APPEAL NO. 960238
FILED MARCH 21, 1996

On October 17, 1995, a contested case hearing (CCH) was held with the record being closed on November 6, 1995. The hearing was held under the provisions of the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). The issues at the CCH were: (1) which insurance company is liable for the "claimed repetitive injury," respondent, (carrier 1), or appellant, (carrier 2); (2) whether the claimant, who is a respondent on appeal, sustained a compensable injury in the form of an occupational disease; (3) whether the claimant reported an injury to the employer on or before the 30th day after the injury and, if not, "did the employer or the carrier have actual knowledge and/or did not contest the claim;" (4) average weekly wage (AWW); and (5) whether the claimant had disability resulting from the claimed injury and, if so, for what period(s). The parties agreed that the claimant's AWW is $474.00. The hearing officer determined that the claimant sustained an occupational disease in the course and scope of his employment; that the date of injury was _____; that the claimant did not timely report his injury to his employer but had good cause for delaying until Injury 2, to report his injury to his employer; that carrier 2 is liable for compensation because the claimant was last injuriously exposed to the hazards of the disease on Injury 2, while in the employ of the employer; that carrier 2 waived its right to contest the compensability of the claimant's injury since it failed to do so timely and since its contest is not based on newly discovered evidence; that the claimant had disability from February 16, 1995 "to the present"; and that the claimant's AWW is $474.00.

Carrier 2 contends that the claimant sustained an accidental injury on (alleged date of injury); that the claimant did not have good cause for failing to timely notify his employer of his injury; that timely contest of compensability was not an issue at the CCH; that the date of injury and not the date of last injurious exposure controls the determination of liability; that the claimant failed to establish a causal connection between his claimed occupational disease and his employment; that if the claimant sustained an occupational disease, then the date of injury was (alleged date of injury); that it did timely contest compensability; and that carrier 1 is liable. There is no appeal of the hearing officer's decision on disability or on AWW.

Carrier 1 and the claimant request affirmance.

DECISION

Affirmed in part and reversed and rendered in part.

The claimant contended at the CCH that he suffered a repetitive trauma injury to his neck and shoulders. The claimant began working for the employer, on May 31, 1991. The employer makes wire mesh which is used in road and parking lot construction. Concrete or other material is poured over the wire mesh in the construction process. According to RZ, the employer's safety director, iron bars up to one inch in diameter are put into a machine

which makes the wire mesh. According to other testimony, the iron bars can be up to 12 feet long. The claimant testified that he always worked as a helper on the same machine which makes the wire mesh and that it was his job, along with another coworker who was also a helper, to put the iron bars into the machine. The claimant said he usually worked seven days a week for eight hours a day, but that sometimes he worked only six days a week. He said his job required constant movement of his body and he demonstrated how he would pick up the iron bars, make a movement from one side to the other, and push the iron bars into the machine. He said that he felt as if his tendons were being pulled because of all of the "excessive force" that he used on the job. He said that his injury was caused by "the movement that I always had." He said he first began to feel pain in his neck and shoulders on (alleged date of injury), when he was putting a rod into the machine, and when he was asked whether he had had an accident on (alleged date of injury), he said "Yes, that's logical. That's when I first began to feel it." However, he later clarified that he did not fall down or trip at work on (alleged date of injury). He said that when he felt pain on (alleged date of injury), he didn't say anything about it because he thought he would get over it.

The claimant further testified that when his pain did not go away, he told his supervisor, AL, on November 11, 1994, that he had pain and that AL told him to go to a doctor. The claimant gave various accounts as to what he told AL depending on who was asking the question. Sometimes he testified that he only told AL that he had pain without mentioning anything else, and at other times he testified that he told AL that he believed his pain was related to his job. AL testified that the claimant never told him anything about having pain or about having a work-related injury and that he did not tell the claimant to go to a doctor. AL said he first learned that the claimant was claiming a work-related injury in March 1995.

