APPEAL NO. 980194
FILED FEBRUARY 25, 1998

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on April 29, 1997. With regard to the disputed issues at the CCH, the hearing officer determines that the respondent (claimant) sustained a compensable right wrist repetitive trauma injury, with a date of injury of (initial date of injury); that he sustained a left wrist repetitive trauma injury, with a date of injury of (subsequent date of injury); that he provided timely notice of each injury to (employer); that he timely filed a claim for compensation with the Texas Workers' Compensation Commission (Commission); that he had disability because of the (initial date of injury), compensable right wrist injury from December 29, 1992, to January 21, 1993; and that he had disability because of the (subsequent date of injury), compensable left wrist injury from July 9 to August 14, 1993.

Co-appellant, (carrier 1) appealed the determinations regarding the (initial date of injury), compensable right wrist injury and seeks a reversal of the decision. Co-appellant, (carrier 2) appealed the determinations regarding the (subsequent date of injury), compensable left wrist injury and seeks a reversal of the decision. The claimant responded to each carrier's request for appeal and seeks an affirmance of the decision. We reversed and remanded the case to the hearing officer to construct the record, since his original decision and order was ambiguous, confusing and incomplete as to what the CCH record included.

On January 26, 1998, the hearing officer entered an order which details the contents of the CCH record and effectively reinstates the original decision and order, the carriers' requests for appeal and the claimant's responses. He states that he "considered the entire transcripts from both the 10/12/94 hearing, the 8/20/96 hearing and the 4/29/97 hearing . . ." His most recent order states that the October 12, 1994, proceeding was a prehearing in which exhibits were admitted but no testimony was taken; that the August 20, 1996, proceeding was a CCH where exhibits were admitted and testimony was taken; and that the April 9, 1997, proceeding was a CCH where no exhibits were admitted and no testimony was taken but where argument was made. Therefore, the record constitutes the October 12, 1994, prehearing, the exhibits admitted and the testimony taken on August 20, 1996,[1] and the argument made on April 9, 1997. We consider the January 26, 1998, order to meet the requirements of our decision remanding the case and consider the issues on appeal.

[1]The exhibits admitted on August 20, 1996, include those admitted on October 12, 1994, and additional exhibits, but the exhibits admitted on October 12, 1994, were numbered differently when admitted on August 20, 1996. Therefore, it appears that the set of exhibits in the record that were admitted on October 12, 1994, are duplicated in those admitted on August 20, 1996.

DECISION

We affirm in part and reverse and render in part.

DATE OF INJURY

The 1989 Act provisions regarding timely reporting of an occupational disease to an employee's employer and timely filing of a claim with the Commission necessitate the determination of a date of injury. "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 injury occurs, or, if the injury is an occupational disease, the employee knew or should have known that the injury may be related to the employment." Section 409.001(a); Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 122.1(a) (Rule 122.1(a));Texas Workers' Compensation Commission Appeal No. 951115, decided August 15, 1995. "The date which triggers notice requirements for an occupational disease is 'distinct to the claimant and reasonably sufficient to cause him to believe he has the occupational disease,' 'the date a reasonably prudent person would recognize the existence of the disease and recognize it was related to his employment.'" Texas Workers' Compensation Commission Appeal No. 94709, decided July 15, 1994, citing INA of Texas v. Adams, 793 S.W.2d 265 (Tex. App.-Beaumont 1990, no writ). The determination as to the date of injury in an occupational disease case, or the date an employee knew or should have known his disease may be related to his employment, is a fact question for the hearing officer to determine. Texas Workers' Compensation Commission Appeal No. 91030, decided October 31, 1991.

The claimant testified at the CCH that he had worked "pumping and gauging" at the employer's oil tank farm since 1976. He testified that he first began to feel pain and numbness in his hands in 1985. But the medical records reveal that he began seeing a family doctor, (Dr. O), for right hand tendinitis on December 14, 1981. On January 3, 1984, he saw Dr. O for a synovial cyst in the fifth digit of his left hand. Dr. O referred the claimant to a neurologist, (Dr. S), and an orthopaedic surgeon, (Dr. F). On September 18, 1992, he first saw Dr. S, who noted a history of:

> Rt. hand goes to sleep. Intermittently x 10 years. Progressively worse. Job at [the employer] involves twisting of lots of valves - Lots of handiwork at home.

Dr. S conducted nerve conduction velocity (NCV) studies and her impression after the first visit was:

> Abnormal study of right median nerve with prolonged distal latency, mild slowing of motor conduction.

> There is mild prolongation of left median sensory latency with slowing of conduction through the carpal tunnel. Abnormal study consistent with carpal tunnel syndrome [CTS].

