APPEAL NO. 990157

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 December 11, 1998. He determined that the respondent (claimant) sustained an occupational injury; that the injury included reflex sympathetic dystrophy (RSD) of the upper right extremity and an unknown injury to the right hand/wrist; that the date of injury was _____; and that the appellant (self-insured) was not relieved of liability for the injury even though the claimant did not timely report the injury because the employer had actual knowledge of the injury. The self-insured appeals all but the date of injury determinations, contending that they are not supported by sufficient evidence. The appeals file contains no response from the claimant.

DECISION

Affirmed in part, reversed and rendered in part, and reversed and remanded in part.

The claimant worked as a data entry clerk for the self-insured hospital district. She testified that her work involved entering data for approximately 200 to 400 prescriptions per day. The claimant testified that on _____, her right hand started swelling and that she told Mr. P about the swelling. Mr. P, according to the claimant, told her to seek medical care at the self-insured's clinic. In her testimony, the claimant denied any prior problems with her hand. According to the claimant, she had no idea that her right hand pain and swelling were work related at this time. Mr. P, she said, told her "maybe you need to slow down a little bit and I said, well I don't know what was causing it to hurt." Mr. P at some time cut off two rings because of the swelling. The claimant admitted that she did not tell Mr. P that she thought she had a work-related injury, but she did not think this herself. In a written statement of July 27, 1998, Mr. P said his first knowledge of a work-related injury came in a phone call on July 15, 1998, from Dr. M, D.C., "a chiropractor from whom [claimant] had sought care."

The medical report of the claimant's visit on _____, to the employer's clinic recorded onset of the pain four days ago and noted swelling from the elbow to the wrist. The diagnosis was tendinitis and "acute" carpal tunnel syndrome (CTS) rather than RSD. The claimant returned to the clinic on April 30, 1998. The doctor concluded that her examination was not consistent with CTS. The diagnosis was wrist swelling. The claimant was referred to Dr. D. Dr. D's records were not in evidence, but the claimant said that his diagnosis was arthritis. Dr. D referred the claimant to Dr. G for a neurologic consultation. Dr. G examined the claimant and in a report of September 29, 1998, recorded a history of right upper extremity pain since July 1997, worse since _____. The claimant said she did not recall giving this history. His diagnosis was RSD of the right upper extremity.

The claimant also received treatment from Dr. B. On May 12, 1998, he noted "mild swelling" of the right hand. X-rays showed "well maintained intercarpal and radial carpal joint spaces." On May 21, 1998, he gave a "presumptive diagnosis" of RSD. By May 26,

1998, he considered the etiology of the right hand pain "unclear" and saw no skin changes associated with RSD. Later examinations in June 1998 showed no swelling, full digital and wrist range of motion and intact sensibilities and grip.

The claimant selected Dr. M as her treating doctor in July 1998. Her diagnoses included "suspect [CTS] & RSD.

Dr. P reviewed the claimant's records at the request of the self-insured and concluded that there was no documentation to support a claimed right wrist or right upper extremity injury due to job activities. Dr. W examined the claimant on July 20, 1998, at the request of Dr. M. His tentative diagnoses were possible sympathetically mediated pain and myofascial pain syndrome. He doubted that her symptoms reflected CTS.

The hearing officer asked the parties at the CCH if they desired to add an extent-of-injury question since there was evidence of both a right hand/wrist injury and an upper extremity injury (RSD). The parties agreed. The hearing officer found that the claimant sustained a compensable injury in the form of an occupational disease and that the injury included both right upper extremity RSD and an unknown injury to the right hand/wrist. The self-insured appeals these determinations, arguing that the claimant failed to establish any compensable injury, but pain at most, and that the finding of RSD was not based on reasonable medical probability. Section 401.011(26) defines injury as damage or harm to the physical structure of the body. An occupational disease includes a repetitive trauma injury, which is damage or harm from repetitious, physically traumatic activities. Sections 401.011(34) and (36). Whether a claimant has sustained a compensable injury is a question of fact for the hearing officer to decide and his resolution of this question is subject to reversal on appeal only if it is so against the great weight and preponderance of the evidence as to be clearly erroneous and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Company, 715 S.W.2d 629, 635 (Tex. 1986).