The claimant went to Dr. J on November 15, 1994. Dr. J's letterhead indicates that he is with (health insurance company), which PS, the employer's workers' compensation administrator, identified as the employer's group insurer. PS testified that employees who report work-related injuries are sent to the employer's company doctor, whom she identified as someone other than Dr. J. Dr. J's notes state that the claimant complained of neck pain radiating into his shoulders and down to his elbows and that he, Dr. J, began testing for arthritis. The claimant testified that on (alleged date of injury), he thought his pain was related to his work, but that he became confused as to the cause of his pain when Dr. J told him he had arthritis on November 15, 1994. The claimant returned to Dr. J on _____, and at that time Dr. J noted that the laboratory work was negative for arthritis and that the claimant had "musculoskeletal pain, most likely over use arthritis type picture." The claimant said that Dr. J told him on _____, that he did not have arthritis and that he had inflammation of his muscles. On January 31, 1995, cervical spine x-rays were done which showed that the claimant had spondylosis at the C5-6 level.

The claimant said that on February 13, 1995, he told the assistant plant manager, PM, that he thought his pain was due to his job. PM stated in a recorded statement that on

some unspecified date the claimant told him that "his neck was hurting when he throws the wires" and that the claimant told him "it was about two or three months ago." PM stated that he asked the claimant if he had told his supervisor, and the claimant told him he had not. The claimant testified that after (alleged date of injury), he continued to work; that the pain would "progress" and get "stronger" every day; and that his pain became so strong that he could not work any more. He said he went to Dr. H on February 16, 1995, told Dr. H about his neck and shoulder pain, and Dr. H told him he could not work. Dr. H issued a note dated February 16, 1995, which stated that the claimant was under his care and that the claimant may not return to work until further notice. The claimant said he gave the off-work note to EM on February 16, 1995, and that he has not worked since Injury 2. The claimant identified EM as the "first manager of personnel."

In a letter to Dr. H dated September 15, 1995, carrier 1 asked Dr. H "[i]n your opinion, does [claimant] suffer from a repetitive trauma injury? That is, does his condition result from repeated work activities at his job?" To these questions Dr. H responded "yes" and wrote "exacerbated a chronic condition of neck." Carrier 1 also asked Dr. H "[a]ssuming that he continued working until sometime in February 1995, is it reasonable to assume that the repetitive trauma continued until he stopped working or was taken off work in February 1995?" To this question Dr. H responded "yes" and wrote "may well be." The claimant said that Dr. H referred him to Dr. S. Dr. S noted on March 3, 1995, that the claimant complained of neck and bilateral arm pain with an onset in November 1994. Dr. S referred the claimant for physical therapy, which the claimant undertook on March 14, 1995. The claimant testified that it wasn't until he started physical therapy that he knew his injury was related to his work because "they told me that my problem was from my job." An MRI scan of the claimant's cervical spine done on April 3, 1995, showed that the claimant has cervical spondylosis at the C5-6 level and disc protrusions at the C5-6 and C6-7 levels with indentation of the thecal sac. The claimant began treating with Dr. C in April 1995, and Dr. C diagnosed the claimant as having a cervical sprain and bilateral shoulder sprains, and he reported that the claimant is to remain off work. Dr. C has continued to treat the claimant.

The claimant was examined by Dr. F at the carrier's request, and Dr. F reported on August 7, 1995, that he found no pathology and that the claimant had at most a back sprain which probably resolved in 30 to 90 days. He also reported that the claimant had reached maximum medical improvement with a zero percent impairment rating. Dr. G, who is associated with Dr. C, disagreed with Dr. F's report.

RZ, the safety director, testified that he first learned that the claimant was claiming that his shoulder and neck condition was work related in March 1995. PS, the workers' compensation administrator, said that a supervisor called her on March 17, 1995, and told her that a doctor called the employer on that day about authorization for treatment of the claimant. PS said that was when she first learned that the claimant was claiming an on-the-job injury.

In a letter dated April 21, 1995, the claimant's attorney (the attorney who

represented the claimant at the CCH and on appeal works with the attorney who wrote the April 21st letter) advised carrier 2 that he represented the claimant for an injury sustained on or about (alleged date of injury), while working for the employer. The claimant's Notice of Injury or Occupational Disease and Claim for Compensation (TWCC-41) stated a date of injury of (alleged date of injury). In a letter to carrier 2 dated May 4, 1995, the claimant's attorney who wrote the April 21st letter stated that the claimant's date of injury is (alleged date of injury), and that "the actual date of loss is _____." The parties stipulated that the employer had workers' compensation coverage with carrier 1 from February 1, 1994, to February 1, 1995, and with carrier 2 from February 1, 1995, to February 1, 1996.

