APPEAL NO. 951115
FILED AUGUST 15, 1995

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 June 14, 1995. The issues were whether the claimant had sustained an injury in the course and scope of her employment, the date of her injury, and whether she timely notified her employer of the injury, and, if not, whether she had good cause. The hearing officer concluded that the respondent, who is the claimant, sustained a compensable repetitive trauma injury to her left hand, arm, and shoulder in the course and scope of her employment with her (employer); the hearing officer, although he found that claimant knew that her left arm soreness and pain was from her work duties "in May 1994", found that the date of injury was _____, because this was the date that she " knew or should have known" she had a serious problem, and because this was the date of the last injurious exposure; and that she timely notified her employer of her injury "no later than" (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).

The carrier has appealed the decision, arguing that the hearing officer erred by applying the statute concerning "last injurious exposure" to his analysis of the case and by failing to apply the employer notice provision of Section 409.001(a)(2). The carrier argues that the great weight of the evidence proves that claimant knew or should have known that her injury was related to her employment in May 1994, and that her December 23, 1994, notice was therefore untimely. The carrier appeals a finding of fact that appears to indicate that claimant also gave requisite notice in May 1994 to her employer. The carrier does not argue error in the holding that claimant sustained a repetitive trauma injury, although those underlying findings of fact and conclusions of law are enumerated as disputed. The claimant responds that there is sufficient evidence to support the hearing officer's decision for the most part defending that the claimant sustained a repetitive injury.

DECISION

We affirm the holding that claimant sustained a repetitive trauma injury, but reverse and remand the case for proper application of the law to the facts on the issues relating to timely notice to the employer.

Claimant stated that she worked for employer for four years on the cafeteria serving line, slicing and dishing up the meat dishes. Claimant stated that the plates were stored face down on a shelf under the steam table, and that the act of serving involved getting a plate with her left hand, rotating it to a face-up position, and serving the meat with her right hand. Claimant said she would either pass the plate to the vegetable servers, or hand it over to the customer in a fully extended position. Although claimant was unable to testify how often customers did not desire vegetable courses, she was evidently the first person on the serving line as evidenced by her obtaining of the customer's plate. Claimant said her working hours were from ll:00 a.m. to 8:00 p.m., and she customarily took an hour and

a half lunch at one o'clock. She characterized the work on holidays and Sundays as "busy."

Claimant said that sometime in May, her left shoulder and arm began to hurt. She said that she told her line supervisor, Mr. F, that she was sore, in the context of asking for more assistance, and he assured her that help was on the way. Claimant said that her arm hurt her at home as well, although more at work. Claimant's testimony on her knowledge is conflicting. She stated on direct examination that she did not tell Mr. F her pain was work related because she did not know herself. She further stated that she did not know in May that she had a medical condition that would require treatment. However, on cross-examination, she agreed with questions asking whether, in May 1994, she understood that her pain was related to the work she did, and whether she complained to coworkers that her job was causing her arm to hurt.

Claimant continued to work, with her pain increasing in severity until _____, when her arm became immobile and she could not grip, and she realized she needed medical treatment. She stated that the only time she went to the doctor from May to December was in August 1994, and then for stomach pain. Notes from her visit on August 31, 1994, reflect that she complained she had been having pain in the midscapular region of the back that made it hard for her to move, sleep, and work, and tenderness of the right breast. The notes, which do not mention the stomach, record the impressions from her examination as a pulled or strained muscle. Claimant said that she saw Dr. M, on December 23, 1994, and was taken off work. She gave notice to Mr. M, the assistant manager, on December 23, 1994, when she brought in her off-work slip. Mr. M agreed. Claimant returned to work on December 30, 1994, and remained working until January 30, 1995.

Medical evidence in the case beginning in December indicated that on December 23, 1994, claimant complained of having had shoulder pain for 2 weeks; her occupation was noted. Claimant was treated, beginning January 7, 1995, by Dr. B, who recorded an impression of bursitis, carpal tunnel syndrome, and muscle spasm in the report of the initial visit. Dr. C, a doctor for the carrier, examined claimant on April 5, 1995, and concluded that claimant had frozen shoulder, myofascial pain syndrome involving the left shoulder and scapular muscles, and mild carpal tunnel syndrome. He further noted that claimant had "flat affect with considerable overlay and early chronic pain syndrome appearance."

