APPEAL NO. 990081

Following a contested case hearing held on December 7, 1998, pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act), the hearing officer, resolved the disputed issues by determining that the respondent (claimant) sustained an occupational disease injury, namely, bilateral carpal tunnel syndrome (CTS) caused by repetitive physically traumatic activities at work; that the date of injury is _____; that claimant timely reported the injury to the employer and the appellant (carrier A) is not excused from liability for benefits; that claimant has had disability; and that the workers' compensation carrier on the date of injury is liable for benefits. Carrier A has appealed certain of the findings of fact and conclusions of law and contends that the evidence is insufficient to establish that claimant had the occupational disease injury, that the date of injury is _____, that claimant timely reported the injury to the employer, that claimant had disability, and that the workers' compensation carrier on the date of injury is liable for benefits. Claimant has responded and urges the sufficiency of the evidence to support the appealed findings and conclusions. The file does not contain a response from respondent (carrier B) nor from respondent (carrier C).

DECISION

Affirmed in part, as reformed; reversed in part.

The parties stipulated that at all relevant times claimant was the employee of (employer); that from June 22, 1992, through December 31, 1996, the employer had workers' compensation insurance with carrier B; that from December 31, 1996, through December 31, 1997, the employer had workers' compensation insurance with carrier C; and that from December 31, 1997, through December 7, 1998, the employer had workers' compensation insurance with carrier A.

Not appealed is a finding that claimant worked as a forklift technician for the employer beginning in 1987; that his job as a forklift technician required him to use hand tools everyday for most of the working day; and that he also used vibrating tools such as an air rachet daily, a grinder occasionally, and a steam cleaner.

Claimant testified that he had worked for the employer as a forklift service technician since June 1987, that his job was to repair forklifts, and that since 1987 he has used his hands repetitively in his work including the use of general mechanical tools and air ratchets daily and grinders and a steam cleaner wand occasionally. He said that in 1994 he began to experience pain, numbness, and tingling in his hand and arms, greater on the right; that the symptoms appeared randomly and mostly at night; that he had not previously had hand pain; that he was tested at the (clinic) but was not provided with the results; that at the suggestion of a relative, Mr. W, he began to wear wrist splints which he purchased but they did not help; and that the pain eventually abated. Claimant further stated that in 1996 he saw Dr. A, a chiropractor, because he had pain not only in his hands but also in his neck and between his shoulders, that Dr. A thought he might have a cervical problem, and that

he stopped treating with Dr. A after three months because his pain had gone. Dr. A's record of March 13, 1996, states that claimant complained of "right elbow to right CTS area" since March 1995 and had been tested for CTS. This record also reflected complaint of pain in other areas and has several references to claimant's hands on dates in April 1996. Claimant stated that his hand pain returned in late 1997, that he saw Dr. B on _____, and that it was Dr. B who first advised him that his hand pain was related to his work. He insisted that he did know his work was the cause of his hand pain until he was so advised by Dr. B and that he did not remember having been so informed by any other doctor. Claimant acknowledged that he knew that Mr. W's CTS was work related.

Claimant further testified that he reported the injury to the employer on April 9, 1998, and a finding of fact to that effect has not been appealed.

Concerning disability, claimant testified that he missed a total of 10 days in the period from January through August 1998 because of his CTS injury and that these days are reflected in his documentary evidence. Claimant's Exhibit No. 7 contains Daily Time Sheet forms. Ten of these forms state only "Out with no pay," one (January 24, 1998) also states "MRI" and another (March 18, 1998) also states "EMG testing." On top of these Daily Time Sheet forms is a typewritten page stating "Time Off Work Due to CTS in Hands" and reflecting that claimant missed eight hours of work each day on March 3, 1998, April 6, 9 and 20, 1998, May 8, 1998, June 1, 1998, July 14 and 31, 1998, and August 14 and 31, 1998. These are, apparently, the 10 days of disability to which claimant testified.

In evidence is a July 26, 1996, report of Dr. G concerning claimant's pharyngitis which refers to his past medical history as positive for, among other things, CTS. Also in evidence is a March 9, 1998, record of Dr. M stating that claimant complains of numbness in both hands, primarily at night and more on the right, that claimant has had this for going on two years, and that claimant was apparently worked up for this in the past and told that he had CTS. A March 18, 1998, EMG report to Dr. M states that claimant presents with an approximately four-month history of right greater than left hand numbness, intermittent and worse at night, and that he has a history of cervical pain. Also in evidence is the _____, report of Dr. B which states a history of recurrent numbness, right greater than left, for approximately four years with an increase in intensity in the past two years and which states the diagnosis as bilateral CTS. Dr. B further stated that claimant has been informed that in his, Dr. B's opinion, claimant's hand problems "are directly attributable to work related duties."