One issue at the CCH was whether the claimant sustained a "compensable injury, in the form of an occupational disease." The hearing officer found that the claimant "sustained harm to his neck and both shoulders/arms while engaged in repetitive activities that originated in and had to do with [employer's] business and that were performed by the claimant in furtherance of the business or affairs of [employer]." The hearing officer further found that " _____ is the date the claimant knew or should have known that his condition may be related to his employment at [employer's]." The hearing officer concluded that the claimant sustained a "compensable occupational disease injury to his neck and both shoulders while in the course and scope of his employment with [employer] and the date thereof for purposes of the Act is _____."

Carrier 2 contends that the claimant failed to prove that he sustained an occupational disease, that he sustained an accidental injury on (alleged date of injury), and that, if he sustained an occupational disease, the date of injury was (alleged date of injury). An occupational disease includes a repetitive trauma injury. Section 401.011(34). A "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. Section 401.011(36). The hearing officer is the judge of the weight and credibility of the evidence, resolves conflicts in the evidence, and may believe all, part, or none of the testimony of any witness. Texas Workers' Compensation Commission Appeal No. 950084, decided February 28, 1995. We conclude that the claimant's testimony along with Dr. C's diagnosis of cervical and shoulder sprains and Dr. H's affirmative reply to the question of whether the claimant's condition resulted from repeated work activities at his job provide sufficient evidence to support the hearing officer's finding that the claimant sustained harm to his neck and shoulders while engaged in repetitive work activities. That finding supports the hearing officer's conclusion that the claimant sustained an occupational disease. *See* Texas Employers' Insurance Association v. Ramirez, 770 S.W.2d 896 (Tex. App.-Corpus Christi 1989, writ denied).

Section 408.007 provides 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. The hearing officer found and concluded that the date of injury was _____. Carrier 2 contends that the date of injury is (alleged date of injury), which was the date the claimant testified he first felt pain at work. We have previously pointed out that the

date of first symptoms will not necessarily constitute the date of injury for an occupational disease. Texas Workers' Compensation Commission Appeal No. 94534, decided June 13, 1994. Carrier 2 states that it disagrees with the hearing officer's finding that on November 15, 1994, the claimant saw Dr. J for pain in his neck, shoulders, and elbows and Dr. J's assessment was that the claimant had arthritis and he prescribed medication to treat the condition. It is unclear why carrier 2 disagrees with this finding. The finding is supported by the claimant's testimony and by Dr. J's patient notes. While the claimant testified that he thought that his pain was related to his job on (alleged date of injury), he also testified that he became confused as to the cause of his pain when Dr. J told him he had arthritis on November 15, 1994. The uncontroverted evidence is that Dr. J did not tell the claimant that he did not have arthritis until _____. We conclude that the hearing officer's finding and conclusion as to a _____, date of injury are supported by sufficient evidence.

Carrier 2 contends that the claimant should not be allowed to contend that his date of injury is other than (alleged date of injury), because the claimant and carrier 2 entered into a benefit review conference (BRC) agreement "noting that the date of injury was (alleged date of injury)." No BRC agreement signed by the parties was introduced into evidence at the CCH. What is in evidence is the BRC report of June 29, 1995, wherein the benefit review officer (BRO) states that the resolution to the dispute as to the date of injury is that the date of injury is (alleged date of injury). While the BRC report reflects that the claimant, carrier 1, and carrier 2 attended the BRC, in a response to the BRC report carrier 1 stated that it did not enter into any agreement at the BRC concerning the correct carrier or the correct date of injury and that its position is that the date of injury is Injury 2. Exhibit 1 to carrier 2's appeal is a BRC agreement dated June 29, 1995, which is signed by the claimant, the claimant's attorney, carrier 2's attorney, and the BRO. This agreement was not introduced into evidence at the CCH. The BRC agreement is not signed by a representative of carrier 1. The BRC agreement states with regard to the disputed issue of "[w]hat is the date of injury," that "the parties agree the date of injury is (alleged date of injury)."