On (date of injury), the claimant first saw Dr. F, who recorded:

> [A] history of several years of recurrent numbness and tingling involving his right hand, primarily during work . . . .
>
> He has had an EMG [electromyography] examination recently, which confirms the presence of [CTS].

The claimant testified regarding the visit as follows:

> Q: And did [Dr. F] take a history from you at that time as to what was causing the numbness in your hands?
>
> A. There was a discussion between he and I as to what I did – I am just trying to remember this; but it seems to me like this is what it ought to be, that I told him what I did. And he looked at the tests by [Dr. S], and just the tests alone indicated carpal tunnel . . . .
>
> Q: So, on that first examination, November of '92, you knew, or [Dr. F] told you, based on his review of the tests and his brief history, you had [CTS]?
>
> A: Yes.
>
> Q: And you told him at that time that – when you most experienced numbness in your hands; is that correct?
>
> A: Yes.
>
> Q: And you told you [sic] had been experiencing this off and on since 1985?
>
> A: That's right.
>
> Q: And you told him that you primarily experienced while at work; is that right?
>
> A: Yes.
>
> Q: So, you told [Dr. F] that one of the things that caused the numbness in your hands was working; is that correct?

A: When I was turning the valves, at times I noticed it would go numb, yes.

Q: So, work was a contributing factor to the numbness in your hands?

A: Yes.

Q: Isn't it true that in November of 1992 when you gave [Dr. F] a history of what was causing your pain, you knew at that time that your pain was caused by work?

A: We talked -- you say "contributing." I say yes, every once in a while it would. Not on every valve. But every so often, the hands would grow numb.

Q: That's one of the reasons you went to [Dr. S] and went on to the specialist, because you were having some pain at work?

A: Yes.

On December 29, 1992, Dr. F performed a right carpal tunnel release surgery.

The hearing officer makes disparate findings of fact regarding the date of injury issues. He finds that:

9. The Claimant and his supervisor, [Mr. R], were both aware of the Claimant's symptoms of numbness occurring from turning valves at work before 1992 and up through December of 1992.

25. Prior to 1992, in 1992, and in 1993, [Mr. R] had actual knowledge of the Claimant's complaints of pain related to his turning valves at work, but did not have actual knowledge of any possible relation to CTS at work.

But he also finds the following:

20. An ordinary prudent person under same or similar circumstances of the claimant in 1992 and 1993 would not have realized a possible connection of the right CTS to work activities until (initial date of injury).

22. An ordinary prudent person under same or similar circumstances of the claimant in 1992 and 1993 would not have realized the existence of the left CTS and the need for

> surgery until (subsequent date of injury), and at this point relation to work should have been known.

The carriers complain that it is nonsensical for the hearing officer find that the employer knew the claimant sustained an injury before the claimant knew or should have known that the injury may be related to the employment.

The contested case hearing officer, as finder of fact, is the sole judge of the relevance and materiality of the evidence as well as of the weight and credibility that is to be given the evidence. Section 410.165(a). We will reverse the hearing officer's determination if we find that it is so weak or against the overwhelming weight of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Atlantic Mutual Insurance Co. v. Middleman, 661 S.W.2d 182 (Tex. App.-San Antonio 1983, writ ref'd n.r.e.); Texas Workers' Compensation Commission Appeal No. 950456, decided May 9, 1995. From Findings of Fact Nos. 20 and 22, we infer the hearing officer believed that the claimant knew his CTS may be related to his employment when he first saw Dr. F on (date of injury), albeit without certainty. Such an inference is consistent with the claimant's testimony. He testified he reported to Dr. F on (date of injury), that his right and left hand numbness was caused by his work. The hearing officer's determinations that the claimant met his burden of proof to show that the dates of injury are (initial date of injury), and (subsequent date of injury), are so weak or against the overwhelming weight of the evidence as to be clearly wrong or manifestly unjust and, therefore, we reverse those determinations. The proper legal standard is determining the day the employee knew or should have known his injury may be related to his employment. The 1989 Act does not establish separate "procedural" and "substantive" dates of injury. Since the hearing officer applied an improper standard and the claimant testified he knew the conditions to each of his wrists were caused by his employment as early as (date of injury), we reverse the date of injury determinations. Texas Workers' Compensation Commission Appeal No. 972622, decided January 28, 1998; Texas Workers' Compensation Commission Appeal No. 972242, decided December 15, 1997; Texas Workers' Compensation Commission Appeal No. 962183, decided December 16, 1996. Therefore, we render a decision that the claimant knew or would have known his right and left wrist injuries may be related to his employment on (date of injury).

