APPEAL NO. 950028
FILED FEBRUARY 16, 1995

This case returns to us following our remand for further consideration and development of the evidence on the notice of injury issue in Texas Workers' Compensation Commission Appeal No. 941298, decided November 8, 1994. On December 7, 1994, a contested case hearing was held on remand. The hearing was held pursuant to the provisions of the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). The appellant (carrier) disagrees with the hearing officer's determination that the respondent (claimant) timely notified her employer of her carpal tunnel syndrome (CTS). The claimant requests affirmance.

DECISION

As reformed herein, the hearing officer's decision and order are affirmed.

The benefit review conference (BRC) report stated the notice of injury issue as follows: "Did the claimant report an occupational disease to the employer on or before the 30th day she knew or should have known her condition was work related, and if not, does good cause exist for failing to report the occupational disease injury timely." The occupational disease referred to in the BRC report is bilateral CTS which the claimant was diagnosed as having on November 30, 1993. At the first hearing the hearing officer framed the notice of injury issue as follows: "whether the claimant timely reported her injury or had good cause for failing to do so." In Appeal No. 941298, *supra*, we reversed the hearing officer's decision that the claimant timely reported her CTS to her employer, and remanded the case for further consideration and development of the evidence and for findings as to when the claimant knew or should have known that her CTS may be related to her employment, when the claimant gave notice of injury to her employer in regard to her CTS injury, and if applicable, for findings in regard to good cause for failure to give timely notice and in regard to actual knowledge of the injury by the employer and carrier.

The claimant, who is 47 years of age, testified that she had worked for the Texas Employment Commission (employer) for 15 years and that her job required her to do "a lot of keyboarding." The claimant further testified that she filed a workers' compensation claim for a back injury she sustained on _____, and that she last worked on May 14, 1993. The claimant testified that on _____, her leg got caught in a chair at work and she fell onto a table and hurt her whole right side, including her neck, back, shoulder, arm, hand, leg, knee, and foot. She said that the day after she fell she reported to (Ms. K), her supervisor, that she had fallen at work and twisted her back. (Ms. K is erroneously identified as (Ms. M) in Appeal No. 941298.) She said she thought her arm and hand pain was related to her fall and that she first told Ms. K "about her hands" on May 20, 1993. When the claimant was asked as to when she first noticed she had problems with her wrists, she answered, "[a]fter my back injury my neck, back, arms and everything was

hurting and I complained to my doctor about it." She said that to her knowledge, she did not have any problems with her wrists before her fall in May 1993.

(Dr. C), D.C., reported that he saw the claimant on May 18, 1993, for complaints of pain in the neck, back, leg, knee, shoulder, and arm; and he diagnosed lumbosacral facet syndrome, cervical hypolordosis, cervicobrachial syndrome, cervical myofascitis, sciatica neuritis, unspecified back pain, and headache. There is no mention of wrist problems or CTS in his report. The claimant said that (Dr. K) had nerve conduction tests performed on some unspecified date and that on November 30, 1993, he told her that she had "severe carpal tunnel in my right and also in my left." She said that November 30, 1993, was when she first learned that she had CTS. She said that Dr. K did not tell her why she had CTS and she further testified that she thought her CTS was related to her back injury.

In a letter to the carrier dated November 30, 1993, which states an injury date of _____, Dr. K advised the carrier that EMG and nerve conduction studies showed severe CTS on both sides, that the claimant is willing to have surgery for the CTS, but that the claimant wanted to wait until next year for the surgery. There is no mention as to the cause of the CTS in Dr. K's letter. When the claimant was asked "[w]hen did you first become aware that this problem might possibly not be related to your other injury," the claimant said "[i]n December," and she further stated "[i]n December I got a letter from the carrier stating that it wasn't related, they didn't feel it was related." The carrier's letter is not in evidence.

