APPEAL NO. 980058

Following a contested case hearing (CCH) held on October 13, 1997, with the record closing on December 1, 1997, pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act), the hearing officer. (hearing officer 1), resolved the disputed issues by determining that the respondent (claimant) sustained a compensable injury in the form of an occupational disease, bilateral carpal tunnel syndrome (CTS) and (right) deQuervain's syndrome; that the date of the injury is (injury date 2), the day claimant knew she had a new injury; that claimant did not timely report her injury to the employer but had good cause for her failure, as the employer had actual knowledge of the injury; and that claimant timely filed a claim for compensation with the Texas Workers' Compensation Commission (Commission). The appellant (carrier 1) has generally appealed from these determinations on the grounds of evidentiary insufficiency. Claimant's response urges the sufficiency of the evidence to support the decision.

DECISION

Affirmed as reformed.

Before discussing the evidence adduced at this hearing, it is necessary to refer to one of claimant's exhibits, namely, the decision and order in Docket No. (1 signed by (hearing officer 2) on April 8, 1996. That decision involved the same claimant and employer, (employer 1), but a different carrier, (carrier 2), and an injury date of (injury date 1). The disputed issues at that hearing were whether a finding of maximum medical improvement and a zero percent impairment rating by (Dr. T) on or about November 3, 1993, became final under Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.5(e) (Rule 130.5(e)) and whether the current condition of claimant's hands was a natural result of the compensable injury of (injury date 1).

At the earlier hearing, the parties stipulated that claimant had bilateral CTS surgery on July 8, 1993, and a right thumb deQuervain's release on December 21, 1995. According to hearing officer 2's statement of the evidence, claimant, a medical records transcriptionist, returned to work for employer 1 (after the CTS surgery) and later began to experience other problems with her hands, particularly pain in her right thumb; she returned to Dr. T but became dissatisfied with his treatment and changed to (Dr. B); and she underwent a right deQuervain's release in December 1995. Hearing officer 2 further stated that claimant returned to full-duty work for employer 1 within a few days of her 1993 CTS surgery and continued full-duty work until she resigned; that on the next workday she began a new job with her current employer, (employer 2), and that she has worked full time ever since except for the days which involved her December 1995 surgery. Hearing officer 2 further stated that carrier 2 urged that the subsequent hand problem should not be included in the compensable claim because it was a new injury or an aggravation of the previous injury and that claimant urged that her subsequent problem was a continuation of

her 1993 injury and that carrier 2 should be responsible. Hearing officer 2 noted that carrier 2 ceased providing coverage for employer 1 some time after the claimed date of injury, (injury date 1). We note that carrier 1 was the carrier for employer 1 on (injury date 2), the date of injury determined by hearing officer 1. The record in the case we consider does not indicate either that claimant proceeded with a claim against employer 2, for whom she is apparently still employed, on the theory that her last injurious exposure to the hazards of the disease occurred while employed by employer 2 or that carrier 1 defended the claim on that theory.

Hearing officer 2 found that the medical records presented did not establish by a preponderance of the evidence that the current problems that claimant has experienced with her hands, particularly the right de Quervain's release, are the result of the compensable (injury date 1), and concluded that the current condition of claimant's hands is not a natural result of the compensable (injury date 1). Hearing officer 2 also stated that her decision and order "will not act to prevent the Claimant from pursuing a claim against another carrier, but procedurally, including the present Carrier in any subsequent dispute will not be possible." Hearing officer 2's decision and order was not appealed to the Appeals Panel.

At the October 13, 1997, hearing, claimant testified that her original injury (injury date 1), bilateral CTS, which was apparently accepted by carrier 2, occurred while working for employer 1 as a transcriptionist (apparently typing medical dictation); that she had surgical releases for her bilateral CTS on July 20, 1993, and shortly thereafter returned to work for employer 1 performing transcriptionist duties until she resigned and went to work as a transcriptionist for employer 2 on May 2, 1995; that when she returned to work with employer 1 about three weeks after the CTS surgery, her symptoms were "slight" and that after her initial follow-up visit in July 1993, she worked for nearly a year without treatment and treated slight aching with Tylenol; that she began experiencing symptoms in early March 1995 and was not sure whether they were "new" but did feel they were related to her work; that the symptoms would start up after a couple of hours on the keyboard and let up when resting; that she underwent the deQuervain's release on the right on December 21, 1995; and that she has had continuous symptoms of tingling and numbness almost daily since March 1995 and has been told she requires further right-hand surgery. Claimant said that she returned to Dr. T on March 6, 1995, but after that visit changed to Dr. B whom she first saw in August 1995 after going through the Commission change of treating doctors procedure.