Section 410.029(b) provides that, if the BRC results in the resolution of some disputed issues by agreement or in a settlement, the BRO shall reduce the agreement or the settlement to writing and that the BRO and each party or the designated representative of the party shall sign the agreement or settlement. Section 410.030(a) provides that an agreement signed in accordance with Section 410.029 is binding on the insurance carrier through the conclusion of all matters relating to the claim, unless the Texas Workers' Compensation Commission (Commission) or a court, on a finding of fraud, newly discovered evidence, or other good and sufficient cause, relieves the insurance carrier of the effect of the agreement, and Section 410.030(b) provides in part that the agreement is binding on the claimant, if represented by an attorney, to the same extent as on the insurance carrier. Ordinarily, we do not consider on appeal documents which are sent with the appeal which could have been submitted at the CCH. *See* Texas Workers' Compensation Commission Appeal No. 92400, decided September 18, 1992. Even if we were to consider the BRC agreement which was sent with carrier 2's appeal, it does not

meet the requirements of Section 410.029 because it is not signed by all of the parties. The record reflects that carrier 1 was a party at the BRC and at the CCH. Since the BRC agreement was not signed by all the parties as required by Section 410.029, we can not agree that the BRC agreement or the BRO's statement in the BRC report that the resolution of the date of injury issue is (alleged date of injury), is binding on the parties. We note that carrier 2 appears to agree that carrier 1 did not enter into such an agreement because it states in its appeal that the agreement was entered into by it and the claimant without mention of carrier 1 having been a party to the agreement.

Carrier 2 also points out that the claimant's TWCC-41 and the claimant's attorney's letters to it state a date of injury of (alleged date of injury). Since one of the issues at the CCH was whether the claimant gave timely notice of injury to his employer, it was incumbent upon the hearing officer to establish the date of injury. *See* Texas Workers' Compensation Commission Appeal No. 941505, decided December 22, 1994. Simply because the claimant has previously stated a date of injury in his TWCC-41 and in correspondence to a carrier does not make that the date of injury where the parties are contesting the date of injury at the CCH. That the date of injury was in dispute is evidenced by carrier 1's opening statement that the date of injury was Injury 2, by carrier 2's closing argument that the date of injury was (alleged date of injury), and by the claimant's opening statement to the effect that it was up to the hearing officer is determine the date of injury.

Section 409.001(a) provides that, if the injury is an occupational disease, then an employee or a person acting on the employee's behalf shall notify the employer of the employee of an 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(c) provides that, if the injury is an occupational disease, the employer is the person who employed the employee on the date of last injurious exposure to the hazards of the disease. Carrier 2 disagrees with the hearing officer's finding that on November 11, 1994, the claimant told AL, his supervisor, that he had pain and needed to see a doctor, but he did not state or indicate that the pain was work related. Carrier 2 also disagrees with the hearing officer's conclusion that the claimant did not report his injury to the employer on or before the 30th day after _____. The reason for carrier 2's disagreement with such finding and conclusion is not apparent, except that it takes the position that notice of injury was not given to the employer until March 1995. The claimant had the burden to prove that he gave timely notice of injury to his employer. Carrier 1 Insurance Company v. Miller, 390 S.W.2d 284 (Tex. Civ. App.-El Paso 1965, no writ). To fulfill the purpose of the notice of injury provision, the employer need only know the general nature of the injury and the fact that it is job related. DeAnda v. Home Insurance Company, 618 S.W.2d 529 (Tex. 1980). The claimant gave varying accounts of what he told AL on November 11, 1994, and AL stated that the claimant never reported a work-related injury to him. We conclude that sufficient evidence supports the finding of no report of a work-related injury on November 11, 1994, and that finding supports the conclusion of no timely report of injury because the next notice of injury the claimant said he gave was in February 1995, which was more than

30 days after the date of injury of _____.