COMPENSABILITY

The claimant alleges he turned valves for over 40 minutes each eight-hour day and used a tape measure to gauge valves. The hearing officer made a finding of fact that:

> The Claimant spent approximately 40 minutes each eight hour work day, with more minutes on longer shifts, opening and closing valves, the majority of which required approximately 30 pounds of force, with some of the valves being more difficult to turn. The Claimant also gauged tanks each work day, and gauging required using a 50 foot manual tape reel. The Claimant

engaged in repetitive forceful movements each work day for a number of years.

There was exhaustive testimony at the CCH from various employer witnesses, including Mr. R, who disputed the claimant's version of the number of valves he turned each day, the size of the valves and the time he spent turning them. Carrier 1 called a failure analysis engineer, (Mr. G), who conducted an on-sight investigation. He testified that the number of valves the claimant testified to was too high. Carrier 1 also called the employer's medical director, (Dr. L), who testified that the activities performed by the claimant did not cause CTS. There was also evidence of other factors which may have led to the development of the claimant's CTS, including his diabetes, carpentry activities and handgun shooting. Both Dr. S and Dr. F opined that repetitive trauma at the claimant's employment caused bilateral CTS.

An occupational disease is "a disease arising out of and in the course of employment that causes damage or harm to the physical structure of the body, including a repetitive trauma injury . . . ." Section 401.011(34). A repetitive trauma injury is "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). An employee must prove, by a preponderance of the evidence, the compensability of an occupational disease. Texas Workers' Compensation Commission Appeal No. 960582, decided May 2, 1996, citing Schaefer v. Texas Employers' Insurance Association, 612 S.W.2d 199 (Tex. 1980). "[O]ne must not only prove that recurring, physically traumatic activities occurred on the job, but must also prove that a causal link exists between these activities on the job and one's incapacity; that is, the disease must be inherent in that type of employment as compared to employment generally." Texas Workers' Compensation Commission Appeal No. 950868, decided July 13, 1995, citing Davis v. Employers Insurance of Wausau, 694 S.W.2d 105 (Tex. App.-Houston [14th Dist.] 1985, writ ref'd n.r.e.), *see also* Texas Workers' Compensation Commission Appeal No. 951630, decided November 15, 1995.

The hearing officer determined that the claimant showed that the actions involved in his employment, turning valves and measuring gauges, were causally linked to his condition. His determination is supported by Dr. S and Dr. F, despite conflicting evidence. The hearing officer's determination that the claimant met his burden of proof with regard to the course and scope of employment issue is not against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust and, therefore, we affirm the decision as to that issue.

NOTICE OF INJURY

If an employee does not provide timely notice of injury per Section 409.001(a), an insurance carrier is relieved of liability unless the employee can show that the employer had actual notice of the injury, that good cause existed for his failure to provide timely notice, or that the carrier failed to contest the claim. Section 409.002; Rule 122.1(d). The claimant

did not argue that he had good cause for failing to provide timely notice to the employer. The claimant testified that he never claimed his right wrist injury was work-related until January 25, 1993, and never claimed his left wrist injury was work related until July 23, 1993. He placed a question mark after a question regarding an injury on-the-job on a (initial date of injury), employee accident form. Mr. R testified that he never received notice of an injury in the course and scope of employment from the claimant until (initial date of injury). The hearing officer finds that:

> 28. The right CTS injury was timely reported to the Employer as possibly work-related on (initial date of injury), and on January 21, 1993 . . . .
>
> 29. The left CTS injury was timely reported to the Employer as possibly work-related on July 23, 1993 . . . .

It is important to note that although the hearing officer finds Mr. R had actual notice of the claimant's "complaints" prior to 1992, he does not find that the employer had actual knowledge of either the claimant's right wrist injury any time prior to (initial date of injury), or actual knowledge of the claimant's left wrist injury any time prior to July 23, 1993.

Since we hold that the date of injury for both the right and the left wrist claims is (date of injury), and Findings of Fact Nos. 28 and 29, that the claimant provided notice to the employer regarding his right wrist injury on (initial date of injury), and notice to the employer regarding his left wrist injury on July 23, 1993, are not challenged, we reverse the notice determinations. We render a decision that the claimant did not provide timely notice of either injury. Therefore, carrier 1 and carrier 2 are both relieved of liability. *Id.*

CLAIM FILING

A carrier is also relieved of liability if an employee fails to file a claim with the Commission within one year of the date of injury. Sections 409.003 and 409.004. Since we hold that the date of the alleged injuries was (date of injury), the claimant's August 3, 1993, Employee's Notice of Injury or Occupational Disease & Claim for Compensation (TWCC-41) constitutes timely filing of a claim. Therefore, neither carrier 1 or carrier 2 is relieved of liability on the ground of failure to timely file a claim and we affirm the determinations regarding that issue.