Claimant further testified that she did not know she had a "new injury" until a Commission ombudsman reviewed with her the decision issued after the April 1, 1996, hearing and advised her to file a new claim. In evidence is an undated Employee's Notice of Injury or Occupational Disease and Claim for Compensation (TWCC-41) signed by claimant and bearing a Commission date stamp reflecting receipt by the Commission on (injury date 2). The form states the injury as being to claimant's hands and wrists and the date of injury as "___ or ___." She also indicated she did not report this new injury to

employer 1 before the benefit review conference on February 1, 1996, which preceded the April 1, 1996, hearing and that she was not sure then she had a new injury. She did not testify to any date that she actually reported the "new injury" to employer 2. The April 1, 1996, decision and order reflects that claimant introduced both a TWCC-41 and an Employer's First Report of Injury or Illness (TWCC-1) although these latter two documents were not reintroduced into evidence at the October 13, 1997, hearing.

Dr. B's record of August 3, 1995, stated that claimant returned to work after the bilateral carpal tunnel releases by Dr. T on July 20, 1993, and was "doing fine" until March 6, 1995, when she noted increasing pain in both hands, right worse than left, and was seen by Dr. T, who diagnosed deQuervain's and a right trigger thumb. Dr. B's impression was early recurrent bilateral CTS, a right deQuervain's, and right thumb tendinitis. Dr. B's records indicate that she performed the deQuervain's release on December 21, 1995, saw claimant frequently on follow up, and is considering surgical intervention for recurrent CTS. Dr. B wrote on July 1, 1997, that claimant had a period when she was doing just fine and that the new injury is related to the type of work she has been doing which has caused a recurrence of CTS.

Hearing officer 1 made 23 findings of fact, none of which are specifically challenged by carrier 1, who has appealed the dispositive legal conclusions. Carrier 1 asserts error in the "findings" that claimant sustained a compensable injury in the form of an occupational disease, bilateral CTS and right deQuervain's syndrome; that claimant had good cause for failure to report her injury timely to the employer as the employer had actual knowledge of the injury; that the date of injury (injury date 2); and that claimant timely filed a claim for compensation with the Commission.

Hearing officer 1 found that claimant was diagnosed with right deQuervain's syndrome on March 6, 1995, and on August 3, 1995, was diagnosed with recurrent bilateral CTS, right deQuervain's syndrome, and right thumb tendinitis; that as a result of typing medical records for employer 1 in 1995, she developed right deQuervain's ' syndrome and her previous condition of bilateral CTS recurred; and that her typing of medical records furthered the business interests of employer 1. We are satisfied that claimant's testimony and the medical evidence she introduced sufficiently support the challenged conclusion that claimant sustained a compensable injury in the form of an occupational disease, bilateral CTS and right deQuervain's syndrome, and that the conclusion and its underlying factual findings are not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951).

Since the date of injury issue is pivotal in determining the timely injury reporting and timely claim filing issues, we will discuss it first. 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. Hearing officer 1 found that claimant believed that the recurrent bilateral CTS and right deQuervain's syndrome were a

continuation of her (injury date 1), injury and were caused by her job duties; that the duties claimant performed for employer 2, namely, typing medical records, were substantially the same duties she performed in 1995; that a reasonable person in the same situation as claimant would have believed the problems she was experiencing in her hands and her right thumb were caused by or the result of the (injury date 1), injury; that a CCH was held on April 1, 1996, in claim number ___ to determine if claimant's recurrent bilateral CTS and right deQuervain's syndrome were a continuation of her (injury date 1), injury; that the decision and order from the April 1, 1996, CCH determined that claimant's recurrent bilateral CTS and right deQuervain's syndrome were not a continuation of her (injury date 1) injury but were new injuries and that no appeal was taken from that decision, which is final as a matter law; that claimant received the April 1, 1996, decision and order from the prior hearing on or about April 21, 1996; that claimant knew she had a new injury on or about (injury date 2), when she discussed the decision and order with the ombudsman; and that claimant knew she had recurrent bilateral CTS on August 3, 1995.