Carrier A has appealed findings that claimant's use of vibrating tools was beyond that of the ordinary public; that he had hand numbness and pain in 1994; that his symptoms appeared at night; that he was diagnosed with bilateral CTS with the right being worse than the left; that he was given hand splints which he wore to work for a period of time; that he had a coworker (sic) who had CTS that was related to work; that in 1994 claimant, as a reasonably prudent person, neither knew nor should have known that CTS or wrist problems may have arisen from employment or were related to the employment; that claimant had additional arm pain in 1997 and sought treatment from a chiropractor; that he

had neck adjustments that may have made his symptoms of arm pain disappear; that his arm pains were apparently diagnosed as radicular pain from a neck problem; that claimant neither knew nor should have know that his CTS may be related to his employment in 1997; that _____, is the date claimant, as a reasonably prudent person, knew or should have known, that the CTS may be related to employment although he was aware that he had a diagnosis of CTS in 1994; that claimant's CTS arose out of repetitively physically traumatic activity at work and was caused by such activity; that claimant was injuriously exposed to the conditions at work at all times that he worked as a forklift technician; and that claimant missed time from work because of his bilateral CTS on March 3, March (sic) 6, April 9, April 20, May 8, June 1, July 14, July 31, August 14, and August 13 (sic), 1998, and that his CTS caused him to be unable to obtain and retain employment at his preinjury wage for more than eight days. The evidence established that claimant missed work on April 6th, not March 6th, and on August 31st, not August 13th, and we reform Finding of Fact No. 14 accordingly.

The hearing officer is the sole judge of the weight and credibility of the evidence (Section 410.165(a)) and, as the trier of fact, resolves the conflicts and inconsistencies in the evidence (Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ)). As an appellate reviewing tribunal, the Appeals Panel will not disturb the challenged factual findings of a hearing officer unless they are 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).

Concerning the evidence of claimant's having CTS, the medical evidence, including EMG and nerve conduction testing in 1998, sufficiently supports the hearing officer's determination in this regard. As for the date of the occupational disease injury, 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 carrier urges that the date of injury is on or about July 1, 1994, pointing to evidence of claimant's experiencing hand pain and numbness as early as that date, to his being tested for CTS, to his wearing splints for a time, and to his knowledge that Mr. W had work-related CTS. However, claimant testified that he did not know his CTS was related to his work until Dr. B so advised him on _____. The hearing officer could credit this testimony, corroborated by Dr. B's record of that date. Incidentally, claimant identified Mr. W as a relative, not a coworker, and we reform Finding of Fact No. 4 accordingly. Concerning the causation issue, the hearing officer could consider the unrefuted evidence of claimant's using general hand tools as well as air ratchets daily in repairing and servicing forklifts since June 1987 and find that such activities were sufficiently repetitious, physically traumatic activities to cause claimant's bilateral CTS. Because we affirm the date of injury, the timely notice and liable carrier issues are also affirmed.

Concerning disability, Section 401.011(16) defines disability as the inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage. The Appeals Panel has recognized that periods of disability can be

intermittent. Texas Workers' Compensation Commission Appeal No. 93707, decided September 16, 1993. However, since disability must result from a compensable injury, *a fortiori* an injured employee cannot have disability before the date of the compensable injury. Weekly income benefits begin to accrue on the eighth day after the date of injury. *See* Section 408.082(b) and 408.083. *And see* Texas Workers' Compensation Commission Appeal No. 951667, decided November 21, 1995. The hearing officer has determined the date of the injury to be _____, a date we affirm, and yet has also determined that claimant had disability on March 3, 1998, a date preceding the date of injury. Accordingly, we reverse the determination that claimant had disability on March 3, 1998, but affirm the determination that claimant had disability on the dates found by the hearing officer subsequent to _____.

We reverse the hearing officer's determination that claimant had disability on March 3, 1998, and we affirm the remainder of the decision and order, as reformed.

_____
Philip F. O'Neill
Appeals Judge

CONCUR:

_____
Susan M. Kelley
Appeals Judge

_____
Elaine M. Chaney
Appeals Judge