

APPEAL NO. 991442

The contested case hearing (CCH) was originally held on April 5, 1999, under the provisions of the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). In Texas Workers' Compensation Commission Appeal No. 990903, decided June 9, 1999, the Appeals Panel reversed the decision of the hearing officer and remanded the issue of the date of injury; whether the respondent (carrier) is relieved from liability under Section 409.002 because of the appellant's (claimant) failure to timely notify her employer pursuant to Section 409.001; and disability, since the issue of compensability was not resolved. The hearing officer did not convene another hearing and rendered another decision on June 17, 1999. He determined that the claimant's date of injury is \_\_\_\_\_; that the carrier is relieved from liability under Section 409.002 because of the claimant's failure to timely notify her employer pursuant to Section 409.001; and that the claimant did not have disability because the injury is not compensable. The claimant appeals, urging that there is no reasonable evidence in support of the \_\_\_\_\_, injury date; that her reference to "around the first of December" should be interpreted to be any day in the first week or half of December; that she timely reported the injury; that, in the alternative, she had good cause for failure to timely report the injury; and that she had disability. The carrier replies that there is sufficient evidence to support the hearing officer's determinations that the date of injury is \_\_\_\_\_; that the carrier is relieved of liability due to the claimant's failure to timely report the injury; and that the decision should be affirmed.

DECISION

Reversed and rendered.

The facts of this case are stated in Appeal No. 990903, *supra*, and will only be briefly restated here. The claimant sustained an occupational disease to her back, right hip, and left shoulder due to repeatedly climbing up and down from a chair and stool. The claimant testified that the injury was caused by job duties she began in October 1998. The parties stipulated that the claimant first reported the alleged injury to employer on (alleged date of injury).

The date of injury, for purposes of a repetitive trauma/occupational disease, is "the date on which the employee knew or should have known that the disease may be related to the employment. [Emphasis added.]" Section 408.007. The date of injury is when the injured employee, as a reasonable person, could have been expected to understand the nature, seriousness, and work-related nature of the disease. Commercial Insurance Co. of Newark, N.J. v. Smith, 596 S.W.2d 661 (Tex. Civ. App.-Fort Worth 1980, writ ref'd n.r.e.). While a definite diagnosis from a doctor is not required, neither is the employee held to the standard of a doctor's knowledge of causation. See Texas Workers' Compensation Commission Appeal No. 91097, decided January 16, 1992. The date of the first symptoms will not necessarily constitute the date of injury.

The hearing officer determined the claimant's date of injury is \_\_\_\_\_. The claimant

asserts that the date of injury is (alleged date of injury), the first day she sought medical treatment and was advised her condition was work related. This determination of the date of injury presented a question of fact for the hearing officer to resolve. Texas Workers' Compensation Commission Appeal No. 931028, decided December 23, 1993. The evidence indicates that the claimant began to have symptoms of back pain on \_\_\_\_\_.

The only finding of fact made by the hearing officer that supports a date of injury of \_\_\_\_\_, is the following:

### FINDING OF FACT

5. Assuming Claimant's condition on July 18, 1998 was caused by a completely different mechanism of injury as Appeals Panel No. 15 has determined, the date on which Claimant knew or should have known that her shoulder condition may be related to her employment with Employer is \_\_\_\_\_, based on Claimant's testimony that she associated her condition around the beginning of December 1998 with tenseness from the Christmas season and based on her testimony to the effect that she had a stressful job, but if she could get through Christmas, she would be okay.

Finding of Fact No. 5 misstates the claimant's testimony. We acknowledge that in Appeal No. 990903, *supra*, in an effort to summarize the evidence, we stated, "The claimant testified that she began having shoulder problems and headaches around the first of December 1998. . . ." However, the actual sequence of events indicates that the claimant did not testify that she had shoulder pain around the first of December. The claimant testified that she had a headache around the first of December, but did not pay any attention to it, thinking it was because of the Christmas season and that she was stressed; that she went home due to a headache in mid-December; and that "sometime after that" she noticed tenseness in her shoulders. Finding of Fact No. 5 describes a shoulder condition and refers to symptoms of tenseness the claimant speculated was caused by the Christmas season and a stressful job. We note that Appeal No. 990903 affirmed the hearing officer's finding that the claimant sustained an injury to her back, right hip, and left shoulder due to having to repeatedly climb up on and down from a chair and stool in order to perform her job duties for employer. Finding of Fact No. 5 has no relation to the mechanism of injury and does not support the date of injury for a repetitive trauma/occupational disease injury. The hearing officer should have determined the date the claimant knew or should have known her disease (injury to her back, right hip, and left shoulder) may be related to the employment (repeatedly climbing up on and down from a chair and stool). Finding of Fact No. 5 is not supported by the evidence and there is no other finding of fact to support a date of injury of \_\_\_\_\_.

We have already remanded this case one time and cannot do so again. Section 410.203(c). We find the hearing officer's decision that the claimant's date of injury is \_\_\_\_\_, to be against the great weight and preponderance of the evidence. We reverse Finding of Fact No. 5, Conclusion of Law No. 4, and the decision and order and render a

new decision that the claimant's date of injury is (alleged date of injury). In determining the date of injury is (alleged date of injury), we must also reverse Conclusions of Law Nos. 7 and 8 and the decision and order, and render a new decision that the carrier is not relieved from liability under Section 409.002 because the claimant did not fail to timely notify her employer, and that the claimant had disability from (alleged date of injury), and continuing through the date of the CCH.

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Dorian E. Ramirez  
Appeals Judge

CONCUR:

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Joe Sebesta  
Appeals Judge

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Robert W. Potts  
Appeals Judge