In this case, there was evidence that the claimant experienced right hand swelling that eventually subsided, at least to some degree. This can constitute an injury as defined by the 1989 Act. The claimant's testimony relating this condition to her work activities, if found credible by the hearing officer, constitutes sufficient evidence to support a finding of a work-related right hand/wrist injury even though other medical opinion may be to the contrary. The evidence was in greater conflict with regard to the diagnosis of RSD and its cause. Dr. G, a neurologist, diagnosed RSD even though he noted no evidence of "atrophic skin changes, swelling, or any discoloration of the right upper extremity at this time." The self-insured argues on appeal that lack of significant swelling or color changes "are two factors that one would expect to be present if the claimant had [RSD]." Given the lack of evidence presented at the CCH on physiologic indicators of RSD, we conclude that the self-insured's challenge to Dr. G's conclusion goes to the weight of this evidence. The hearing officer, as sole judge of the weight and credibility of the evidence under Section 410.165(a), found Dr. G's opinion credible and persuasive despite other evidence challenging the RSD conclusion. We believe his opinion, together with the testimony of the

claimant and opinion of Dr. M, provided sufficient evidence to support the hearing officer's finding as to the extent of a work-related injury in this case.

The parties stipulated that the date of injury was _____, and that the claimant first reported the injury to her employer on July 15, 1998, well outside the 30 days established for reporting an injury in Section 409.001. As a consequence of these stipulations, the claimant stated her intention to prove good cause for the lack of timely notice. The hearing officer, on his own initiative, invited the parties to take a position on whether the employer had actual knowledge of the injury on the date of the injury, thereby excusing the claimant's failure to give timely notice of the injury. The claimant, who bore the burden of proof on this issue, declined the invitation and made no comment whatsoever on possible actual knowledge. Rather, she maintained her position that she had good cause for the late notice. In any case, the hearing officer declined to make findings of fact and conclusions of law on the good cause excuse for lack of timely reporting on which the claimant expressly relied in favor of a finding of actual knowledge which was not the position of either party. In the face of the claimant's testimony that she did not know her hand/wrist condition was work related on _____, and Mr. P's confirmation that she did not report it to him as work-related, we believe that the hearing officer's finding of actual knowledge is so against the great weight and preponderance of the evidence as to be clearly erroneous and unjust. For this reason, we reverse that determination and remand this issue for further findings of fact and conclusions of law as to whether the claimant had good cause for not timely reporting the injury.

On remand, the hearing officer may be confronted with certain problems arising out of the parties too-willing acceptance of the hearing officer's insertion of himself into the way they tried this case. For example, there is a stipulation of the date of injury. This stipulation was made, it seems, when only a right wrist/hand injury was under consideration. The hearing officer, with the consent of the parties, added an extent-of- injury issue of whether the compensable injury included right upper extremity RSD. The RSD injury he found may or may not make sense in terms of the only stipulated date of injury and the issue of good cause for not timely reporting this injury. We leave it to the parties on remand to sort through these issues.

We affirm the finding of a date of injury of _____, and the findings that the claimant sustained a work-related right hand/wrist injury and right upper extremity RSD. We reverse the determination that the employer had actual knowledge of the injuries and render a decision that the employer did not have actual knowledge of the claimed injuries. We remand for findings of fact and conclusions of law on the issue of whether good cause did or did not exist for the lack of timely notice of the injuries. Pending resolution of the good cause issue, we also reverse and remand the findings that the work-related injuries were compensable.

Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a

request for review not later than 15 days after the date on which such new decision is received from the Texas Workers' Compensation Commission's Division of Hearings, pursuant to Section 410.202. *See* Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

_____
Alan C. Ernst
Appeals Judge

CONCUR:

_____
Stark O. Sanders, Jr.
Chief Appeals Judge

_____
Susan M. Kelley
Appeals Judge