APPEAL NO. 992486

On September 21, 1999, a contested case hearing (CCH) was held. The CCH was held under the provisions of the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). The issues at the CCH were: (1) whether appellant/cross-respondent (claimant) sustained a compensable injury in the form of an occupational disease on _____, 1998; (2) what is the date of injury; (3) whether respondent/cross-appellant (carrier) is relieved of liability under Section 409.002 because of claimant's failure to timely notify her employer under Section 409.001; and (4) whether claimant timely filed a claim for compensation with the Texas Workers' Compensation Commission (Commission) within one year of the injury as required by Section 409.003, and if not, does good cause exist for failing to timely file a claim, or did employer or carrier not contest the claim. The hearing officer decided that: (1) claimant did not sustain a compensable occupational disease with a date of injury of ___, (2) the date of injury is ___, (3) claimant sustained a bilateral carpal tunnel syndrome (CTS) injury on ____while in the course and scope of her employment with (employer); (4) claimant did not give timely notice to employer of a ___, injury, but there was continuous good cause for the late report on ___, and (5) claimant failed to timely file a claim for compensation with the Commission without good cause.

Claimant appeals the hearing officer's decision that the date of injury is ___, that she sustained a bilateral CTS injury on ___, while in the course and scope of her employment with employer (appeal is of the date of injury); that she did not sustain a compensable occupational disease with a date of injury of ___, and that she failed to timely file a claim for compensation with the Commission without good cause. Carrier appeals the hearing officer's decision that claimant sustained a bilateral CTS injury on ____, while in the course and scope of her employment with employer and that claimant had continuing good cause for the late report on ___. The carrier also appeals the hearing officer's finding concerning claimant's good cause for not filing a claim for compensation prior to being sent a letter by the Commission on ___. In its response to claimant's appeal, carrier asserts that the hearing officer was correct in deciding that the date of injury was ___, and that claimant failed to timely file her claim for compensation. Claimant responds that sufficient evidence supports the hearing officer's determinations appealed by carrier.

DECISION

Affirmed in part and reversed and rendered in part.

Claimant had the burden of proof on the disputed issues. Claimant, who is 54 years of age and right-handed, claims a repetitive trauma injury in the form of bilateral CTS. Claimant testified that she has worked for the employer for 21 years. Claimant works full time for employer. She said that she is an inventory and administrative clerk and that one-third to one-half of her workday is spent using a calculator and a computer keyboard. She

said that she has used a calculator at work since being employed by employer and has used a computer keyboard at work for the last 18 years. Claimant testified that she has had problems with her hands off and on over the years, that they go to sleep occasionally, that eight or ten years ago she saw Dr. R for her left hand (in claimant's recorded statement a Dr. MC is mentioned as having seen claimant eight or nine years ago), that Dr. R sent her to a neurologist Dr. RI is the neurologist mentioned by claimant in her recorded statement), that the neurologist performed an EMG which was negative for CTS, that she was told that she did not have CTS and that "it" was not work related, and that she thought her hand problems were due to her age. Claimant also testified that no one told her that "it" was not work related because "it" was not CTS. Claimant said that 10 years ago she was not paying attention to a "work factor."

Claimant agreed that work is the only thing she does on a repetitive basis and that "if" she thought that her diagnosis was CTS, then it must be work related, and that "if" she had been diagnosed with CTS 10 years ago, she would have believed that the CTS was work related. As noted, she said she was not diagnosed with CTS by the neurologist Dr. R sent her to and no medical records contradict her testimony on that point. Claimant said that after seeing Dr. R, she started wearing a brace on her left hand at night off-and-on when "it" would waken her and that later she began wearing a brace on her right hand at night off-and-on. When claimant was asked whether during "this period of time 10 years ago" her problems were worse during the day when working, she said she did not know.

In a patient note dated September 20, 1985, Dr. C noted that he saw claimant that day for lateral epicondylitis of the elbow and that claimant does a lot of writing and filing. Dr. C noted on ___,1986, that claimant had recurrent right lateral epicondylitis and was given a new tennis elbow strap. Claimant testified that she had had a problem with her elbow that was diagnosed as epicondylitis, that she attributed that to her use of a hand stapler at work, that that was "fixed," that she did not file a workers' compensation claim for the epicondylitis, and that since then she got an electric stapler at work. Claimant's current claim is not for epicondylitis of the elbow, it is for bilateral CTS.