Section 409.002 provides that failure to timely notify the employer of the injury relieves the employer and the employer's insurance carrier of liability unless: (1) the employer or the carrier has actual knowledge of the employee's injury; (2) the Commission determines that good cause exists for failure to provide notice in a timely manner; or (3) the employer or the carrier does not contest the claim. A claimant who fails to give timely notice of injury to his employer has the burden to show good cause for such failure. Aetna Casualty & Surety Company v. Brown, 463 S.W.2d 473 (Tex. Civ. App.-Fort Worth 1971, writ ref'd n.r.e.). Carrier 2 disagrees with the hearing officer's findings that the claimant continued to work until he could no longer do so because of pain in his neck and shoulders/arms; that the last day the claimant worked and his last exposure to the injurious hazards of the disease was on Injury 2; that on or about that date, the claimant informed the assistant plant manager, PM, of the work-related nature of his injury; and that this was the claimant's first communication to the employer that his condition was work related. These findings are supported by the testimony of the claimant, by PM's statements, and by Dr. H's off-work slip of February 16, 1995. While the claimant testified that he notified PM on February 13, 1995, of his injury, the hearing officer could reasonably conclude from the other evidence that the notice was actually given on Injury 2.

Carrier 2 also disagrees with the hearing officer's finding that the claimant "acted like an ordinarily prudent person under the same or similar circumstances when he waited to report his injury on Injury 2, after realizing that he could no longer work due to the physical demands of his duties," and with the hearing officer's conclusion that the claimant had continuous good cause for waiting until Injury 2, to report his injury to his employer. Carrier 2 contends that good cause for delay in giving notice of injury was not an issue at the CCH. We disagree. We have held that good cause for delay in giving notice of injury to the employer is subsumed in the issue of notice of injury when raised by the facts of the case. Texas Workers Compensation Commission Appeal No. 941722, decided February 6, 1995. The test for the existence of good cause is that of ordinary prudence, that is, whether the claimant prosecuted his or her claim with that degree of diligence that an ordinarily prudent person would have exercised under the same or similar circumstances. Hawkins v. Safety Casualty Co., 146 Tex. 381, 207 S.W.2d 370 (1948). Good cause for delay from the viewpoint of ordinary prudence is ordinarily a question of fact. Brown, *supra*. A bona fide belief of a claimant that injuries are not serious is sufficient to constitute good cause for delay. Texas Casualty Insurance Company v. Crawford, 340 S.W.2d 110 (Tex. Civ. App.-Amarillo 1960, no writ).

While we agree with carrier 2's assertions that being able to continue to work would not, in and of itself, necessarily constitute good cause and that the claimant did not directly testify that he thought his injury was trivial, there is some evidence in the record to support a reasonable inference that the claimant did not appreciate the seriousness of his injury until Injury 2. In this regard, we note that on _____, Dr. J only diagnosed the claimant as having musculoskeletal pain and the claimant testified that Dr. J told him on _____ that he

had muscle inflammation. Such diagnoses would not necessarily convey to the claimant that he had a serious injury. The claimant was able to work after _____, although he testified that his pain got worse and that it was not until Injury 2, that he became unable to work due to his pain. The next day, Dr. H took him off work. Considering the totality of the evidence, we conclude that sufficient evidence supports the hearing officer's finding and conclusion on good cause for delay in giving notice of injury to the employer until Injury 2.

Another issue at the CCH was "which insurance company is liable for the claimed repetitive injury, carrier 1 or carrier 2." It is undisputed that from February 1, 1994, to February 1, 1995, the employer had workers' compensation insurance coverage with carrier 1 and that from February 1, 1995, to February 1, 1996, the employer had workers' compensation insurance coverage with carrier 2. The hearing officer found that the last day the claimant worked and the last day he was exposed to the hazards of the disease was on Injury 2. Carrier 2 disagrees with this finding. The finding is supported by the evidence. The hearing officer concluded that carrier 2 is liable for compensation in connection with the claimant's claim because the claimant was last injuriously exposed to the hazards of the disease on Injury 2, while in the employ of the employer. Carrier 2 contends that the date of injury, and not the date of last injurious exposure, should control which carrier is liable under the circumstances of this case. Carrier 2 contends that Section 406.031(b) has no application where there is one single and continuous employer. Section 406.031 provides as follows:

> (a) An insurance carrier is liable for compensation for an employee's injury without regard to fault or negligence if:
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> (1) at the time of injury, the employee is subject to this subtitle; and
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> (2) the injury arises out of and in the course an scope of employment.
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> (b) If an injury is an occupational disease, the employer in whose employ the employee was last injuriously exposed to the hazards of the disease is considered to be the employer of the employee under this subtitle.