COVERAGE

The issue of coverage was not a specifically delineated issue but was tried on the consent of the parties. It was discussed repeatedly in the notice of injury, date of injury and carriers' contest of compensability contexts. Therefore, we discuss coverage herein.

It is undisputed that carrier 1 provided workers' compensation coverage for the employer on (date of injury), and through December 31, 1992, and that carrier 2 provided

workers' compensation coverage for the employer from January 1, 1993, through at least June 20, 1993. It is further undisputed that the claimant worked for the employer and no other employer on (date of injury), and January 5 and June 20, 1993. Carrier 1 argues that the hearing officer erred as a matter of law in that he determined it is liable for an injury that allegedly occurred on a date which it did not cover the employer. It cites the 1989 Act's provision where "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." Section 406.031(b). Carrier 1 argues that the section refers to the "employer" and not to the "carrier." We agreed with that rationale in Texas Workers' Compensation Commission Appeal No. 960238, decided March 21, 1996. In reaching our decision, we considered the Court of Appeals' interpretation of substantially similar language found in the predecessor statute. *See* TEX. REV. CIV. STAT. ANN. Art. 8306 § 24 (Vernon Pamph. 1992), *now repealed*. In Hernandez v. Travelers Indemnity Company of Rhode Island, 855 S.W.2d 786 (Tex. App.-El Paso 1993, no writ), the court considered the question of "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." We followed Hernandez, *supra*, and held 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." Appeal No. 960238, *supra; see also* Texas Workers' Compensation Commission Appeal No. 931180, decided February 14, 1994.

The hearing officer attempts to forge new, unrecognized, legal ground in creating a "procedural" date of injury applicable to coverage issues. He opines that such a date is separate from the date the employee knew or should have known his injury may be related to his employment and determines that carrier 1 is liable for an injury with a date of injury after its policy period. We reject this notion. However, since we hold that the date of each injury is (date of injury), at the latest, we affirm the determination that carrier 1 is liable for payment of benefits if any are due.

CONTEST OF COMPENSABILITY

A carrier must contest compensability of an injury on or before the 60th day after it is notified of the injury or else it waives its right to contest compensability and is liable for payment of benefits. Section 409.021(c); Rule 124.6(c). The analysis to determine whether a carrier has timely contested compensability is essentially a two-step process. In the first step, the hearing officer must determine when the carrier was notified of the injury. Within the first step lies an analysis of the sufficiency of the notice to the carrier. A written notice of injury to a carrier, for the purposes of starting the time period for contesting compensability, must fairly inform the carrier of "the name of the injured employee, the identity of the employer, the approximate date of the injury, and facts showing compensability." Rule 124.1(a)(3). The writing may be from any source. Rule 124.1(a)(3).

It is undisputed that carrier 1 contested the claim in its February 17, 1993, Payment of Compensation or Notice of Refused or Disputed Claim Interim (TWCC-21) and that carrier 2 contested the claim in its September 13, 1995, TWCC-21. Carrier 1 and carrier 2 argue that they each contested the compensability of the claimant's respective injuries with 60 days of receiving notice of a compensable injury. A "compensable injury" is "an injury that arises out of and in the course and scope of employment for which compensation is payable under this subtitle." Section 401.011(10). "Compensation" is "payment of a benefit." Section 401.011(11). A carrier is liable for payment of compensation if the employee is the employee of the employer at the time it provided a certificate of insurance for the employer. *See* Appeal No. 960238, *supra.* A carrier only receives notice of a compensable injury when it receives written notice of an injury, including "facts showing compensability." Rule 124.1(c).

Carrier 1 argues it first received notice that claimant alleged a (date of injury), date of injury when it attended an August 24, 1994, benefit review conference (BRC). It maintains that prior to that BRC, the claimant alleged a "December 1992" date of injury, his January 25, 1993, notice of injury was timely and it had no reason to contest timely notice. It argues that it first became aware that the claimant knew or should have known his injury may be related to his employment on (date of injury), and that he had not provided timely notice of injury, when it attended the BRC. The hearing officer made a finding of fact that carrier 1 received written notice of the right CTS on February 17, 1993, and failed to contest the compensability of that injury within 60 days of its receipt. In making that finding, the hearing officer specifies carrier 1's February 17, 1993, TWCC-21 as evidence he relied upon to make his finding. The employee has the burden of proof to show when the carrier received written notice. Texas Workers' Compensation Commission Appeal No. 962512, decided January 27, 1997. Based on our review of carrier 1's February 17, 1993, TWCC-21 and the entire record, we conclude that there is insufficient evidence to support a determination that on February 17, 1993, carrier 1 received notice that the claimant sustained a compensable injury for which he did not provide timely notice of injury. The February 17, 1993, TWCC-21 cited by the hearing officer did not prove that it received notice that the claimant did not provide timely notice of injury to the employer. It listed "no specific date of injury."

