

## APPEAL NO. 990324

Following a contested case hearing held on January 12, 1999, 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 concluding that the date of injury is \_\_\_\_\_; that the appellant's (carrier) second Payment of Compensation or Notice of Refused or Disputed Claim (TWCC-21), filed with the Texas Workers' Compensation Commission (Commission) on October 9, 1998, was not based on newly discovered evidence that could not reasonably have been discovered at an earlier date; that because the respondent (carrier) did not timely dispute claimant's injuries, claimant has sustained a compensable injury in the form of an occupational disease to both wrists and both upper extremities, including her elbows and right shoulder; and that claimant had disability resulting from her current injuries from April 9, 1998, through January 12, 1999. The carrier has appealed these conclusions and three findings of fact, asserting they are against the great weight of the evidence. The carrier states that its delay in disputing the injuries is attributable in part to claimant's actions and also contends that, based on recent case law, since claimant did not sustain an injury, the carrier is not liable by waiver. Claimant has responded, contending that the evidence sufficiently supports the appealed determinations and that waiver does apply in this case.

### DECISION

Affirmed.

Claimant testified that she commenced employment with the employer on October 31, 1995; that she obtained the job through the Texas Rehabilitation Commission; that her duties in customer support included fielding telephone calls from customers and using the computer to research information and enter data; that she worked 13 to 14 hours per day, including 11 to 12 hours on the computer, four days per week; and that she sustained compensable neck and back injuries in 1991 and was treated by Dr. W. Her October 3, 1991, Employee's Notice of Injury or Occupational Disease and Claim for Compensation (TWCC-41) states that she was lifting and pulling at work for a prior employer on July 8, 1991, and injured her arm, shoulder, neck and back. The prior employer's insurance carrier filed a TWCC-21 dated October 4, 1994, denying that claimant's carpal tunnel syndrome (CTS) is related to her July 8, 1991, injury. The copies of the latter two documents, the TWCC-41 and TWCC-21, reflect that the carrier received them on August 17, 1998.

Claimant further testified that in September 1997, Dr. W, her treating doctor, took her off work and she commenced drawing short-term disability benefits (STD) for her neck and back injuries. Her STD claim form reflects that Dr. W wrote the diagnosis as herniated disc, degenerative joint disease, myofascial syndrome, and depression. Claimant said she returned to work in March 1998 at which time a new supervisor made some changes in her workstation which were not as accommodating of her physical problems as she had previously enjoyed and that she could not periodically stretch out on the floor with a headset as she had done before commencing STD; that during the first week in

\_\_\_\_\_, she experienced problems with her wrists and her hands would ache and go to sleep when she typed; that she complained of these problems to a supervisor, Mr. T, on \_\_\_\_\_; that Dr. W took her off work again on April 9, 1998, at which time she commenced drawing long-term disability benefits for her neck and back injuries; and that she remains off work and on long-term disability and cannot perform her job due to her pain. Employer records in evidence reflect that claimant returned to work on March 9, 1998, stopped working on \_\_\_\_\_, and that her employment was terminated on April 24, 1998. Claimant further stated that Dr. W told her that her wrist complaints would not be covered under her 1991 injury and that he thought she had a new injury. She testified, variously, that she was having some problems with her wrists before commencing STD and that she "did not remember" having problems with her wrists before commencing STD. Claimant acknowledged that when she was interviewed by the adjuster, Ms. W, in May 1998, she did not remember to tell Ms. W that she had previously been diagnosed with CTS.

Ms. K, testified that the carrier retained her in \_\_\_\_\_ to manage claimant's case including obtaining claimant's medical records; that in May 1998, she met with claimant and reviewed her medical history; that claimant discussed prior neck and back injuries but not CTS; that she attended claimant's examination by the carrier's independent medical evaluation doctor, Dr. RP, in September 1998; and that when Dr. RP asked claimant about the prior CTS diagnosis mentioned in her records, claimant responded that she was unaware of it. Ms. K also said she tried unsuccessfully to obtain an EMG report from Dr. W and eventually obtained it from the examining doctor, Dr. C, and sent a copy to Dr. W. The June 3, 1998, report of Dr. C 's EMG exam states that claimant's study is consistent with early CTS and that "there is evidence of neuropathic postpolio picture in this study." This exhibit indicates it was faxed to Ms. K on July 23, 1998. In her written report, Ms. N stated that Dr. RP read to claimant an excerpt from a 1993 report of Dr. JM indicating that he had discussed bilateral CTS with claimant and that she had refused surgery for that condition.

