the great weight and preponderance of the evidence and should be affirmed.

DECISION

We reverse and remand.

The claimant worked as a chicken deboner for the employer. She testified that in September 1993 she had some pain in her left arm and shoulder and when to see a Dr. A. She was prescribed some medication and continued working. She again saw Dr. A on January 7, 1994, and an entry in medical records shows that, although her visit appeared to be primarily for another reason, she also had "head aches to the back of the neck and upper back," and was told that it could be coming from her "repetitive movements at work." According to the claimant, the pain continued to become worse and she could not work anymore on or about the (date of injury) of (date of injury). She went to Dr. A, was taken off work, and diagnosed with bilateral myofacial pain syndrome of both trapezoids and biceps tendonitis. Dr. A told the claimant and noted in his report that this was related to repetitive problems at work. The claimant reported this matter to her employer on (date of injury, and listed the date of injury as (date of injury), because, according to her testimony, it was in September that she first started experiencing the pain that necessitated her going to the doctor. Her subsequent workers' compensation claim was changed to reflect the _____, date, the claimant explaining that this was the first that she realized that her injury was work related as told to her by her doctor.

At the hearing, the carrier requested to add an issue on timeliness of notification of injury. However, this was objected to and not allowed by the hearing officer who indicated that the issue had not been raised at the earlier proceedings and could be considered waived. His determination not to allow an issue of timely notice is not on appeal and stands uncontested at this time. *See* Texas Workers' Compensation Commission Appeal No. 91097, decided January 16, 1992. The issues as framed at the hearing were whether the claimant sustained an occupational disease on (date of injury), and whether she had disability. The wording of the issue may have caused some confusion in that it tended to restrict a repetitive trauma injury to a specific date. It might have facilitated the matter if there had been a separate issue of whether an occupational disease was sustained in the course and scope of employment. The hearing officer found that the claimant knew (and that a reasonable person would have known) by at least (date of injury), that her injury may be related to her employment. He thus concluded that she had not proved she sustained a compensable repetitive trauma injury on (date of injury), and that she failed to

prove that she had disability.

A repetitive trauma injury which is included as an occupational disease, by definition, does not occur at a specific or particular time. This is in contrast to injuries (and the natural flowing results thereof) that arise out of a specific accident or incident that occurs at a particular time and place and results in injuries. Section 401.011(36) provides:

> "Repetitive trauma injury" means 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.

Determining when a repetitive trauma injury occurs is sometimes an imprecise exercise and is, at best, frequently confusing when a claimant is required to state a specific date of injury. *See* Texas Workers' Compensation Commission Appeal No. 94546, decided June 7, 1994. However, the 1989 Act provides for this in Section 408.007 where it is provided that 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." This is a factual call for the hearing officer to make based upon the evidence before him. Texas Workers' Compensation Commission Appeal No. 931028, decided December 23, 1993. From the evidence before him, the hearing officer found that the claimant knew by (date of injury), of the work relationship of her injury and concluded, therefore, that she failed to prove that she sustained a compensable repetitive trauma injury on (date of injury). From this finding it would appear that the hearing officer was satisfied that the claimant did indeed sustain a repetitive trauma injury in and during the course and scope of her employment. Too, if the claimant did sustain a repetitive trauma injury in and during the course and scope of her employment, and she continued working in the same type of employment from January 7, 1994, to (date of injury), then it would seem likely that the repetitive trauma injury was a continuing matter up to (date of injury), when she was taken off of duty by her doctor. These matters are not entirely clear from the record and decision and need to be clarified on remand, and we make no determination that a repetitive injury has necessarily been established or that there has been any disability.

The hearing officer appears to reach his decision that the claimant has not proved her claim since she did not establish a date of injury as (date of injury), because she knew or should have known that she had a job related injury no later than January 7, 1994. Of course, establishing the date of an injury is an essential matter in resolving the compensability of a claim. The purpose of timely notice has been the subject of a number of decisions. *See* Texas Workers' Compensation Commission Appeal No. 93761, decided October 4, 1993; Texas Workers' Compensation Commission Appeal No. 93649, decided September 8, 1993; Texas Workers' Compensation Commission Appeal No. 93184, decided April 29, 1993. Once there is an injury, it is the date of the injury that starts the time clock on significant milestones that determine whether benefits are due. For example, notice of injury must be given not later than the 30th day after the date on which,

in the case of repetitive trauma, the employee knew or should have known that the injury may be related to the employment. Section 409.001(a). This permits an employer or carrier to timely investigate a claimed injury while evidence and memories are fresh. DeAnda v. Home Insurance Co., 618 S.W.2d 529 (Tex. 1980) Also, a claim for compensation for an injury must be filed not later than one year after the date, in a repetitive trauma case, the claimant knew or should have known that the injury was job related. Section 409.003. Where timeliness of notice, a defensive issue as we noted in Texas Workers' Compensation Commission Appeal No. 93178, decided April 26, 1993, is waived or not an issue, the fact that a claimant is determined to have known or should have known of the job relatedness of the repetitive trauma injury outside the 30-day notice period would not, in and of itself, defeat an entitlement to benefits. This is the case where, as here, there was no timely notice issue or it was waived under such circumstances. The purpose of the notice requirements do not come into play and are not thwarted. *See* Texas Workers' Compensation Commission Appeal No. 92199, decided June 26, 1992, and Texas Workers' Compensation Commission Appeal No. 93183, decided April 22, 1993.

Since we are not able to ascertain if benefits would have been awarded in this claim but for the hearing officer's incorrect conclusion that the date of (date of injury) not having been shown as the "date of injury" was fatal to this claim, we necessarily remand. And, not being able to determine if the disability issue hinged on the date of injury matter, we remand for further consideration and development of the evidence as deemed appropriate by the hearing officer and not inconsistent with this opinion. 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.

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Stark O. Sanders, Jr.
Chief Appeals Judge

CONCUR:

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Susan M. Kelley
Appeals Judge

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Philip F. O'Neill
Appeals Judge