In a patient note dated ___, Dr. W noted that he saw claimant on that day for complaints of bilateral hand pain that claimant had for years, left thumb pain, and right finger pain, and he diagnosed claimant as having "arthritis (DJD)" (DJD is probably degenerative joint disease). The diagnoses are contained in Carrier's Exhibit No. 3. While Dr. W noted that claimant's left thumb hurts all day and that her right finger pain is worse in the morning, there is no mention in his note about claimant's work or about claimant's hand pain being related to her work. Claimant is not claiming that she has arthritis or degenerative joint disease due to repetitive trauma at work. Her claim is for bilateral CTS. There is no mention of CTS in Dr. W's note of ___. In questioning claimant about the ___, visit to Dr. W, carrier mischaracterized the patient note of that date as stating that claimant was doing "key-entry" when, in fact, no mention is made in that report of the type of work claimant does. Claimant at first agreed with carrier's mistake, but then realized that it was the ___, note that carrier was questioning her about and she testified that she had not

discussed with the doctor in ___, her hand problems in connection with her work or that she did not remember such a discussion. Claimant said that in ___, an EMG was not done and that she was not seen by a neurologist for her hands.

Claimant testified that the weekend prior to ___, her hand pain became more intense and her fingertips went numb and stayed numb. She said that her fingertips had not gone numb and stayed numb before, that she then knew that something was wrong, and that it could only be related to her working over the years on the computer keyboard. Claimant said that ___, was the date of her injury. Claimant said that on ___, she reported her injury to her supervisor and told her that she would be leaving work early that day to see Dr. P. It is not disputed that claimant reported an injury to her employer on 1998. In an employer's workers' compensation incident report dated ___, claimant wrote that she had wear and tear of her hands over a period of 20 years and that she had seen a doctor seven to nine years earlier for a problem with her left hand. Supervisor wrote in a supervisor's investigation report that claimant notified her on ___, that she had a doctor's appointment that afternoon, that she was experiencing numbness in her right hand, and that she said that about eight or nine years ago she had seen a doctor for the same condition. Supervisor then noted that claimant had seen a doctor eight or nine years ago for her left hand and that claimant performs repetitive data entry.

Dr. P noted on ____, that he saw claimant that day for a complaint of numbness in her fingertips and that two EMGs, apparently done some time in the past, had not identified CTS as the problem. On March 9, Dr. P wrote that he referred claimant to Dr. L for a nerve conduction study, that claimant had complaints of bilateral hand pain and numbness and right middle finger numbness, and that there was a long history of questionable carpal tunnel problems. In a Payment of Compensation or Notice of Refused or Disputed Claim (TWCC-21) dated March 12, carrier disputed claimant's claim. On April 7, 1998, Dr. L performed EMG and nerve conduction studies on claimant's upper extremities and reported that the findings were compatible with bilateral CTS, moderate on the right side and mild on the left side. In a patient note dated April 10, 1998, Dr. P noted Dr. L's findings, wrote that it should be handled as a workers' compensation claim, and referred claimant to Dr. C. In an undated "To Whom It May Concern" letter, Dr. P wrote that Dr. L's study was positive and that "I feel this injury has resulted from her job and that this claim should be filed under workmans compensation." In a handwritten note at the bottom of that letter, Dr. P wrote that when he saw claimant on April 10, 1998, following the nerve conduction study, claimant was diagnosed with bilateral CTS, right worse than left, and that, as a typist and computer operator for 20 years, claimant's problem is most likely work related and should be handled under workers' compensation. Dr. P also noted that claimant needed an orthopedic consult and surgery. On another copy of his undated letter, Dr. P noted that the testing done nine years ago was on the left hand only and was negative.

In a Specific and Subsequent Medical Report (TWCC-64) dated July 21, 1998, Dr. P wrote that claimant has bilateral CTS and that she needs a referral to Dr. C for surgery. Dr. C saw claimant on July 29, 1998, and recommended a right carpal tunnel release and

conservative treatment of the left hand. On July 29, 1998, Dr. C wrote that claimant has bilateral CTS, right greater than left, because of repetitive office work dating from approximately 1998. On August 14, 1998, carrier denied Dr. C's request for claimant to have a right carpal tunnel release. At the request of the Commission, Dr. CR examined claimant on February 17, 1999, and he diagnosed claimant as having bilateral CTS, right worse than left; that claimant would benefit from carpal tunnel releases; and that "I do believe that this is work related." On May 18, 1999, claimant filed with the Commission an Employee's Notice of Injury or Occupational Disease and Claim for Compensation (TWCC-41), in which she claimed that she has CTS in both hands from using the calculator and computer at work and gave a date of injury of ___, 1998. Carrier placed into evidence numerous medical journal articles and editorials which question whether there is evidence to substantiate a causal connection between work activities and upper extremity disorders and list various risk factors for CTS.