Carrier 2 correctly states that Section 406.031(b) refers to the "employer" and not to the "carrier." In the instant case, there are not multiple employers. The claimant worked for the same employer on the date of injury, _____, and on the date of last injurious exposure, Injury 2. However, between the date of injury and the date of last injurious exposure, the employer's workers' compensation insurance coverage changed from carrier 1 to carrier 2.

The case most directly on point is Mr. H v. Carrier 1 Indemnity Company of Rhode

Island, 855 S.W.2d 786 (Tex. App.-El Paso 1993, no writ), wherein the court stated that the question was "which of two workers' compensation carriers for the same employer is liable where the employee's first distinct manifestation of an occupational disease occurred during the policy period of one carrier but he was last exposed to the injurious chemical substance during the policy period of a second carrier." Mr. H worked for the same employer from 1980 to July 1989. His job was to clean up spilled diesel fuel and paint engines. In April 1988 he was diagnosed with asthmatic bronchitis and allergic rhinitis, and on (alleged date of injury 2), he was terminated by his employer. Carrier 1 was the employer's workers' compensation carrier from February 1987 to February 1989 and Carrier 2 was the employer's workers' compensation carrier from February 1989 to February 1990. Carrier 1 denied liability on the ground that it was not the carrier on the date that Mr. H was last injuriously exposed to the hazards of his alleged occupational disease. The trial court granted Carrier 1' motion for summary judgment. The court of appeals reversed and remanded. Carrier 1 argued that TEX. REV. CIV. STAT. ANN. art. 8306 § 24, which was in effect during the relevant time period, but which was subsequently repealed with the enactment of the 1989 Act, controlled the question of liability. Article 8306 § 24 provided as follows:

> Where compensation is payable for an occupational disease, the employer in whose employ the employee was last injuriously exposed to the hazards of such disease shall be deemed the employer within the meaning of the Act.

As can be readily seen, Article 8306 § 24 was the predecessor to Section 406.031(b) of the 1989 Act, which contains very similar language. Carrier 1 argued that, since Mr. H was exposed to the chemicals up until the date of his termination, the date of last injurious exposure was (alleged date of injury 2), and hence it was not liable since it was not the carrier on that date. This is the same argument that carrier 1 makes in its response. In rejecting Carrier 1 argument, the court noted that Art. 8306, 24 had only been applied to situations where there was a dispute as to which one of several possible employers was the employer for purposes of the workers' compensation act. The court noted that, under the workers' compensation law in effect during the relevant time period, specifically Art. 8307, 4a, the time limitations for giving notice of injury of an occupational disease and for filing a claim for compensation for an occupational disease ran from the first distinct manifestation of an occupational disease. We note that the court in Miller, *supra*, equated the term "first distinct manifestation" with when the claimant knew or should have known that he had an occupational disease. The terminology used in Miller to define the first distinct manifestation is similar to the definition of date of injury for an occupational disease in the current law, Section 408.007. *See* Texas Workers' Compensation Commission Appeal No. 93184, decided April 29, 1993. In Mr. H, *supra*, the court stated:

> If the evidence shows when the first distinct manifestation of the occupational disease occurred, that date determines the identity of the employer and the carrier. If the claimant fails to give timely notice of injury and/or to make timely claim for compensation, he must show good cause for such failure in

> order to maintain his claim for compensation. On the other hand, if the claimant has worked for several employers over a period of time in which he has been exposed to similar causes of the occupational disease but a distinct manifestation of the disease has not previously occurred, then Article 8306, Section 24 tells us that his employer for purposes of the Workers' Compensation Act will be deemed to be that employer in whose employ he was last injuriously exposed to the causes of the disease.
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> * * * *
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> In conclusion, we hold that where an employee who has worked for the same employer makes a claim for workers' compensation benefits due to an occupational disease, the compensation carrier at the time of the first distinct manifestation of the disease is liable for such benefits.

