APPEAL NO. 991123

This appeal arises pursuant to the 1989 Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). On April 28, 1999, a hearing was held. The hearing officer determined that appellant (claimant) did not sustain a compensable repetitive physical trauma injury with a date of injury of _____, that she did not give timely notice of an injury, and that there was no disability. Claimant asserts that she did sustain a compensable injury, she did timely report her injury or that she did show good cause for late notice, that the date of injury should be (claimant's alleged date of injury), and that she did have disability from (34th day after date of injury), through the date of hearing. Respondent (self-insured) replied that the decision be affirmed.

DECISION

We affirm.

Claimant worked for (school) on _____, the date of injury as found by the hearing officer in this case. While claimant states that the date of injury should be (claimant's alleged date of injury), the claimant herself stated on a form used for disability insurance, dated October 27, 1998, that her "date of accident or first sign of illness" was _____, that she first saw a doctor for this illness on _____, and that she has not made and will not make a claim under workers' compensation. In addition, claimant testified that Dr. B is the same surgeon she had seen in 1994 when she previously had surgery for carpal tunnel syndrome (CTS). Dr. B's notes of _____, show that claimant had not been seen since 1994, that she had had paresthesia (burning, numbness, or prickling) in both hands for two weeks, that she had positive Tinel's and Phalen's tests (on examination), and that an EMG would be done; he also commented that claimant had lost her wrist splints (prior CTS in 1994), which reasonably indicates that there was a discussion about the nature of her problem. Although claimant testified that she did not know then that she had CTS because she did not know it could come back after surgery, the hearing officer found that she knew or should have known that she had CTS and should have reported it. The Appeals Panel has stated that a claimant does not have to have medical corroboration in order to "know or should have known" that an injury "may" be related to the work. *See* Texas Workers' Compensation Commission Appeal No. 92559, decided December 3, 1992. The determination that the date of injury was _____, is sufficiently supported by the evidence in this case, including that claimant had previously had CTS with surgery, that claimant listed _____, as a date of the first sign of illness (which is not the same test as that for date of injury under the 1989 Act), that she had positive signs for CTS on examination on that date, that she began painting at work the day after (Holiday), and that she testified that she had done nothing any differently off work during the development of the paresthesia.

Claimant testified that she injured herself (bilateral CTS) and bilateral cubital tunnel syndrome (CuTS) by working for school in the 1998 summer months painting classrooms. Claimant is normally a teacher's aide and part-time janitor, but was working full time in the

janitor's position in the summer of 1998. There was conflicting evidence as to how much painting she did, with her supervisor testifying that she only completely painted five rooms at most, with touch-up work on other rooms. Claimant testified that she painted 14 of 15 rooms plus parts of several bathrooms plus some rooms in another building on the school grounds. Claimant testified that she had painted at the school during the previous summer also. Claimant did not work after August 14, 1998.

Claimant's doctor, Dr. B, said in December 1998, that claimant has bilateral CTS and bilateral CuTS, adding that the injuries are "work related in that they are the result of the repetitive hand and forearm motions that people do in their jobs." (This statement can have several interpretations.) He also said that part of her job description as a janitor requires "repetitive forearm and hand motions." A statement from Dr. B in October 1998 had also cited claimant's work requirement for "a lot of hand manipulating" and said the work "probably" aggravated her CTS and CuTS. However, Dr. B also signed an application for disability benefits for claimant, dated (34th day after date of injury), in which he checked a box saying that claimant's condition did not arise from her employment. On October 1, 1998, Dr. B again signed a disability benefits form in which he checked that claimant's CTS was not due to injury arising from her work. Then on October 27, 1998, Dr. B signed another disability benefits form checking that the CTS and CuTS were due to injury arising from employment.

Although there is no dispute that claimant has CTS and CuTS, that does not mean that the hearing officer has to follow the opinion of Dr. B in regard to causation. *See* Gregory v. Texas Employers Insurance Association, 530 S.W.2d 105 (Tex. 1975). This is especially true when Dr. B does not relate that claimant was painting during the period of time in question and did not otherwise describe her duties other than generically as those of a janitor; it is also especially true since Dr. B on at least two occasions contradicted himself and said that claimant's work did not cause the injuries. In explaining why disability benefits were sought, claimant did testify that she was told by Ms. W, the workers' compensation administrator at school that she would not qualify for workers' compensation, while Ms. W denies that assertion, adding that on (34th day after date of injury), claimant said her CTS stemmed from her prior problem with CTS. The determination that claimant did not show that her CTS and CuTS were caused by her work is sufficiently supported by the evidence.

The issue of notice was a focal part of the hearing. Claimant testified that she told her supervisor, Mr. S, that her arms were hurting before she saw the doctor on _____. She did not say she told him that it was from the painting or from any work at the school. Mr. S said that claimant never told him her pain was from any work for school. Claimant did not say that she told Mr. S anything more after she saw the doctor on _____. While the hearing officer found that the date claimant provided notice was (34th day after date of injury), that date is open to question because of the testimony of Ms. W and claimant's own application for disability benefits dated (34th day after date of injury), in which she said that her problem was not related to work. Claimant does not appeal this

determination except to say that she also had given notice earlier, to the extent of what she knew, which was that she had pain in her hands. Therefore, with no assertion on appeal that claimant did not give notice on (34th day after date of injury), that finding will not be further discussed.

With a date of injury of July 9th and a date of notice provided of (34th day after date of injury), more than 30 days had passed. Section 409.001 provides a 30-day limit for notice. Claimant asserts that Safford v. Cigna Insurance Company of Texas, 983 S.W.2d 317 (Tex. App.- Fort Worth 1998, n.w.h.) provided new guidance in regard to "latent" disease or injury. Claimant does not propose that repetitive physical trauma is "latent" but points to the reasoning as providing guidance indicating that the 30-day time limit should not be strictly applied. Safford, however, did not indicate any laxity in regard to the 30-day limit, but only in regard to when that 30 days began to run in latent disease and injury cases. In regard to latent cases, it did say that the 30 days begins when the disease or injury "manifests itself" in a way as to put a reasonable person on notice and that person knows or should have known "that the injury is likely work-related." (Emphasis added.) The latter part, quoted, is different (as that court applied it to latent cases) from the 1989 Act's words as to when the 30 days begin for an occupational disease, which said that the employee knew or should have known that the injury "may be related to the employment." (Emphasis added.)

While the hearing officer found that notice was given on (34th day after date of injury), which is the 34th day after the date of injury, the only basis apparent for arguing good cause would be that claimant saw Dr. B that day and learned that the EMG had confirmed the diagnosis. A claimant does not have to have a diagnosis in order to report an injury, and while a fact finder may consider such a reason as showing good cause, the Appeals Panel cannot say that it is an abuse of discretion by the fact finder not to find good cause when a claimant waits to report an injury until a diagnosis is made. We note further that the evidence appears to indicate that when claimant received such diagnosis on (34th day after date of injury), she filed a disability benefits claim on that day.

With affirmed findings of no compensable injury there can be no disability. *See* Section 401.011(16).

Finding that the decision and order are sufficiently supported by the evidence, we affirm. *See* In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951).

Joe Sebesta
Appeals Judge

CONCUR:

Philip F. O'Neill
Appeals Judge

Tommy W. Lueders
Appeals Judge