Claimant testified that she has not had CTS surgery due to carrier's denial of her claim; that, other than doctor's appointments and hearings, she has not lost time from work due to her injury; that on May 7, 1998, she mailed the documents in Claimant's Exhibit No. 5 to a named customer assistance employee at the Commission; that she faxed the same documents to that Commission employee on June 11, 1998; that after she sent those documents to the Commission a benefit review conference (BRC) was set up and she was assigned an ombudsman at the BRC; that she had about seven BRCs; that she did everything that the ombudsman told her to do; that at a BRC or meeting on May 18, 1999, she was asked whether she had filed a TWCC-41; that the ombudsman looked at her file and did not find a TWCC-41; that she filed her TWCC-41 on May 18, 1999; that she has taken diuretics for 36 years; that she weighs 180 pounds; and that over the past three years she has had a significant weight gain.

Claimant's Exhibit No. 5 consists of a cover page from claimant to a Commission customer assistance employee; a May 6, 1998, letter from claimant stating that the "workman's comp insurance" had denied her claim based on a preexisting condition, that testing done nine or ten years ago on her left hand was negative, and that the date of injury should be ___1998; and the undated "To Whom It May Concern" letter from Dr. P, without the handwritten note at the bottom of the letter. According to Commission Dispute Resolution Information System (DRIS) notes, these documents were received by the Commission no later than June 11, 1998, and the Commission DRIS notes state that Dr. P indicated that claimant's condition is work related. DRIS notes reflect that Dr. CR's report of his February 17, 1999, examination of claimant was not received by the Commission until March 22, 1999.

We first address the issue of occupational disease. An occupational disease includes a repetitive trauma injury. Section 401.011(34). Section 401.011(36) defines a "repetitive trauma injury" as "damage or harm to the physical structure of the body occurring as the result of repetitious, physically traumatic activities that occur over time and arise out of and in the course and scope of employment." The hearing officer found that

claimant sustained harm to both hands while engaged in repetitious work activities with employer and concluded that claimant sustained bilateral CTS while in the course and scope of her employment with employer. Carrier contends that the hearing officer erred in finding and concluding that claimant sustained an occupational disease in the form of CTS. There is conflicting evidence on the issue of whether claimant sustained an occupational disease. Claimant's testimony and the reports of Drs. P, L, C, and CR support the hearing officer's determination that claimant has bilateral CTS as a result of repetitious work activities. The 1989 Act makes the hearing officer the sole judge of the relevance and materiality of the evidence offered and of the weight and credibility to be given to the evidence. Section 410.165(a). As the finder of fact the hearing officer resolves conflicts in the evidence and may believe all, part, or none of the testimony of any witness. Texas Workers' Compensation Commission Appeal No. 950084, decided February 28, 1995. When reviewing a hearing officer's decision to determine the factual sufficiency of the evidence, we should set aside the decision only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Appeal No. 950084. We conclude that the hearing officer's decision that claimant sustained a bilateral CTS injury in the course and scope of her employment is supported by sufficient evidence and is not so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175 (Tex. 1986).

We next address the issue of the date of injury. Section 408.007 provides that the date of injury for an occupational disease is the date on which the employee knew or should have known that the disease may be related to the employment. In Texas Workers' Compensation Commission Appeal No. 94534, decided June 13, 1994, the Appeals Panel stated:

> Unlike the case of a specific injury, the date of injury in the 1989 Act 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." Section 408.007 [emphasis added]. Clearly, this standard is not as precise as a specific incident. 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 definitive 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 Court in Bocanegra v. Aetna Life Insurance Co., 605 S.W.2d 848, 853 (Tex. 1980), stated:

> Many diseases do not fit neatly within an either/or distribution, and the dispute whether such a condition is compensable or not is an ongoing one. Uncertainty in many complex areas of medicine and law is more the rule than the exception. It would be a harsh rule that charges a layman with knowledge of medical causes when, as in this case, physicians and lawyers do not know them.

The hearing officer found that claimant knew or should have known no later than ___, that her hand symptoms may be related to her employment at employer and concluded that the date of injury is ___ The hearing officer also concluded that claimant sustained a bilateral CTS injury on ___, and that claimant did not sustain a compensable occupational disease with a date of injury of ___. Claimant appeals the hearing officer's decision of a ___ date of injury.

