APPEAL NO. 990899

This case returns to us after having been reversed and remanded for further consideration of the date of injury and timely notice issues pursuant to our decision in Texas Workers' Compensation Commission Appeal No. 983006, decided February 9, 1999. In that decision we pointed out that the hearing officer's determination that the date of injury was Injury 2, was plain error since it had no support in the evidence. We also cautioned that if the hearing officer determined a different date of injury upon further consideration of the evidence, consideration would also need to be paid to the findings on the issue of timely notice, including a subsumed issue of good cause should the hearing officer determine that the respondent (claimant) did not report the injury within 30 days of the date of injury found by the hearing officer. The hearing officer, who presided over the contested case hearing on November 24, 1998, pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act), did not convene a hearing on remand but reconsidered the date of injury and timely notice issues based on the evidence of record.

In the hearing officer's first Decision and Order in this case, dated December 2, 1998, he made certain findings of fact and concluded that the date of injury was Injury 2, that the claimant reported the injury to the appellant (self-insured) not later than 30 days after the date of injury, that claimant sustained a compensable injury in the form of an occupational disease, and that claimant had disability beginning on November 21, 1997, and continuing through the date of the hearing. In his remand Decision and Order dated April 6, 1999, the hearing officer concluded that the date of injury was Injury 1; that claimant did not report an injury to the self-insured until November 21, 1997, a date more than 30 days after the date of injury; and that claimant had good cause for failing to report the injury until November 21, 1997. The hearing officer did not, however, repeat in the remand decision and order the findings of fact and conclusions of law reached in his earlier decision concerning the disputed issues of whether claimant sustained a compensable injury in the form of an occupational disease and whether she had disability and, if so, for what period, and the parties treat the matter as though the compensable injury and disability findings and conclusions in the first decision carried over to the remand decision. The self-insured appeals not only the date of injury and good cause for late reporting findings and conclusions reached on remand but also the compensable injury and disability determinations made in the earlier decision and order. Claimant's response addresses the date of injury, good cause for late reporting, and injury determinations.

DECISION

Affirmed.

As noted, no new evidence was admitted on remand and, since the evidence in this case was fully set out in detail in our earlier decision, it will not be repeated. Suffice to say that in the first decision and order, the Injury 2, date of injury determined by the hearing

officer was utterly without support in the evidence since the hearing officer tied that date to claimant's having seen Dr. T on that date and there was no evidence that she did. Since the date of injury had to be reconsidered, and since a different date of injury could affect the determination of the timely notice issue and could implicate the subsumed issue of good cause for not timely reporting, the hearing officer was asked to reconsider those issues on remand. Our decision took no action on the hearing officer's determinations of the compensable injury and disability issues pending the remand decision.

On remand, the hearing officer made the following findings and conclusions which are appealed by the self-insured.

FINDINGS OF FACT

3. As of injury 1, Claimant knew or should have known she had sustained a new injury until her appointment with [Dr. T] that day.

4. After her appointment with [Dr. T] on injury 1, Claimant reasonably believed that she had not sustained [sic] new injury, but that her symptoms were a continuation of her injury 2 compensable injury.

5. Claimant acted as a reasonably prudent person by delaying the reporting of the claimed injury to [self-insured] until 11-21-97.

CONCLUSIONS OF LAW

3. The date of injury was injury 1.

* * * *

5. Claimant had good cause for failing to report the injury until 11-21-97.

Finding of Fact No. 2 that "[c]laimant first reported her claimed injury to her supervisor, Ms. W, on 11-21-97" was also made in the earlier Decision and Order, was not appealed from the earlier decision, and thus became final. Conclusion of Law No. 4 that "[c]laimant did not report an injury to the Employer until 11-21-97 more than 30 days after the date of injury" has not been appealed.

The disputed issues, for which claimant had the burden of proof by a preponderance of the evidence, presented the hearing officer with questions of fact to resolve. 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.

Concerning the date of injury of her claimed occupational disease injury, the hearing officer felt that claimant knew or should have known when she saw Dr. T on Injury 1, that her bilateral hand symptoms were related to her job duties with the self-insured. *See* Section 408.007. As we noted in our earlier decision, claimant indicated that, when she saw Dr. T on Injury 1, about her hand pain, she thought that she possibly had a new injury to her hands because she had not felt the pain for a while. She had also testified that other than normal use of her hands around the house, she had not done repetitive work with her hands since quitting a computer job in February 1995. While the evidence would have supported a date of injury of Injury 2, the date that Dr. Z told her she had a new injury, we cannot say the Injury 1, date of injury is contrary to the great weight of the evidence.

Since the finding that claimant reported the injury to the self-insured on November 21, 1997, was not earlier appealed and became final, and since that date was more than 30 days after the Injury 1, injury date found by the hearing officer on remand, claimant had to show either that the employer had actual knowledge of the injury or that she had good cause for failing to provide the notice not later than the 30th day after the date she knew or should have known that the injury may be related to the employment. *See* Sections 409.001 and 409.002. The hearing officer felt, as stated in Finding of Fact No. 4, that claimant had good cause for not reporting the injury to Ms. W until November 21, 1997, because she reasonably believed, after seeing Dr. T on Injury 1, that she had not sustained a new injury.

As for the injury and disability issues, the hearing officer found in his earlier decision that claimant sustained right and left median compressive neuropathy injuries in the course and scope of her employment due to repetitive trauma performing her work using her hands and that, due the claimed injury, claimant was unable to obtain and retain employment at wages equivalent to her preinjury wage beginning November 21, 1997, and continuing through the date of this hearing (referring to the November 24, 1998, hearing). The self-insured appealed those determinations. We are satisfied that claimant's testimony and Dr. Z's records sufficiently support the hearing officer's determinations of the injury and disability issues. Claimant testified that she had essentially recovered from her prior repetitive trauma injury and had not done repetitive work with her hands after quitting a computer job in February 1995 until she began using her hands as a food service worker for the self-insured on August 13, 1997, at which time she said she repetitively used her hands for five and one-half hours per day, five days per week performing such duties as lifting heavy cans and boxes of food, lifting heavy pans of food and trash bags, opening large cans of food with a can opener, and sweeping and mopping the floor frequently. Dr. Z reported on November 24, 1997, that claimant had bilateral median compressive neuropathy secondary to repetitive strain/trauma disorder. Dr. Z testified that, while aware of claimant's history of previous carpal tunnel syndrome and surgery, he told her she had a new pathology or disease state. Claimant testified that when she saw Dr. Z on November 21, 1997, he took her off work. Dr. Z testified that he took claimant off work on November

21, 1997, to prevent further injury and that she has not been able to work since he first saw her.

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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Alan C. Ernst
Appeals Judge

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Elaine M. Chaney
Appeals Judge