The claimant testified that the first week of December 1993 she had a conversation with Ms. K regarding her CTS. She said Ms. K told her at that time that the carrier said her CTS was not related to her injury and was not going to pay for it. She said she told Ms. K that she was "hurting real bad and that someone had to take care of it, that I had to get it taken care of." When the claimant was asked "do you have any type of factual information that would indicate that you actually reported this to [Ms. K] in December that it was job related," the claimant answered "only thing that the doctors sent all my reports to work and I talked with them every week, every week since I was off work." In a letter to the carrier dated January 3, 1994, Dr. K stated "[w]e received notification that her workers comp is not responsible for the carpal tunnel. The patient already knows that." Dr. K did not mention the cause of the CTS in that letter. In a letter to the carrier dated (date), which references a date of injury of _____, and which indicates that a copy was sent to the claimant and to the Texas Workers' Compensation Commission, Dr. K advised the carrier that the claimant has a small herniated disc in her cervical spine and that "this patient gets a 2 percent of disability for this condition." He also stated as follows:

> Regarding whether or not the carpal tunnel is related to the original injury, at least in the way the patient described the injury the first time she came to the office she didn't mention anything about her carpal tunnel and the way she described her injury it does not involve anything that has to do with carpal

tunnel. Carpal tunnel syndrome is an occupational problem and she may have that also.

The claimant testified that when she received Dr. K's letter of (date), that was when she first became aware that her doctors were saying that her CTS was not related to her fall in May 1993. The claimant testified that she filed a "new claim," the last week of February 1994. The BRC report indicates that the claimant filed a claim for compensation for CTS on February 28, 1994. The claimant indicated that she had filed a workers' compensation claim for her back injury sometime prior to filing the claim for the CTS. On March 3, 1994, (Dr. S) reported that the claimant reported having numbness and tingling in her hands and that:

Relative to her [CTS], this patient has had no symptoms prior to her fall, however, it is difficult to relate the type of injury she had to bilateral [CTS] and slowing of conduction distally in the left ulnar nerve. I would thus say that this is not related to this fall.

In a Payment of Compensation or Notice of Refused/Disputed Claim form (TWCC-21) dated March 28, 1994, which records the date of injury as (date) (which is the date Dr. K reported that CTS is an occupational problem), the carrier stated that the claimant had not reported her claim in a timely manner and that it was relieved of liability. It also stated "[b]ased on the information provided to the carrier the claimant became aware of the carpal tunnel condition on/or about November 30, 1993."

The hearing officer did not make an explicit finding on the date the claimant knew or should have known that her CTS was related to her employment, but in the discussion section of her decision she states that that date is _____, the date the claimant fell at work. She found that, "[w]ithin thirty days of _____, the claimant informed her supervisor that she believed she had injured her hands/or wrists as a result of her employment with Employer." She concluded that, "[c]laimant made a timely report of her [CTS]." In its appeal, the carrier states that the claimant's back injury from her fall on _____, was not contested and that it "made proper payments." However, it states that it denied treatment for CTS because CTS was not related to the fall on _____, and that it based its denial on failure to give timely notice of injury. It contends that the claimant knew or should have known that her CTS was job related on November 30, 1993, when Dr. K diagnosed her as having CTS and that she failed to "report this as a new injury within 30 days of when she knew or should have known it was job related." It acknowledges that the claimant filed a claim for an occupational disease in February 1994.

The notice issue in the BRC report was framed in terms of notice of an occupational disease. In Texas Workers' Compensation Commission Appeal No. 941505, decided December 22, 1994, we stated:

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 symptoms. 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 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.
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> 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).

In the instant case the carrier challenges the hearing officer's determination that the date the claimant knew or should have known her CTS was related to her employment was _____. The hearing officer is the judge of the weight and credibility of the evidence. Section 410.165(a). When reviewing a hearing officer's decision to determine the factual sufficiency of the evidence, we consider and weigh all the evidence, and should set aside the determination only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. *See* Cain v. Bain, 709 S.W.2d 175 (Tex. 1986). Having considered and weighed all the evidence, we conclude that the hearing officer's determination that the claimant knew or should have known that her CTS was related to her employment on _____, when she experienced hand and arm pain which she related to her fall on that date, is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. However, we disagree with the carrier's contention that the evidence shows that the claimant knew or should have known that her CTS was related to her employment on November 30, 1993, when she was first diagnosed as having CTS.

