APPEAL NO. 000150

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). On December 27, 1999, a contested case hearing (CCH) was held. With respect to the issues before her, the hearing officer determined that: (1) the date of injury was _____ (all dates are 1998 unless otherwise stated); (2) appellant/cross-respondent (claimant) sustained a compensable injury in the form of an occupational disease (repetitive trauma); and (3) respondent/cross-appellant (carrier) is relieved of liability due to claimant's failure to timely report the injury to his employer and that there was no good cause for failure to timely report.

Carrier appeals the hearing officer's findings and decision on the injury issue, contending that claimant's work was not sufficiently repetitive "to constitute a repetitive trauma injury." Carrier requests that we reverse the hearing officer's decision on that issue and render a decision in its favor. Claimant appeals the hearing officer's finding on the _____ date of injury, arguing both "I testified that _____ was the day that I knew for sure that my injury was job related. I did report the injury prior to _____ because it was before that date that operations manager [Mr. RC, who was claimant's supervisor] made a site visit to the project that I manage." Claimant alleges that Mr. RC "was already aware of the injury" at some time prior to the date claimant wrote Mr. RC a letter on September 14th. Claimant also alleges a number of irregularities, and that there was reference to "testimony" given at the benefit review conference (BRC). Claimant requests that we reverse the hearing officer's decision (on the issues of date of injury and timely reporting). Carrier filed a response to claimant's appeal, urging affirmance of those issues.

DECISION

Affirmed on all issues.

Claimant testified that he was an administrative/contract manager for a cleaning service (employer) for a number of years. Claimant testified that he began to have some intermittent pain in his right shoulder "back in about 1995" and that it would come and go. Claimant testified in some detail what his duties were, which consisted mainly of administrative duties including reporting and filing workers' compensation reports of other employees under his supervision, and that perhaps twice a month the mops used to clean the building had to be cleaned. Claimant testified that the employer did not, at the time, have a "mop service" and how he took the 30 to 40 mops to a laundry and cleaned them. Claimant testified to this procedure in some detail and the hearing officer summarizes that testimony. Claimant also demonstrated how the procedure was done and we will simply refer to it as "moving the mops." Claimant testified that the intermittent pain became worse in January and that he sought treatment with Dr. J, a chiropractor. Claimant said that the manipulations gave some temporary relief but the right shoulder pain grew progressively worse. There is some testimony that claimant began using his left arm to move the mops after January and that he may have spoken to Mr. RC about it. Carrier maintains that

claimant knew or should have known at that time that his shoulder complaints may have been related to his employment. In any event, claimant sought treatment with his family doctor, Dr. P, on _____, when his right shoulder pain became more severe. Although not entirely clear, claimant appeared to have testified that he spoke with Mr. RC prior to the doctor's appointment and told him about his shoulder pain, but that he did not know what caused it and that he was going to the doctor. Claimant testified that in talking with Dr. P on _____, he knew that he had sustained a work-related injury to his right shoulder moving the mops. Claimant said that Dr. P referred him to an orthopedic specialist, Dr. C. Claimant apparently saw Dr. C on August 6th. Claimant apparently saw another chiropractor on September 11th for chiropractic shoulder treatment. At the CCH, claimant was asked:

> Q. And that's -- when you testified earlier that within -- within the time of that visit of _____ and 8/7 or 8/8 of '98, which is within ten days, you talked to [Mr. RC] and you let him know that you had an injury, that you were going to see another doctor. Am I correct?
>
> A. Yes.

It is undisputed that claimant wrote Mr. RC by letter dated September 14th stating:

> I spoke to you the last time that you were here . . . about a problem with my right shoulder and pain around the area of the specula [sic] (shoulder blade). At that time I stated to you that I was going to see the doctor for an examination because I wasn't sure what might have caused my shoulder to be strained. I was referred to an orthopedic doctor by my personal physician.
>
> * * * *
>
> I very strongly suspect and feel that this injury is job related. Let me explain why. First, this is the only type of heavy lifting that I do. Second, I have been lifting, transporting and laundering mops that we use here at the facility since June of 1993. In order to transport them to and from the laundry, they are loaded and unloaded by hand.

