APPEAL NO. 000483

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 January 18, 2000. The hearing officer determined that the respondent (claimant) sustained a compensable repetitive trauma injury; that the date of injury is _____; that the claimant timely reported the injury; and that the claimant had disability from _____, through the date of the CCH. The appellant (carrier) appeals these determinations, contending they are against the great weight and preponderance of the evidence. The claimant replies that the decision is correct, supported by sufficient evidence, and should be affirmed.

DECISION

Affirmed.

The claimant sustained a compensable right carpal tunnel injury in _____ with resulting carpal tunnel release and ulnar nerve transposition. He returned to work in October 1998. He said he thought he could do his old job, which involved repetitive motion of the upper extremities. In June and July 1999, he said, the swelling and pain returned. He thought this was the same problem as before and he kept working. In September 1999, he said he noticed something "different" about the condition of his right upper extremity. About this time, he had been switched to an "I-machine" which required more physical activity to run it than other machines to meet his production quota. On Friday, _____, the swelling returned to his right hand and he used ice to reduce the swelling. He continued working his normal shift. On the following Monday morning, _____, he said, his right hand froze and cramped "like a claw." This lasted about an hour and he went to work to advise his employer he could not work that day. According to the claimant, this never happened before. On _____, Ms. L, a human resources assistant, told him by telephone that he had to bring in a doctor's excuse for being off work. On that day, he saw Dr. M and was told he had a herniation at C3-4 with spinal cord impingement and was given an off-work slip to this effect, which he then gave to Ms. L. On October 18, 1999, he began a series of facet injections. On October 26, 1999, he gave Ms. L a similar note from Dr. M continuing him in an off-duty status. In a report of December 2, 1999, Dr. Z stated that the claimant sustained a new injury in the sense of a reaggravation of his prior injury.

In a memorandum of November 2, 1999, Ms. L wrote that the claimant called her to say that he was not going to complete a short-term disability application because he "needed to keep" this a workers' compensation matter. She asked him why and, according to the memorandum, it was because his doctor told him he suffered a new injury. The claimant gave a date of injury of _____. Ms. L said she then reminded him that he did not work on that day. On November 3, 1999, the claimant completed an accident report for an injury on _____, and had a meeting with Ms. L and Mr. D, a manager, and advised them that he injured himself on _____, while working at the "I-machine." In

his testimony at the CCH, the claimant said he was claiming a date of injury of October 1, 1999, presumably because he realized he did not work on _____.

Prior to closing argument at the CCH, the hearing officer invited the claimant's attorney to comment on whether he was claiming a repetitive trauma or discrete trauma injury. The attorney replied that he was proceeding on a repetitive trauma theory. The carrier's counsel responded that the claimant had always proceeded under a discrete trauma theory of an injury on _____, until he was told by the employer or carrier he did not work on that date and did not report the injury prior to November 2, 1999. The carrier reiterated on appeal that the claimant was always claiming a discrete injury in order to have a new injury and not a continuation of the prior injury. Nonetheless, it does not allege prejudice in having to defend under both theories of repetitive and discrete trauma and we perceive none. *See* Texas Workers' Compensation Commission Appeal No. 992343, decided December 6, 1999. In any case, we cannot agree that simply the assertion of a date of injury presumably tied in the claimant's mind to his last day at work made this a claim of discrete trauma.

The claimant had the burden of proving he sustained a new injury in the course and scope of his employment. Johnson v. Employers Reinsurance Corporation, 351 S.W.2d 936 (Tex. Civ. App.-Texarkana 1961, no writ). The hearing officer considered the evidence and found that he did sustain a new compensable repetitive trauma injury. The evidence of cervical herniation and "clawing" of the right hand was sufficient, we believe, to support this determination.

The major thrust of the carrier's appeal is its disagreement with the date of injury and timely notice determinations. Section 408.007 defines the date of injury of an occupational disease (which includes a repetitive trauma injury) as "the date on which the employee knew or should have known the disease may be related to the employment." Although much time was spent at the CCH stressing that the claimant did not work on _____, the date originally claimed as the date of injury, the date of an occupational disease need not necessarily be a date a claimant was at work. Similarly, a claimant's misperceptions about this legal definition are not controlling. We have also pointed out that the date of an occupational disease is somewhat of a moving target and need not be as early as the first symptoms nor as late as a definitive diagnosis. *See* Texas Workers' Compensation Commission Appeal No. 992783, decided January 26, 2000. The date of an occupational disease ultimately presents a question of fact for the hearing officer to decide, and a hearing officer may find a date of injury different from that alleged if the evidence indicates otherwise. Texas Workers' Compensation Commission Appeal No. 941029, decided September 16, 1994.

The hearing officer in this case found that the date the claimant knew or should have known that his disease may be related to his employment was _____, the date the claimant said his doctor told him he had cervical herniation. This diagnosis is reflected in an off-work slip of that date signed by Dr. M. A claimant acts at his or her own peril in

asserting the date of injury to be the date a formal diagnosis is given when it should have been apparent that the condition was related to the employment without regard to a specific diagnosis. This case was complicated by the prior right carpal tunnel syndrome injury and the question of whether the symptoms still related to that injury or were distinctly different. The hearing officer properly considered this context in arriving at a date of injury. We will reverse a factual determination of a hearing officer only if that determination is so against the great weight and preponderance 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). Under this standard of appellate review, we find the evidence sufficient to support the date of injury determination.

The carrier's position was that the employer first received notice of this claimed new injury on November 3, 1999. Having affirmed the finding of a date of injury within 30 days of that date of notice, *see* Section 409.001, we also affirm the determination that claimant gave timely notice of his claimed injury.

We construe the carrier's appeal of the disability determination to be premised on its contention that the claimed injury was not compensable. Having affirmed the compensability determination, we also affirm the disability determination.

For the foregoing reasons, we affirm the decision and order of the hearing officer.

Alan C. Ernst
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Dorian E. Ramirez
Appeals Judge