The instant case tracks the facts of Mr. H. The claimant in the instant case knew or should have known that his repetitive trauma injury, which is an occupational disease, was related to his employment on _____, when coverage was provided to the employer by carrier 1, and his last injurious exposure occurred on Injury 2, while he was still working for the same employer and when coverage was provided by carrier 2. In accordance with the decision in Mr. H, carrier 1 is liable for benefits. Consequently, the hearing officer's conclusion and decision that carrier 2 is liable for compensation on the ground that it was the carrier on the date of last injurious exposure are reversed, and a decision is rendered that carrier 1 is liable to the claimant for workers' compensation benefits in connection with his occupational disease.

With respect to the issue of which carrier is liable, we distinguish our decision in Texas Workers' Compensation Commission Appeal No. 931180, decided February 14, 1994, from the facts of Mr. H, *supra*, and from the facts of the instant case. In Appeal No. 931180 the employee suffered an occupational disease of silicosis. The employee worked for the employer as a sandblaster from March 1979 until November 1981. He had not worked as a sandblaster prior to working for the employer or after quitting the employer in November 1981. The parties stipulated that the employee was last injuriously exposed during November 1981. The employer had workers' compensation coverage with one carrier from November 1979 to November 1988, with a second carrier from November 1988 to August 1991, and with a third carrier from August 1991 to August 1993. We affirmed the hearing officer's determination that the employee's date of injury, the date he knew or should have known that his disease may be related to his employment, was Injury 3. The hearing officer determined that the carrier who provided coverage to the employer from November 1979 to November 1988 was liable for benefits. The carrier who was found to be liable for benefits argued that the date of injury should control the question of which carrier is liable. The carrier who provided coverage on the date of injury argued that the employee's last injurious exposure should determine liability. In affirming the hearing officer's decision that the carrier who provided coverage at the time of the last injurious

exposure was liable for benefits, as opposed to the carrier who provided coverage on the date of injury, we stated as follows:

> Section 406.031(b) does not address the carrier but does address which employer should be selected by saying that the employee's employer when the employee was last "injuriously exposed" is the chosen one. (We note that Section 406.031(a) places liability on a carrier for an injury if "at the time of injury, the employee is subject to this subtitle;" this language does not create a new criteria relative to whether a claim is "old law or new law" either, by using the words "time of injury" rather than "date of injury" or by indicating that at the time the employee was injured he had to be "subject to this subtitle.") We do interpret identification of a particular employer at a stated time as implying that the carrier for that employer at such stated time should be the responsible carrier.

We distinguish Appeal No. 931180 from the instant case and Mr. H, *supra*, in that in Appeal No. 931180 the date the claimant knew or should have known that his disease may be related to his employment came 10 years after the date of his last injurious exposure. In contrast, in Mr. H and the instant case, the date the employee knew or should have known his disease was related to the employment came before the date of last injurious exposure while working for the same employer.

We note that carrier 1 put into evidence a blank "standard" Workers' Compensation and Employers Liability Insurance Policy, with an effective date of April 1, 1984. Carrier 1 asserts in its response that this policy is the "Standard Texas Workers' Compensation Policy, in effect and approved by the Texas Department of Insurance since 1984. . . ." Part One A(2) of the policy (Part One is Workers' Compensation Insurance) in evidence provides that "[b]odily injury by disease must be caused or aggravated by the conditions of your employment. The employee's last day of last exposure to the conditions causing or aggravating such bodily injury by disease must occur during the policy period." If such standard policy were in effect since 1984, then it was in effect during the time period in which the employee in the Mr. H case was claiming compensation. The court's opinion in the Mr. H case makes clear that when a claimant who has worked for the same employer makes a claim for workers' compensation benefits due to an occupational disease the compensation carrier at the time of the first distinct manifestation of the disease, which courts interpreted under the old law to mean when the claimant knew or should have known he had an occupational disease, is liable for such benefits.

