

APPEAL NO. 990103

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). In Texas Workers' Compensation Commission Appeal No. 981699, decided August 28, 1998, the Appeals Panel affirmed the finding of the hearing officer that the respondent (claimant) sustained an occupational disease, bilateral carpal tunnel syndrome (BCTS). The determination that the date of injury was _____, was **not** appealed. The Appeals Panel reversed the determination of the hearing officer that the appellant (carrier) had actual knowledge of the injury and rendered a decision that the carrier did not have actual knowledge of the injury. The determination of the hearing officer that the claimant gave her employer notice of the injury by facsimile transmission on February 14, 1998, was **not** appealed. The determination that the claimant had good cause for lack of timely notice was reversed and remanded for the development of the evidence and further findings that the good cause did or did not extend to the date of notice. After a hearing on remand, the hearing officer revisited the already decided issue of actual knowledge and determined that the carrier had "actual notice" of the BCTS injury on _____; that the date of notice of the injury was now January 14, 1998, not as previously decided, on February 14, 1998; and that the claimant had continuing good cause for the lack of timely notice "until January 14, 1998." The carrier appeals numerous findings of fact and conclusions of law and argues essentially that the hearing officer's finding of good cause should be reversed because the hearing officer failed to address good cause from January 14, 1998, her newly decided date of notice, to February 14, 1998, the previously decided, unappealed, and final determination of the date of injury. Carrier also challenges on appeal, as was done at the contested case hearing (CCH) on remand, the authority of the hearing officer to revisit the issue of actual knowledge, when the Appeals Panel had already rendered a decision on this issue. The claimant responds that work-relatedness is inherent in the nature and definition of BCTS and that simple notice of the disease is, as a matter of law, notice that it was caused by activities on the job. The claimant also seeks affirmance of the finding of good cause based on a date of notice of January 14, 1998, without further mention of the unappealed prior finding of a date of notice of February 14, 1998.

DECISION

Reversed and a new decision rendered.

The essential facts of this case were contained in Appeal No. 981699, *supra*, and need not be reproduced here. We first address the issue of good cause for lack of timely notice and will consider briefly the argument of the claimant on appeal that BCTS can only be a work-related injury. This argument was not presented at the CCH below. The attorney offered this theory on appeal, with no evidentiary support whatsoever. For these reasons, we find no merit in this argument and decline to further address it.

The most troubling aspect of this appeal is that the hearing officer previously found that the claimant reported her BCTS to her employer on February 14, 1998. This is

consistent with the position of the claimant at the first CCH and this finding was not appealed. The evidence offered by the claimant at the first CCH to establish when the injury was reported consisted of two facsimile transmissions from the claimant's attorney to the carrier and the employer on February 14, 1998. The document transmitted was a report of a January 6, 1998, visit by the claimant to Dr. B in which he commented that the BCTS was caused by years of repetitive action and not by the specific trauma on January 27, 1997. The copy of the letter transmitted bears no indication that it was previously sent to the employer or carrier.

At the CCH on remand the claimant submitted into evidence another copy of the same letter that was previously transmitted on February 18, 1998. This copy, introduced for the first time at the CCH on remand, contains additional annotations that it was transmitted by facsimile to someone not otherwise identified and that it was date stamped as received on January 14, 1998, by "San Antonio WC Claims." We assume that the hearing officer considered this annotation to reflect receipt by the employer and presumably became the basis for her new Finding of Fact No. 29 that the claimant reported the BCTS occupational disease to the employer (and carrier) on January 14, 1998. This finding of fact was made in the face of the unappealed previous finding of a date of notice of February 14, 1998. The hearing officer then addressed the critical remanded issue of good cause for untimely notice and found that good cause existed up to January 14, 1998.

The remand in this case was premised on the finality of the unappealed finding of a February 14, 1998, date of notice, and the hearing officer was specifically directed to consider the existence, or not, of good cause up to February 14, 1998. She erroneously found a new date of notice of injury and did not address good cause to February 14, 1998, but only to January 14, 1998. Because we are permitted only one remand, we cannot again remand this case with repeated explicit instructions to the hearing officer. It must be noted, however, that at the first CCH, she relied on a document that lacked the critical date of receipt. Only in time for the CCH on remand (which in itself was delayed for two months from its original setting), did the claimant seemingly discover this document. Meanwhile, the claimant did not timely appeal the first finding of a date of notice. Because the hearing officer found good cause only up to one month before the date of notice, we reverse her determination that the claimant had good cause for late reporting of the injury and render a decision that the claimant did not show good cause for not timely reporting the injury until she reported the injury on February 14, 1998.

The matter of actual knowledge requires comment. In her prior decision and order, the hearing officer determined actual knowledge on May 22, 1997, based on a specific set of facts, that is the completion of a Payment of Compensation or Notice of Refused or Disputed Claim Interim (TWCC-21) by the carrier. For the reasons set out in Appeal No. 981699, *supra*, we reversed this finding and rendered a decision that the employer did not have actual knowledge. Over half the decision and order on remand is devoted to the question of actual knowledge. The hearing officer again found actual knowledge, but this time on _____, based on a completely different factual basis of conversations and otherwise not identified documents. In our original decision and order, we rendered a

decision against the claimant on the issue of actual knowledge. This determination was based on the insufficiency of the evidence relied on by the hearing officer to support her findings. This determination foreclosed further findings of fact and conclusions of law on the issue of actual knowledge. The claimant, having lost the first time around on this issue, was not free to re-work the evidence and again present the issue of actual knowledge to the hearing officer.

For the foregoing reasons, we reverse the determinations of the hearing officer that the claimant had good cause for timely notice and that the carrier had actual knowledge of the BCTS injury that is the subject of this claim and render a decision that the claimant did not have good cause for her lack of timely notice and that the carrier did not have actual knowledge of the BCTS injury. Although the injury occurred in the course and scope of employment, it was not a compensable injury and the carrier is relieved of liability for benefits for this injury. For this reason, we also reverse the determination of disability, there being no compensable injury, and render a decision that the claimant did not have disability. Section 401.011(16).

Alan C. Ernst
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Tommy W. Lueders
Appeals Judge