Hearing officer 1 apparently inferred the (injury date 2), date from the Commission's date stamp on the TWCC-41 and claimant's testimony indicating that she filed the claim after talking to the ombudsman. Hearing officer 1 explained in her statement of the evidence that the April 1, 1996, decision and order was submitted to the Commission's Hearings Division on April 9, 1996; that the Division is allotted seven days by the 1989 Act to mail a decision to a claimant; that, presumably, the Division mailed the decision on or about April 16, 1997; and that claimant is presumed to have received the decision on April 21, 1996, five days after it was mailed, apparently referring to Rule 102.5(h).

Carrier 1 argued that claimant knew or should have known that her hand tingling and numbness symptoms in early ___ 1995 were due to her transcription work and thus that her date of injury should ___, the date she went to Dr. T, and, that the date of injury could even be as late as ___, when she saw Dr. B, but that it certainly was not as late as the date the ombudsman explained to claimant the effect of the April 1, 1996, decision and order. We do not regard the date of injury conclusion nor the factual findings upon which it rests as being so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain, *supra;* King, *supra*. Until claimant received and had explained to her the effect of the April 1, 1996, decision, she could reasonably believe that her injury was a continuation of her (injury date 1), injury, the position she took at the earlier hearing, and that such an injury was already reported and a claim filed therefor. Thus, hearing officer 1 determined that claimant did not know nor should she have known before (2nd injury), that her injury date was other than (injury date 1).

Concerning the timely notice of injury issue, hearing officer 1 found that claimant knew she had recurrent bilateral CTS on ___; that employer 1 also received its copy of the April 1, 1996, decision and order on or about April 21, 1996; that employer 1 knew that claimant's recurrent bilateral CTS and right deQuervain's syndrome were new injuries on or about April 21, 1996; and that claimant did not report her right deQuervain's syndrome or recurrent bilateral CTS to employer 1. Hearing officer 1 concluded that claimant "did not

report her injury timely to the Employer, but she had good cause for her failure as the Employer had actual knowledge of the injury."

We are unaware of any requirement that an injured employee, who has previously notified an employer of an injury under circumstances where the employee believes the injury is a continuation of a prior compensable injury, must renotify the employer of the injury once the Commission finally determines that the injury is a new injury with a different date of injury and not a continuation of the prior injury with the prior date of injury. Nevertheless, we view the evidence as sufficient to support the timely notice conclusion and underlying factual findings, but must point out that the challenged legal conclusion has mixed the good cause exception with the actual knowledge exception. Section 409.001(a) requires that an employee notify the employer of an occupational disease 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 409.002 provides that failure to notify an employer as required by Section 409.001(a) relieves the employer and the employer's insurance carrier of liability unless the employer or the employer's insurance carrier has actual knowledge of the employee's injury, the Commission determines that good cause exists for failure to provide notice in a timely manner, or the employer or the employer's insurance carrier does not contest the claim. Good cause and actual knowledge are separate and distinct exceptions found in different subsections of Section 409.002. Hearing officer 1's Conclusion of Law No. 4 merges these exceptions. However, we view the underlying factual findings as sufficiently supported by the evidence and as sufficient to support the actual knowledge exception. Accordingly, we reform Conclusion of Law No. 4 to provide that claimant did not report her injury timely to the employer but the employer had actual knowledge of the new injury. We again state that we are unaware of any requirement to renotify the employer of the injury after the Commission determines the injury is not a continuation of a prior compensable injury, but rather a new injury.

Regarding the timely filing of claim issue, the hearing officer found that claimant filed a TWCC-41 on ___. As previously stated, the TWCC-41 bears the Commission's date stamp showing receipt on ___. Since the evidence indicates that claimant filed the TWCC-41 on the date of her injury, the evidence is obviously sufficient to support the determination that claimant timely filed a claim for compensation with the Commission. As with the matter of notice, we are unaware of any requirement to refile a claim in these circumstances.

Finding the evidence sufficient and no reversible error, we affirm, as reformed, the decision and order of hearing officer 1.

Philip F. O'Neill
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Robert W. Potts
Appeals Judge