Basically, the hearing officer's determination of the May 5th date is based at best on first symptoms, if in fact the claimant was experiencing CTS symptoms on that date and not just hand or wrist pain occasioned from her fall unrelated to CTS. The claimant attributed her hand pain to her fall and had no reason to attribute it to anything else until

she was diagnosed with CTS in November 1993. The evidence simply does not support a determination that the claimant recognized the seriousness and work-related nature of her CTS at the time of her fall in May 1993. Nor does the evidence support a finding, as urged by the carrier, that the claimant knew or should have known that her CTS may be related to her employment when she was diagnosed with CTS on November 30, 1993. Dr. K diagnosed CTS on that date but the uncontroverted evidence is that he did not tell the claimant that the CTS was work related at that time. It was not until (date), that Dr. K related the claimant's CTS to her employment when he stated in his letter to the carrier with a copy to the claimant that "[CTS] is an occupational problem and she may have that also." Having reviewed the record, we conclude that the hearing officer's determination that the claimant knew or should have known her CTS may be related to her employment on _____, is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Cain v. Bain, *supra*. We further conclude that the overwhelming weight of the evidence establishes that the claimant knew or should have known that her CTS may be related to her employment on (date), the date Dr. K called her CTS an "occupational problem." While not dispositive, we observe that the carrier recorded the date of injury as (date), in the TWCC-21. 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. Section 408.007.

The carrier also challenges the hearing officer's conclusion that the claimant made a timely report of her CTS. We observe that it has been held that "[t]he judgment of the trial court must be affirmed if it can be sustained on any reasonable theory supported by the evidence authorized by law." Daylin, Inc., v. Juarez, 766 S.W.2d 347 (Tex. App.-El Paso 1989 writ denied). *See also* Texas Workers' Compensation Commission Appeal No. 941439, decided December 9, 1994. The claimant's employer is an agency of the State of Texas. Pursuant to Section 501.023, the state is self-insuring with respect to an employee's compensable injury. Under Section 501.001(3) "director" means the director of the workers' compensation division of the attorney general's office, and under Section 501.001(4) "division" means the workers' compensation division of the attorney general's office. Section 501.042(a) provides that "[i]n administering and enforcing this chapter [Chapter 501. Workers' Compensation Insurance Coverage for State Employees, Including Employees Under the Direction or Control of the Board of Regents of Texas Tech University], the director shall act in the capacity of employer and insurer." Dr. K's letter of (date), in which he refers to the claimant's CTS as an "occupational problem" is addressed to the Workers' Compensation Division of the Attorney General's Office and it is date stamped as received by "SWC" on January 19, 1994. This same date stamp is on other letters and medical reports in evidence which are addressed to the Workers' Compensation Division of the Attorney General's Office. It can fairly be concluded from the evidence that the Workers' Compensation Division of the Attorney General's Office, whose director under Section 501.042(a) acts in the capacity of employer and insurer in administering and enforcing Chapter 501 of the Texas Labor Code, was notified by the claimant's doctor, Dr. K, that the claimant's CTS was an "occupational problem" within 30 days of when the claimant knew or should have known that her CTS may be related to her employment.

We note that notice of injury may be made by a person acting on the claimant's behalf. Section 409.001(a). Thus, we conclude that the hearing officer's conclusion that the claimant made a timely report of her CTS is supported by sufficient evidence.

The hearing officer's findings and conclusion on disability have not been appealed. We reform Finding of Fact No. 6 to read as follows: "The claimant knew or should have known that her CTS may be related to her employment on (date), and on behalf of the claimant Dr. K notified the employer that the claimant's CTS was work-related within 30 days of (date)." As reformed, the hearing officer's decision and order are affirmed.

Robert W. Potts
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Susan M. Kelley
Appeals Judge