Assuming that the carrier intended to appeal the determination that claimant sustained a work-related repetitive trauma injury, our review of the evidence indicates that this is sufficiently supported and we affirm.

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). While it may be argued that each day of a repetitive trauma causes incremental damage, the nature of a repetitive trauma injury is cumulative; as the

discussion of the facts in this decision indicates, it is not a series of specific injuries. The date of injury for an occupational disease is expressly defined in the 1989 Act and need not be inferred from the provisions of the Act that relate to coverage; that definition specifies that it 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 reference to "last injurious exposure" is included in the coverage provisions of the 1989 Act, in Section 406.031, which essentially states that for an occupational disease, the employer is the one in whose employment the employee is last injuriously exposed to the hazards of the disease. This statute makes clear which carrier is liable where, during the span of a repetitive motion disease, an employee has changed employers.

We do not agree with the hearing officer's observation in his discussion that "[b]asic jurisprudence would not allow a defense to a repetitive trauma not being timely notice to an employer where an employee continues to endure the same injurious repetitive physical traumas."

Under the 1989 Act, if the injury is an occupational disease, such as a repetitive trauma injury, the employee 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). The notice obligation is thus fixed by statute to run from a single date, whether or not the trauma continues. 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, would recognize the nature, seriousness, and the work-related nature of the disease. Although we agree that knowledge of work-related pain does not necessarily equate to knowledge of an injury, Texas Workers' Compensation Commission Appeal No. 941505, decided December 22, 1994, we have also declined to hold that the "knew or should have known" criteria is met only when an injured worker has been given confirmation by a doctor and is taken off work. Texas Workers' Compensation Commission Appeal No. 92559, decided December 3, 1992. Likewise, the notice given, while it need not be fully detailed or include a specific diagnosis, should at a minimum apprise the employer of the fact of an injury, the general area of the body affected, and the fact it is work related. Texas Employer' Insurance Ass'n v. Mathes, 771 S.W.2d 225 (Tex.App.-El Paso 1989, writ denied).

The hearing officer has erred in several respects, necessitating remand of this case. First, the hearing officer has not applied the definition of date of injury under the statute. As there was no dispute over the identity of the employer in this case to whom notice was required to be given, because claimant worked for the same employer throughout the period, the reliance on Section 406.031(b) is misplaced. There is no basis either upon which to infer that "last injurious exposure" fixes the date of injury under the 1989 Act, when Sections 408.007 and 409.001 are express on the subject.

The hearing officer's findings of fact are at odds and frankly cause confusion as to the date of injury, as defined by Section 408.007, in this case. Although the hearing officer finds that the date of injury was _____, he also finds that claimant "knew her left arm soreness and pain" was from her work "in May 1994". The basis for concluding that _____ was the date of injury appears to be misapplication of the "last injurious exposure" statute and the date that claimant finally appreciated that her injury was "serious." The findings appear to fix the date of injury some eight months after the hearing officer arguably found that claimant "knew or should have known" that she had a work-related injury, serious or not. While the claimant's appreciation of the seriousness of the injury would be appropriate in an determination of whether there was good cause for a delayed reporting[1], the hearing officer here has found that claimant timely notified her employer.

It is the failure to apply the relevant statutory definitions, as well as the mixture of aspects of timely notice and good cause, that requires remand in this case.

In addition to the provisions discussed above, we remand by noting that 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* Texas Workers' Compensation Commission Appeal No. 941374, decided November 23, 1994. We further note that the Commission can determine that good cause existed for failure to give notice in a timely manner, or that the employer had actual knowledge of the injury. Section 409.002. 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).

We affirm the determination that claimant had a repetitive trauma injury, and reverse and remand on the issues of notice to the employer of injury and date of injury, for further consideration and/or development of the evidence on these issues. Pending 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,

[1] Belief that an injury is trivial can constitute good cause for failure to give timely notice. Farmland Mutual Insurance Company v. Alvarez, 803 S.W.2d 841 (Tex. App.-Corpus Christi 1991, no writ). Good cause must continue up to the time that notice was actually given. Texas Workers' Compensation Commission Appeal No. 94975, decided September 2, 1994.

1993.

_____
Susan M. Kelley
Appeals Judge

CONCUR:

_____
Alan C. Ernst
Appeals Judge

_____
Elaine M. Chaney
Appeals Judge