The ___, date of injury found by the hearing officer is the day claimant complained to Dr. W about bilateral hand pain and was diagnosed as having arthritis and degenerative joint disease without mention in that patient note about whether her hand pain was related to her work. While the ___, note mentions left thumb pain "all day," it does not limit the pain to just work days or even mention claimant's work. Claimant's uncontroverted testimony concerning when she first believed her hand problems were related to her work due to increased hand pain and numbness in her fingers that would not go away supports a ___, date of injury. Claimant also indicated in her recorded statement that ___, was the date of "first knowledge." We conclude that the hearing officer's determination of a ___, date of injury is not supported by sufficient evidence and that it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. We reverse the hearing officer's decision that the date of injury is ___, and we render a decision that claimant's date of injury is ___. We also reverse the hearing officer's decision that claimant did not sustain a compensable occupational disease on ___, and we render a decision that the date of injury for claimant's compensable bilateral CTS occupational disease is ___, and is not ___.

With regard to the issue of timely notice of injury to employer, Section 409.001(a) provides that, if the injury is an occupational disease, an employee or a person acting on the employee's behalf shall notify the employer of the employee of an injury not later than the 30th day after the date on which the employee knew or should have known that the injury may be related to the employment. Section 409.002 provides that failure to notify an employer as required by Section 409.001(a) relieves the employer and the employer's insurance carrier of liability unless the employer or employer's insurance carrier has actual knowledge of the employee's injury; the Commission determines that good cause exists for failure to provide notice in a timely manner; or the employer or the employer's insurance carrier does not contest the claim.

The hearing officer found that the date of injury, the date claimant knew or should have known that the disease may be related to the employment, was no later than ___, that claimant did not report her work-related hand condition to employer until ___, and that claimant acted liked an ordinarily prudent person in not reporting her work-related injury to

employer between ___, and ___ since it was on or shortly after ___, that claimant learned that she may need surgery for her condition. The hearing officer concluded that claimant did not give timely notice to employer of a ___, injury, but there was continuous good cause for the late report on ___. Carrier appeals the hearing officer's determination that claimant had good cause for waiting over two years to report her occupational disease to employer.

We have concluded that the great weight of the evidence is contrary to a ___, date of injury and that the date of injury is ___. The evidence shows that claimant reported her injury to her employer on ___, as found by the hearing officer. Thus, claimant timely reported her injury to her employer. We reverse the hearing officer's decision that claimant did not give timely notice of injury to employer and we render a decision that claimant did give timely notice of injury to her employer. The hearing officer's finding and conclusion on good cause for late reporting of the injury to employer are surplusage. Since claimant timely notified her employer of her injury, carrier is not relieved of liability under Section 409.002.

With regard to the issue of whether claimant timely filed a "claim for compensation," Section 409.003 provides that, if the injury is an occupational disease, an employee or a person acting on the employee's behalf shall file with the Commission a claim for compensation for an injury not later than one year after the date on which the employee knew or should have known that the disease was related to the employee's employment. Section 409.004 provides that failure to file a claim for compensation with the Commission as required under Section 409.003 relieves the employer and the employer's insurance carrier of liability unless good cause exists for failure to file a claim in a timely manner; or the employer or the employer's insurance carrier does not contest the claim.

The hearing officer found that the date of injury, the date claimant knew or should have known that her disease may be related to her employment, was no later than ____; that claimant did not file a TWCC-41 with the Commission until May 18, 1999; that documents contained in Claimant's Exhibit No. 5 are insufficient to satisfy the requirements of Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 122.2 (Rule 122.2) (regarding an injured employee's claim for compensation); that the documents in Claimant's Exhibit No. 9 are insufficient to satisfy the requirements of Rule 122.2; that relative to an alleged ___, date of injury, claimant did not act like an ordinarily prudent person under the same or similar circumstances when she failed to file a TWCC-41 (or a sufficient equivalent) on or before ___; and that relative to a ___, date of injury, claimant acted like an ordinarily prudent person under the same or similar circumstances when she did not file a TWCC-41 (or a sufficient equivalent) before she received the EES-41 letter (Commission initial contact letter) on March 24, 1998. The hearing officer concluded that claimant failed to timely file a claim for compensation (TWCC-41 or its equivalent) with the Commission without good cause. Claimant appeals the hearing officer's determinations that her documents were insufficient to constitute a claim for compensation and that she failed to timely file a claim for compensation without good cause. Claimant contended at the CCH that documents in Claimant's Exhibit Nos. 5, 7, and 9 constituted a claim for compensation. Carrier appeals

the hearing officer's finding that, in effect, determines that claimant had good cause for not filing a claim for compensation up until March 24, 1998.