Ms. W testified that on May 15, 1998, she interviewed claimant and obtained her signature on a medical records release authorization. In her recorded statement to Ms. W, claimant discussed prior work-related injuries, told Ms. W that her 1991 injury was to her neck and back, that her current injury is to her upper extremities, and also told her that she has rheumatoid arthritis and had earlier had polio. Ms. W stated that she asked Ms. K to obtain the medical records; that the carrier understood from claimant's interview that her claimed injury was CTS and accepted it as compensable; that the carrier filed its first TWCC-21 (dated May 28, 1998) because a medical report indicated some problem with a body part not considered part of the compensable injury at that time and wanted to dispute it; that on June 1, 1998, she sent the Commission a request for a records check on claimant; and that she received the records check report on July 6, 1998, and within a week ordered the claims files. The Commission's July 1, 1998, letter to the carrier reflects that claimant had five workers' compensation files with injury dates in 1982, 1983, 1987, 1991, and the claim involved in this case. Ms. W also said that on August 17, 1998, the carrier received claimant's 1991 injury file. Ms. W further stated that she felt the carrier needed a medical opinion as to whether claimant had a new injury and obtained an appointment for claimant to be examined by Dr. RP on August 24, 1998; that claimant missed the

appointment saying she never received the carrier's scheduling letter; that Dr. RP issued a report to the carrier on August 29, 1998; that Dr. RP examined claimant on September 21, 1998; that Dr. RP issued another report which the carrier received on October 9, 1998; that based on that report, the carrier filed (through its Austin agent) both a second TWCC-21 and a Request for Benefit Review Conference (TWCC-45) dated October 9, 1998, intending to dispute the entire claimed injury; and that the carrier filed a third TWCC-21 dated October 15, 1998.

The TWCC-21 dated May 28, 1998, which is the first TWCC-21 in evidence, states the injury date as "\_\_\_\_\_", "the date the carrier first received written notice of injury as "05/11/98," and the nature of the injury as "upper bilateral extremities." The form states the reasons for refusing or disputing payment as follows: "The work related injury was limited to claimant's bilateral upper extremities. No other injury naturally resulted to any other part of claimant's body." It seems apparent that the carrier was accepting an upper bilateral extremities injury but no other injury in this TWCC-21. The October 9, 1998, TWCC-21 states the same date and nature of injury but also states the reason for dispute as follows: "Carrier disputing further treatment as not being reasonable and necessary or causally related per attached IME report." No report is attached to the exhibit. The October 9, 1998, TWCC-45 states that there was no injury in the course and scope of employment " for the following reasons: "(1) Per IME and record review (attached), claimant's current condition not related to new work related injury, claimant diagnosed with CTS in previous work comp injury as early as 11/93 and due to pre-existing condition. (2) Claimant not back at work long enough to cause any CTS problems." Again, no report was attached to the exhibit. The October 15, 1998, TWCC-21 contained the same language as the TWCC-45. Date stamps reflect that the October 9 and October 15, 1998, forms were received by the Commission on the dates they were prepared.

In evidence is a November 16, 1993, report of an EMG/NCV study which states that the findings are consistent with bilateral CTS. Dr. JM's records reflect that on November 16, 1993, he prescribed a left wrist cock-up splint "for carpal tunnel"; that in January and March 1994, claimant was wearing a cock-up splint at night for her hand pain; and that on September 13, 1994, claimant called Dr. JM stating that her CTS symptoms (left hand) were such that she felt she needed a carpal tunnel release. Also in evidence is the August 7, 1998, report of Dr. PM, a neurologist, indicating that claimant was referred for examination by the carrier and stating the impression as CTS, repetitive strain syndrome, and epicondylitis.

Dr. RP's report of August 29, 1998, states that claimant failed to appear for an examination but that he reviewed her medical records; that the records contained notes of Dr. JM dated January 4 1994, and September 13, 1994, which discussed CTS; that Dr. W's Initial Medical Report (TWCC-61) of April 9, 1998, states the diagnosis as cervical syndrome, impingement of the right shoulder, epicondylitis, and rule out bilateral CTS and recommends an EMG; that the June 3, 1993, EMG report of Dr. C showed borderline CTS and some evidence of probable post-polio neuropathic involvement of the upper extremities; and that the Commission's July 1, 1998, claims report reflected that there was

an \_\_\_\_\_, claim regarding CTS. Dr. RP opined that based on his review of the records, he saw no clear documentation to support a new injury in \_\_\_\_\_, indicating that Dr. W's documentation was "suboptimal" and that he saw no objective evidence to support a new injury on \_\_\_\_\_. Dr. RP's report of September 21, 1998, states that claimant denied having prior problems with CTS and denied having been previously diagnosed with CTS. Dr. RP opined that claimant's CTS complaints, if present, are not related to a new injury and are related to an ongoing process dating back to at least 1993.

