

APPEAL NO. 991796

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 July 16, 1999. The issues at the CCH were whether the appellant (claimant) sustained a compensable injury in the form of an occupational disease; the claimant's date of injury; whether the claimant timely reported an injury to the employer no later than the 30th day after the injury, and, if not, did good cause exist for failing to timely report the injury; whether the claimant is barred from pursuing Texas workers' compensation benefits because of an election to receive benefits under a group health insurance policy; and whether the claimant had disability resulting from the injury. The hearing officer determined that the date of injury is _____; that the claimant sustained a "compensable" injury in the form of an occupational disease, including a bilateral carpal tunnel syndrome injury (CTS); that the claimant failed to timely report her injury to the employer and did not have good cause for failing to timely report the injury; that the claimant is not barred from pursuing Texas workers' compensation benefits because of an election to receive benefits under a group health insurance policy; that the claimant had "disability" from February 16, 1999, through July 16, 1999; and that the respondent (self-insured) is relieved from liability under Section 409.002 because of the claimant's failure to timely report her injury to employer pursuant to Section 409.001. The claimant appeals the hearing officer's determination that the date of injury is _____, and that the self-insured is relieved from liability because of her failure to timely report the injury, urging that she did not know on _____, that her condition was work related. The self-insured replies that the hearing officer's decision is supported by sufficient evidence and should be affirmed, and that the claimant's failure to serve a copy of the appeal on the self-insured renders it untimely.

DECISION

Affirmed.

The self-insured argues that the claimant's appeal was untimely because it was not timely served. We have previously determined that the appellant's failure to serve the respondent does not affect timeliness or jurisdiction; rather, it extends the deadline for filing a response. Texas Workers' Compensation Commission Appeal No. 92397, decided September 21, 1992; Texas Workers' Compensation Commission Appeal No. 91120, decided March 30, 1992. Accordingly, we reject carrier's argument that the appeal was untimely and determine that we have jurisdiction.

The claimant testified that she worked for the employer 16 years, as a nursing aide until 1996 and then as a medication aide. As a medication aide, the claimant dispensed medication to inmates, which required her to repetitively use her hands, wrists, and thumbs to push medicine out of blister packages. The claimant sought medical treatment with Dr. E on _____. Dr. E's notes from _____, state in pertinent part:

She has been having neck and shoulder pain and spasm as well as occasional pain down both arms, more in her left wrist. The patient works as a medication dispenser through TDC and continuously is in a standing position with her head bowed over and using her wrist to open blister pack medication packages.

Dr. E's notes also state "muscle spasms (job related)." Dr. E diagnosed "chronic use syndromes multiple including tension headaches" and recommended work modification as much as possible. On December 14, 1998, Dr. E reexamined the claimant for complaints of pain in her back and bilateral hand pain. Dr. E states that the claimant related her pain to the repetitive activity of her job, pushing pills through blister packs.

Dr. E referred the claimant to Dr. V, who examined the claimant on December 15, 1998. Dr. V's history indicates that the claimant related her upper back and bilateral thumb pain to her job which required her to push medications out of blister packs with her neck in a flexed position. Dr. V diagnosed the claimant with cervical strain from overuse and bilateral trigger thumbs. Dr. V took the claimant off work from December 15, 1998, through December 21, 1998. On December 22, 1998, the claimant submitted a leave request form stating "pain in both hands, unable to use them pushing pills out of blister packs." Dr. V treated the claimant with injections and referred the claimant to Dr. L, who examined the claimant, performed a bilateral nerve conduction study on _____, and diagnosed bilateral CTS. The claimant testified that CTS surgery was scheduled, but could not be performed because the self-insured disputed her claim.

It was the claimant's position that the date of injury is _____, the date she was diagnosed with CTS. The claimant testified that after she was informed that she had CTS, she called the employer and reported the injury to Ms. M. The Employer's First Report of Injury or Illness (TWCC-1) dated March 8, 1999, indicates that the injury was reported to Ms. M on March 5, 1999. According to the claimant, she thought that she had informed the employer about her injury when she completed the leave request form on December 22, 1998. The claimant testified that after the self-insured disputed her claim she called the Texas Workers' Compensation Commission (Commission) for information. According to the claimant, the Commission told her to identify a date of injury and not change it, and that if she obtained her medical records it would speed up the dispute resolution process. The claimant testified that she obtained Dr. E's medical records and after reviewing them, identified the date of injury as _____.

The date of injury for purposes of an 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 1989 Act provides that the hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). Where there are conflicts in the evidence, the hearing officer resolves the conflicts and determines what facts the evidence has established. The hearing officer determined that the date of injury is _____. Despite the claimant's argument to the contrary, the claimant testified on cross-examination that on _____, she was aware that her work was causing pain in her arms and thumbs and that Dr. E had mentioned to her that her problems were probably job related. When reviewing a hearing officer's decision we will reverse such decision only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong 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). The determination that the claimant's date of injury is _____, is sufficiently supported by the evidence.

Section 409.001 requires that an employee notify the employer of an occupational disease injury not later than the 30th day after the date the employee knew or should have known that the injury may be related to the employment. Failure to do so, absent a showing of good cause or actual knowledge of the injury by the employer, relieves the carrier and employer of liability for the payment of benefits for the injury. Section 409.002. Whether, and, if so, when, notice is given is a question of fact for the hearing officer to decide. The hearing officer determined that the employer's first notice of a claimed injury was on March 5, 1999. We find sufficient evidence to support the hearing officer's determination that the claimant did not give notice of a work injury within 30 days and did not have good cause for failure to give timely notice.

The decision and order of the hearing officer are affirmed.

Dorian E. Ramirez
Appeals Judge

CONCUR:

Alan C. Ernst
Appeals Judge

Elaine M. Chaney
Appeals Judge