We have determined that the date of injury is ___. It is undisputed that claimant did not file her TWCC-41 until May 18, 1999, which was over a year after the date of injury. In Texas Workers' Compensation Commission Appeal No. 94546, decided June 7, 1994, wherein the Appeals Panel affirmed a hearing officer's decision that a claimant did not timely file a claim for compensation, the Appeals Panel stated:

> With regard to the hearing officer's finding and conclusion that claimant failed to prove that a claim was timely filed, we note that the case of Cadengo v. Compass Insurance Company, 721 S.W.2d 415 (Tex. App.-Corpus Christi 1986, no writ), held that a doctor bill filed with the Industrial Accident Board (predecessor of the Commission) constituted a "claim" for purposes of the filing limitation. The court noted that the purpose of the claim filing requirement was to provide enough information to serve as a basis for proper investigation and determination whether the claim came under the workers' compensation statute. Information identifying the employer, the employee, the date of injury, and the type of injury was held to be a sufficient "claim," even if not personally filed by the claimant in that case.
>
> We note that [Rule 122.2] indicates that a claim for compensation "should" be on a TWCC-41; however, this form is not strictly required, and Rule 122.2(e) makes allowance for "other" written claim for compensation.

In Texas Workers' Compensation Commission Appeal No. 982461, decided December 2, 1998, the Appeals Panel affirmed a hearing officer's determination that a timely claim for compensation had been filed on behalf of a claimant when the Commission received a medical report from his treating doctor. Rule 122.2(c) provides that the claim "should" be on a form TWCC-41 and "should" include the information listed in that subsection. Rule 122.2(c) does not state that the claim "shall" or "must" be on a TWCC-41 or that all of the information listed in that subsection "shall" or "must" be included in the claim. Rule 122.2(e) provides that the TWCC-41 or other written claim for compensation must be signed by the person filing it. The documents in Claimant's Exhibit No. 5, which claimant said she mailed to the Commission on May 7, 1998, and faxed to the Commission on June 11, 1998 (and which were received by the Commission no later than June 11, 1998), do not contain claimant's employer's name. However, there are numerous documents in Claimant's Exhibit No. 7 and Claimant's Exhibit No. 9, which, according to date stamps thereon, were received by the Commission on January 5, 1999, within one year of the ___, date of injury. These documents include: (1) an Initial Medical Report (TWCC-61) from Dr. C, which is signed by Dr. C and contains the employer's name; the claimant's name; the ___, date of injury; claimant's social security (SS) number; addresses; and the ICD-9 diagnosis code for CTS; (2) a TWCC-64 from Dr. P, which is signed by Dr. P and includes claimant's name; a ___, date of injury; and a diagnosis of bilateral CTS; (3)

Dr. P's patient note for claimant dated April 10, 1998, in which Dr. P states that claimant has bilateral CTS and that it should be handled as a workers' compensation claim; (4) a workers' compensation treatment request form dated July 22, 1998, which is signed by a "w/c clerk," and which includes claimant's name; the employer's name; the ___ date of injury; Dr. P's name as the treating doctor and Dr. C's name as the referral doctor; a diagnosis of CTS; claimant's SS number; and a notation that the "claim" is in dispute; and (5) an insurance verification form from Dr. P's clinic which contains claimant's name, employer's name; a diagnoses of CTS; and a notation of "work comp."

We conclude that a claim for compensation was filed with the Commission on January 5, 1999, which was within a year of the ___, date of injury, and would refer particularly to the signed TWCC-61. We reverse the hearing officer's decision that claimant failed to file a claim for compensation with the Commission without good cause and we render a decision that a claim for compensation was timely filed with the Commission on claimant's behalf within one year of ___. Since a timely claim for compensation was filed, the hearing officer's finding regarding good cause for failing to file a claim up until March 24, 1998, when claimant received a letter from the Commission, is surplusage.

The hearing officer's decision that claimant sustained bilateral CTS while in the course and scope of her employment with employer is affirmed. We reverse the hearing officer's decision that the date of injury was ___, and we render a new decision that the date of injury was ___. We reverse the hearing officer's decision that claimant did not give timely notice of injury to employer and we render a new decision that claimant gave timely notice of injury to employer and that carrier is not relieved of liability under Section 409.002. We reverse the hearing officer's decision that claimant failed to timely file a claim for compensation with the Commission and we render a new decision that a claim for compensation was timely filed with the Commission on claimant's behalf within one year of ___, and that carrier is not relieved of liability under Section 409.004.

We reverse the hearing officer's decision that carrier is not liable for compensation and we render a new decision that carrier is liable for compensation.

Robert W. Potts
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Philip F. O’Neill
Appeals Judge