It became apparent at the outset of the hearing when the hearing officer reviewed the disputed issues in the benefit review conference (BRC) report with the parties (the carrier's representative was present at the BRC but claimant's representative was not retained until later) that there was some confusion concerning one of the disputed issues from the BRC, to wit: was the carrier's second TWCC-21, filed with the Commission on October 9, 1998, based on newly discovered evidence that could not reasonably have been discovered at an earlier date. In the BRC report, claimant's position was stated to be that the carrier learned from an interview with claimant on May 5, 1998, that there were prior injuries, that the carrier did not contest the CTS in its first TWCC-21 filed on May 28, 1998, and that the second TWCC-21 is not based on newly discovered evidence that could not reasonably have been discovered earlier. The carrier's position was stated to be that the carrier did not learn about carpal tunnel until July 6, 1998, that the TWCC-21 was filed on October 9, 1998, and that this information was not available to the carrier before July 6, 1998. Claimant's representative indicated her understanding that the carrier had accepted the claimed bilateral upper extremities injury in the earlier TWCC-21 and that the October 9, 1998, TWCC-21 related just to the CTS part of the claimed injury. However, the carrier indicated that the entirety of the claimed injury was in dispute and the hearing officer stated that there would be no stipulation in that regard.

Not appealed are findings that claimant's upper extremity problems, as well as her CTS, were not caused by her job duties as a data entry clerk while working for the employer; that the carrier first received written notice of claimant's previous CTS and other upper extremity injuries no later than September 5, 1998; and that the carrier first filed a TWCC-21 disputing claimant's CTS on October 9, 1998. The hearing officer may have intended the latter finding to reference the TWCC-45, rather than the TWCC-21 given the difference in the dispute language in the two documents. However, that need not detain us since the finding is not appealed.

In addition to the appealed conclusions of law stated above, the carrier also appeals findings that \_\_\_\_\_, is the date that claimant knew or should have known that her upper extremity problems were related to her employment as a data entry clerk; that claimant does have an injury and the injury is to her cervical spine and upper extremities including her right shoulder and CTS; and that because of claimant's injuries, she has been unable to obtain and retain employment at wages equivalent to her preinjury wages from April 9, 1998, through the date of the hearing, January 12, 1999.

The appealed issues presented the hearing officer with questions of fact to resolve and it is the hearing officer who is the sole judge of the weight and credibility of the evidence (Section 410.165(a)) and who, 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 and we do not find them so in this case. 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).

Regarding the date of injury, the hearing officer could consider claimant's testimony concerning the repetitive nature of her duties including use of the telephone and computer and also consider the bilateral upper extremity pain she began to experience after returning to work in early March 1998 and her report of that pain to Mr. T on \_\_\_\_\_, and to Dr. W on April 9, 1998, as supporting an injury date of \_\_\_\_\_, for her occupational disease injury. See Section 408.007. As for the finding that claimant does have an injury to her cervical spine and upper extremities including her right shoulder and CTS, the hearing officer could consider the extensive medical evidence including diagnostic testing indicating that she does have those injuries. Regarding the determination that the carrier's October 9, 1998, TWCC-21 was not based on newly discovered evidence that could not reasonably have been discovered at an earlier date, the hearing officer could consider that, as he stated in an unappealed finding, the carrier had written notice of claimant's prior CTS and other upper extremity injuries no later than September 5, 1998, the date by which the hearing officer believed the carrier had Dr. RP's August 29, 1998, report reviewing the medical records, and yet did not file the TWCC-21 until October 9, 1998, a time lapse of some five weeks that the hearing officer obviously considered unreasonable. We also note that Ms. K had the June 3, 1998, EMG report referencing CTS on July 7, 1998, and that the carrier had Dr. PM's report of August 7, 1998, stating the impression of CTS and repetitive stress syndrome. Because the hearing officer found that claimant does have an injury, a finding we affirm, we do not find merit in the carrier's contention that based on the decision in Continental Casualty Company v. Williamson, 971 S.W.2d 108 (Tex. Civ. App.-Tyler 1998), the carrier cannot be determined to have waived into liability. See also Texas Workers' Compensation Commission Appeal No. 981847, decided September 25, 1998; Texas Workers' Compensation Commission Appeal No. 982246, decided December 2, 1998 (Unpublished). As for the disability determination, the carrier's appeal is based on the contention that claimant did not sustain a compensable injury, a prerequisite for disability under Section 401.011(16)), and we are affirming that she did.

The decision and order of the hearing officer are affirmed.

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Philip F. O'Neill  
Appeals Judge.

CONCUR:

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Robert W. Potts  
Appeals Judge

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Thomas A. Knapp  
Appeals Judge