Section 409.021(c) provides in part as follows:

> If an insurance carrier does not contest the compensability of an injury on or before the 60th day after the date on which the insurance carrier is notified of the injury, the insurance carrier waives its right to contest compensability. The initiation of payments by an insurance carrier does not affect the right of

the insurance carrier to continue to investigate or deny the compensability during the 60-day period.

Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 124.6(c) provides in part that "[i]f a carrier disputes compensability after payment of benefits has begun, the carrier shall file a notice of refused or disputed claim, on or before the 60th day after the carrier received written notice of the injury or death." It is undisputed that carrier 2 began paying benefits to the claimant. The hearing officer concluded that carrier 2 "waived its right to contest the compensability of the claimant's injury since it failed to do so timely and its contest is not based on newly discovered evidence." Carrier 2 contends that "as the issue of whether [carrier 2] timely controverted [claimant's] claim within sixty days of notification of same was not presented as an issue at the [BRC] which proceeded [sic] the [CCH] or otherwise asserted as an issue by Respondents, the hearing officer erred in adding same to her opinion as a disputed issue." We disagree. The BRC report states that, with respect to the issue of which carrier is liable, carrier 1's position was that carrier 2 "waived the coverage issue by failing to raise it within 60 days of notice of the injury." In addressing the issue of which carrier is liable in written closing argument, the claimant argued that carrier 2 had not raised "a coverage issue within 60 days thus waiving its right to assert the coverage issue." Considering that waiver was raised at the BRC and was also asserted at the CCH with respect to the liability question, we cannot agree that the hearing officer erred in addressing that as an issue in her decision. *See generally* Texas Workers' Compensation Commission Appeal No. 92022, decided March 9, 1992, with regard to litigation of issues.

In evidence was carrier 2's Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) dated May 15, 1995, which stated that the first written notice of injury was received on March 16, 1995. Carrier 2 stated in the TWCC-21 that the proper date of injury was (alleged date of injury), that it was denying liability because it did not have coverage on that date, that carrier 1 was the proper carrier, and that it disputed that the claimant sustained an occupational disease. The hearing officer found that carrier 2 first received written notice of injury on March 16, 1995, and that if filed its TWCC-21 with the Commission on May 19, 1995, which was more than 60 days after the date of notice. She then concluded that carrier 2 had waived its right to contest the compensability of the claimant's injury since it failed to file a timely contest. Apparently, the hearing officer based the filing date on a date stamp on the TWCC-21. However, while the date stamp states a received date of May 19, 1995, the name of the person or entity who made the date stamp is illegible, except that the word “[(City 1)]" can almost be made out. This may be the date stamp of the Commission or it may be the date stamp of a third-party administrator or some other entity. Carrier 2 filed with its appeal a copy of the same TWCC-21 which was in evidence, except that the copy filed with the appeal bears a date stamp from the Commission's central office in (City 2) with a received date of May 15, 1995, and which states that the document was hand-delivered to the Commission. May 15, 1995, was the 60th day after the notice date of March 16, 1995.

In our opinion, under the particular circumstances presented, even if carrier 2 had

failed to timely contest the compensability of the claimant's injury as found by the hearing officer, that does not relieve carrier 1 from liability for the claimant's occupational disease since it provided coverage on the date of injury, nor would such failure make carrier 2 liable for the claimant's claim since carrier 1 is the liable carrier under applicable law as previously set forth in this decision. *See, e.g.,* Texas Workers' Compensation Commission Appeal No. 951489, decided October 17, 1995. *Compare* Texas Workers' Compensation Commission Appeal No. 950042, decided February 23, 1995.

We affirm the hearing officer's decision that the claimant sustained a compensable occupational disease, that the date of injury was _____, that the claimant had good cause for failing to notify his employer of his injury until Injury 2, that the claimant had disability for the period found by the hearing officer, and that the claimant's AWW is $474.00. We reverse the hearing officer's decision that carrier 2 is liable for benefits and we render a decision that carrier 1 is liable for workers' compensation benefits for the claimant's occupational disease with a date of injury of _____.

_____
Robert W. Potts
Appeals Judge

CONCUR:

_____
Susan M. Kelley
Appeals Judge

_____
Alan C. Ernst
Appeals Judge