The medical records include a number of nonrelated matters going back a few years. In a note dated _____, Dr. P refers, among other matters, to a complaint that claimant "has some pain in his right shoulder about the AC joint area. I think either a bursitis or arthritis and it is getting hard to extend his shoulder." In a report dated August 6th, Dr. C sees claimant, along with an unrelated matter, for evaluation of claimant's right shoulder. Dr. C had an impression that claimant had "supraspinatus tendonitis of the right shoulder" and recommended an MRI and physical therapy (PT). A PT note of August 11th notes treatment for tendinitis of the right shoulder. No MRI was performed, apparently because of carrier's denial of the claim. In a report dated March 29, 1999, Dr. C recites that he saw claimant on referral from Dr. P in August for "a history of right shoulder pain that

had been a problem . . . for quite some time." Dr. C recites the mechanics of moving the mops and concluded that claimant "may have a supraspinatus tendovitis to the right shoulder." Dr. C comments that the employer has since (August 1998) supplied an independent mop service so that claimant would not have to move the mops and that "since this activity [moving the mops] has been discontinued . . . his shoulder has demonstrated marked improvement." Dr. C opines that with the history "as well as the subsequent improvement on discontinuation of the aggravating activity indicates that this is certainly a work related trauma to the right shoulder." Claimant was subsequently seen by Dr. A, an independent medical evaluation (IME) doctor, who, in a progress note-type of report dated October 7, 1999, recited the moving of mops history, Dr. C's treatment, the refusal of the MRI and comments that claimant's condition "has improved, secondary to the fact that now he is not carrying and doing repetitive activities involving his right shoulder." Dr A's impression:

> Activity related tendonitis of the right shoulder. I suspect as this has improved with change in his job activities, that this is indeed a work-related aggravation.

The hearing officer found a repetitive trauma injury to claimant's right shoulder caused by work activities, citing testimony and "the records of [Dr. C], a referral orthopedic doctor and [Dr. A], the IME doctor." Carrier appeals the findings of an occupational disease, contending that claimant's duties were "mainly administrative," citing claimant's testimony and PT records showing claimant doing sedentary work and that claimant only moved the mops twice a month. Carrier contends that there was insufficient evidence to establish a repetitive trauma injury. An occupational disease is "a disease arising out of and in the course of employment that causes damage or harm to the physical structure of the body, including a repetitive trauma injury. . . . The term does not include an ordinary disease of life to which the general public is exposed outside of employment, unless that disease is an incident to a compensable injury or occupational disease." Section 401.011(34). A repetitive trauma injury is "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." Section 401.011(36). An employee must prove, by a preponderance of the evidence, the compensability of an occupational disease. Texas Workers' Compensation Commission Appeal No. 960582, decided May 2, 1996, citing Schaefer v. Texas Employers' Insurance Association, 612 S.W.2d 199 (Tex. 1980). "[O]ne must not only prove that recurring, physically traumatic activities occurred on the job, but must also prove that a causal link exists between these activities on the job and one's incapacity; that is, the disease must be inherent in that type of employment as compared to employment generally." Texas Workers' Compensation Commission Appeal No. 950868, decided July 13, 1995, citing Davis v. Employers Insurance of Wausau, 694 S.W.2d 105 (Tex. App.-Houston [14th Dist.] 1985, writ ref'd n.r.e.). In this case, the hearing officer had the benefit of observing claimant's demonstration of how he handled the mops and obviously found claimant's testimony on this issue credible and supported by the reports of Dr. C and Dr. A. We find sufficient evidence to support the hearing officer's decision on this point.

On the issue of date of injury, the hearing officer comments:

> The undisputed testimony shows that Claimant suspected that he had a work related shoulder injury on _____. The preponderance of the evidence shows that Claimant knew or should have known of the work-related nature of his injury on that date. Therefore, _____ is Claimant's date of injury.

