APPEAL NO. 951807
FILED DECEMBER 13, 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 on remand was held on October 2, 1995. The Appeals Panel, in Texas Workers' Compensation Commission Appeal No. 951115, decided August 15, 1995, affirmed the hearing officer's determination that claimant proved that she sustained a repetitive trauma injury, but, noting that the hearing officer had failed to properly apply the 1989 Act with respect to findings on the date of injury and notice, remanded on those issues. Further testimony concerning these issues was developed at the remand hearing.

The hearing officer, who reapplied with more explanation the premises that had been the basis for reversal of the original decision, found that claimant knew that her left arm pain and soreness were caused by her work "in May of 1994" and that she reported this to her supervisor "in May of 1994," and further, that the employer had actual knowledge from that date. Notwithstanding these findings, the hearing officer fixed the date of injury as (alleged date of injury), because that was the date of claimant's last injurious exposure as well as the date she knew she had a "serious problem." The decision of the hearing officer amplifies his position that a notice defense to a repetitive trauma injury cannot be interposed by a carrier when the employee continues to be exposed to the hazards of the disease, and why use of last injurious exposure as the date of injury in this case was correct.

The carrier has appealed the decision and argues that the hearing officer has still not correctly applied the statutory definition of date of injury. The carrier argues that error from the prior decision has been repeated in the decision on remand. The carrier argues that the hearing officer erred by applying the statutory provision relating to "last injurious exposure" to his analysis of the facts and by failing to apply the employer notice provision of Section 409.001(a)(2). The carrier argues that the hearing officer is attempting to limit the definition of injury, for notice purposes, only to those injuries which result in lost time. The carrier specifically appeals the findings of fact relating to the _____ notice to claimant's supervisor and the employer's actual knowledge of injury. The carrier further states that the findings which characterize claimant's (alleged date of injury), "injury" as an aggravation are erroneous in light of the lack of evidentiary support for such finding. The claimant responds that the decision is sufficiently supported and should be affirmed.

DECISION

We reverse the determination of the hearing officer that claimant had an injury by way of aggravation on (alleged date of injury), that the date of injury for her repetitive trauma injury was (alleged date of injury), and that she gave timely notice of injury on that date. We render a decision that claimant had a repetitive trauma carpal tunnel injury of her left shoulder and arm, that she knew or should have known that she had an injury related to her employment on _____, and that she timely reported such injury to her supervisor within 30 days of that date.

The facts developed in the previous session of the CCH are set out in Appeal No. 951115, *supra*, and will not be repeated here.

The parties began the CCH on remand by giving opening statements in which they agreed that the date of injury should be sometime in _____. Claimant's attorney, noting that the evidence would support a date of injury in either _____ or on (alleged date of injury), as well as timely reporting for each date, expressly stated as to the date of injury that, "we believe the correct finding would be _____."

Claimant was a food server on the meat line for the employer. As noted in the previous decision, her duties involved repetitive motions over several hours a day. Claimant said she began having shoulder pain in early 1994, and by _____ realized it was her work causing her shoulder and arm to hurt. Claimant testified that sometime in _____, on the serving line, she complained to her supervisor, Mr. F, who was standing next to her, that she needed more assistance because her shoulder was hurting her due to her work. She stated that Mr. F assured her that a new person had been hired to assist everyone on the line and she would be getting more assistance. She agreed that she did not report her injury or pain to either on-site manager for her employer.

Mr. F testified that the first he knew claimant was contending she had a work-related shoulder injury was on (alleged date of injury), when he was told by the manager. Mr. F denied that claimant ever complained to him that she had shoulder or arm pain because of her work. He acknowledged that they discussed the hiring of an additional worker to relieve everyone working on the line. Mr. F said he had this discussion with claimant because she asked him about the new person just hired, but went on to say he informed everyone about the new assistant.

During closing argument, the claimant's attorney stated that claimant could not prove any specific date in _____ when she realized her shoulder injury or pain was related to her work, because she did not recall and did not want to simply make up a date.

The hearing officer, in his discussion, stated that he found claimant credible, and Mr. F not credible, on their testimony of events. Indicating that he believes the Appeals Panel didn't understand his previous decision because he did not fully explain it, the hearing officer discusses at length his theory on why (alleged date of injury), as the last injurious exposure, is the correct date of injury. The hearing officer once again advances the theory that it is "arguable" that a repetitive trauma injury is a series of discreet injuries, each subsequent day being an "aggravation" of the preexisting condition from the previous days. He argues that the legislature recognized the harshness of having income benefits run a maximum of 401 weeks from the date of injury when it amended the Act, effective September 1, 1995, to provide in Section 408.083(b) that income benefits would count from the date of accrual.

We must agree with nearly every legal point raised by the carrier in its appeal. It is nearly impossible to read our previous decision as anything but a rejection of the hearing officer's theory (not supported by Texas case law) that each day of a repetitive injury is an incremental aggravation injury, or that the date of injury is the date of last injurious exposure. The problem with the previous decision was not failure of explanation, but failure of analysis. While the hearing officer cites "basic jurisprudence" as the foundation for his analysis, there can be no more basic jurisprudence than applying the applicable statutes, whether or not the finder of fact philosophically believes that proper application of the date of injury statute would yield an "artificial" date of injury earlier than the date a claimant begins to lose time. The statutes regarding the date of injury and the need to give notice within 30 days of that date are unambiguous. They are not applied differently depending upon a claimant's work status. The decision on remand bears the hallmark of retroactive application of the amendment to Section 408.083(b) in an effort to achieve what the hearing officer evidently believed to be a more equitable result. We cannot endorse the complete bifurcation of "pain" and "injury" applied to the facts of this case to achieve that result. We further agree that there is no evidence that claimant had a preexisting condition that was aggravated. Claimant had a repetitive trauma injury, the normal course of which was to develop and worsen over time, and no part of which represented a discreet "aggravation" of the previous day's condition as that concept is used in Texas workers' compensation law.

We reverse and render a decision which strikes all reference to (alleged date of injury), as the date of injury in this case. We render a decision, based upon determinations of witness credibility by the hearing officer of which he was the sole judge, that claimant first knew, or should have known, that arm pain and soreness were related to her work in _____, and that she gave timely notice of injury to her supervisor, Mr. F. As notice was timely, it is unnecessary to discuss whether the exceptions of actual knowledge or good cause could be applied to this case (although the hearing officer's continued discussion of claimant's delayed appreciation of the seriousness of her condition might lead another finder of fact to conclude that claimant had good cause in the event untimely notice was found).

Because we may no longer remand the case, and the hearing officer failed to find a date in May when he believed claimant had the requisite knowledge, we must fix a date of injury. In the absence of any indication of a later date, we render a decision that the date of injury was _____.

Having already affirmed the determination that claimant sustained a repetitive trauma injury, carpal tunnel syndrome, we reverse and render a decision that claimant sustained a repetitive trauma injury on _____, and that she gave timely notice of such injury to her employer. Benefits should be paid to the claimant in accordance with this decision.

_____
Susan M. Kelley
Appeals Judge

CONCUR:

_____
Alan C. Ernst
Appeals Judge

_____
Elaine M. Chaney
Appeals Judge