Carrier 1 argues in the alternative that the issue of whether it timely contested the claimant's failure to provide notice, should not have been considered at the CCH. It maintains that the issue was not raised at the BRC, that it was raised by the hearing officer *sua sponte* and that there was no finding of good cause to add the issue. We disagree. Where the issue of whether a carrier contested the timeliness of an employee's notice of injury was not raised at the BRC, the hearing officer may not add the issue *sua sponte*. Texas Workers' Compensation Commission Appeal No. 92268, decided August 6, 1992; Texas Workers' Compensation Commission Appeal No. 941333, decided November 21, 1994. Either the parties must consent or good cause must be found to add the issue. *Id*; *see* Section 410.151(b); Rule 142.7(d) and (e). On August 20, 1996, the parties agreed to the addition of the issue and the hearing officer found that their agreement was good cause to add the issue. Therefore, we dismiss carrier 1's argument on this point.

Carrier 2 argues that it first received written notice that the claimant sustained an injury for which it may be liable to pay benefits on July 28, 1995, when it received the claimant's July 26, 1995, Request for Benefit Review Conference (TWCC-45). It argues that before that time, the claimant alleged a (alleged date of injury), a date before its period of coverage with the employer. The hearing officer makes a finding of fact that carrier 2 received written notice of the left CTS "no later than" August 3, 1993. The hearing officer specifies that he relies on carrier 1's February 17, 1993, TWCC-21, the claimant's July 26, 1995, TWCC-45, and carrier 2's September 13, 1995, TWCC-21 to make his finding. We note that the claimant's August 13, 1993, TWCC-41 stated that he "first knew the disease was work related" in December 1992. Our review of those documents and the entire record does not reveal evidence to support a finding that on August 3, 1993, carrier 2 received notice that the claimant sustained an injury for which it may be liable.

In the second step in determining whether a carrier waived its right to contest the compensability of an injury, the hearing officer must determine if the carrier contested compensability on or before the 60th day after it received notice. Carrier 1 argues it responded to the claimant's oral notice of a compensable injury for which he had not provided timely notice of when it stated its position at the August 24, 1994, BRC. A carrier's oral contest at a BRC, in response to an employee's oral notice of a compensable injury, is sufficient if memorialized in a subsequent BRC report. Texas Workers' Compensation Commission Appeal No. 94292, decided April 26, 1994. The September 26, 1994, BRC report regarding the August 24, 1994, BRC stated carrier 1's position was that the claimant had not provided timely notice of injury. Therefore, we reverse the determination that carrier 1 waived its opportunity to contest the timeliness of the claimant's notice of injury.

It is undisputed that carrier 2's September 13, 1995, TWCC-21 contested the compensability of the claimant's alleged injury. Since we find that there is insufficient evidence that carrier 2 first received written notice of an injury for which it could be liable prior to 60 days before September 13, 1995, we reverse the determination that carrier 2 waived its opportunity to contest the compensability of the claimant's alleged left CTS injury.

DISABILITY

Disability means the "inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage." Section 401.011(16). The determination as to an employee's disability is a question of fact for the hearing officer. Texas Workers' Compensation Commission Appeal No. 92147, decided May 29, 1992. Disability, by definition, depends upon there being a compensable injury. *Id*. Since we hold that neither carrier is liable for payment of benefits, the claimant's injuries are not compensable. Therefore, we reverse and render a decision that the claimant did not have disability for either his right or his left wrist injuries.

CONCLUSION

We affirm portions of the decision and hold that the claimant's right wrist and left wrist injuries were sustained in the course and scope of employment, that neither carrier 1 nor carrier 2 are relieved of liability under Section 409.004 and that carrier 1 is the carrier on the claimant's dates of injury. We reverse other portions of the decision and render a new decision that the date of the claimant's left wrist and right wrist injuries is (date of injury); that both carrier 1 and carrier 2 are relieved of liability under Section 409.002; that the claimant did not prove that carrier 1 waived its right to contest the timeliness of the claimant's notice of injury or that carrier 2 waived its right to contest the compensability of the claimant's left wrist injury; and that the claimant did not have disability because of either his right wrist or his left wrist injuries.

Christopher L. Rhodes
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Alan C. Ernst
Appeals Judge