Although claimant appeals the finding on this issue, and in his appeal states that _____ "was the day that I knew for sure that my injury was job related," we are unclear what date claimant contends should be the date of injury. In his appeal, claimant goes on to say that he reported "the injury prior to _____," when Mr. RC made a site visit. In any event, Section 408.007 provides that the date of injury for an occupational repetitive trauma injury "is the date on which the employee knew or should have known that the disease [repetitive trauma] may be related to the employment." Only the carrier suggested that the date of injury should be earlier, perhaps in January when claimant began having shoulder pain and sought treatment by Dr. J. The hearing officer's decision on this point is supported by the evidence.

On the issue of timely reporting, claimant asserts that Mr. RC was aware of his injury before receiving claimant's letter of September 14th; however, there is scant evidence to support that Mr. RC was told of a work-related injury prior to September 14th. Fairly undisputed is that claimant talked to Mr. RC about his shoulder injury prior to _____ when Mr. RC made a site visit. Equally clear is claimant's position that at that point (as illustrated in the September 14th letter) he was unaware that the cause of his shoulder pain was due to moving the mops. Although some effort was made to show that claimant spoke with Mr. RC again after _____ and before August 8th or 11th, claimant's testimony regarding such conversation was that he did not know what caused the pain and was going to see a specialist Dr. C regarding the cause. The hearing officer, in his Statement of the Evidence, commented:

> The undisputed testimony also shows that Claimant reported a work related injury to is [sic] employer on September 14, 1998, by letter. The evidence is insufficient to show that Claimant reported a work-related injury to his employer prior to that date. Further, as Claimant, in his duties with his employer, was charged with the responsibility of filing workers' compensation reports of injury for other employees, he has not shown that good cause existed for his failure to report his injury within 30 days of the date of injury herein. Carrier is relieved from liability due to Claimant's failure to timely report his injury.

Section 409.001 requires that an employee notify the employer of an injury by the 30th day after the injury occurs. 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's decision on this issue is supported by the evidence.

Claimant, for the first time on appeal, asserts error in the fact that (attorney 1) filed various motions on behalf of the carrier (and perhaps listed himself as a possible witness), that (attorney 2) actually represented carrier at the CCH, and that attorney 2, at the CCH, offered the medical record of another employee (which was withdrawn as soon as the error was noted) into evidence. We note that both attorney 1 and attorney 2 belong to the same law firm and it is not unusual for one attorney to fill in for another attorney. Whether or not attorney 1 listed himself as a witness is irrelevant in that attorney 1 did not testify. Further, we do not generally consider evidence submitted for the first time on appeal. Claimant obviously had knowledge of these allegations at the CCH but failed to raise them at that time. We decline to consider those objections now.

Claimant, at the CCH, did object to the use of comments (as hearsay) from what appears to be the benefit review officer's (BRO) handwritten notes which are in evidence as Carrier's Exhibit No. 7. We find the use of those unsigned, informal, handwritten notes unusual. The normal procedure is that the BRO's BRC report is admitted as a hearing officer exhibit. The BRC report lists the issues in dispute, the parties' position on the issues and the BRO's recommendation and comment. The parties may then provide a response to the BRC report. The accuracy and context of informal scribblings by the BRO could certainly be challenged and we believe that the better course of action in most cases would be not to have them in evidence. There is no indication that the hearing officer in this case relied on those notes or accorded them any weight. We would further note that claimant did not object to any of carrier's exhibits, including the notes, their introduction and admission and, consequently, we hold that any error was not preserved for appeal and that the error, if any, was harmless error and did not result in an improper decision in this case.

Upon review of the record submitted, we find no reversible error and we will not disturb the hearing officer's determinations unless they are so against the great weight and preponderance of the evidence as to be clearly wrong or unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). We do not so find and, consequently, the decision and order of the hearing officer are affirmed.

Thomas A. Knapp
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Dorian E. Ramirez
Appeals Judge