

APPEAL NO. 000830

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on March 2, 2000. The hearing officer concluded that the appellant (claimant) did not sustain a compensable occupational disease (repetitive trauma) injury on or about _____; that claimant failed to timely notify the employer of a work-related injury; and that the respondent (carrier) contested compensability on or before 60 days after being notified of the injury and did not waive its right to dispute the compensability of this claim. Claimant requests our review, asserting that these conclusions and several underlying factual findings are against the great weight of the evidence. The carrier urges in its response that the evidence is sufficient to support the challenged findings and conclusions.

DECISION

Affirmed in part; reversed and remanded in part.

Claimant testified that she commenced working for the employer on December 28, 1996, as a waitress at a restaurant; that she resigned in April 1998 and was rehired in May 1998 at another of the employer's restaurants; that in August 1998, having had no prior problems with her wrists, elbows, and shoulders, she began to experience tingling in her hands and wrists and noticed a cyst on her right wrist; and that by _____, she had "purpling," tingling, swelling, and visible cysts on both sides of her wrists and attributed these conditions to her lifting of heavy trays in waiting on and bussing the tables and other uses of her hands and arms at work. Claimant said she complained of her symptoms to two coworkers; that in November 1998 she also told a manager, Mr. B, about her hand problems and that he referred her to Mr. M, the restaurant's general manager; and that on November 7, 1998, she informed Mr. M that something was wrong with her hands in that they were swollen and discolored and had cysts and inquired about medical attention and an accident report and that he replied that one does not get carpal tunnel syndrome (CTS) from waitress work. She said she also mentioned her hand problems in November 1998 to another manager, Ms. D, who also deferred to Mr. M. Claimant said she continued to work until January 14, 1999, when her employment was terminated for alleged misconduct at work.

Claimant further testified that on _____, she sustained a specific injury, namely, a right wrist and elbow strain, when her left hand gave way while lifting a box of catsup bottles onto a counter and her right hand caught the box to keep it from falling. She said that Mr. M accompanied her to see Dr. F for the _____, injury; that she reported both injuries to Dr. F; that the carrier accepted the injury to her right hand; and that she had surgery on her right hand on March 9, 1999. Claimant also stated that when she asked Mr. M if she should also include her left wrist injury in her statement, he responded in the affirmative.

Dr. F's record of _____, states that claimant complained of pain from her right elbow to her fingers; that the pain is on the ulnar side and does not seem to involve the ulnar nerve or the carpal tunnel; and that his impression is forearm flexor muscle strain. The January 22, 1999, NCS/EMG study of Dr. W stated the impression as mild to moderate right CTS.

Claimant further testified that she later commenced treatment with Dr. P and that Dr. P was going to treat her left hand also but that in June 1998 the carrier refused to authorize diagnostic testing and treatment for the left hand. Dr. P, a hand surgeon to whom claimant was referred by Dr. F, reported on February 11, 1999, that he was recommending a right median nerve release and excision of the right volar wrist ganglion cyst. He also noted that claimant "has some similar symptoms on her left that she has had in the right since the injury" and that he will see how those symptoms evolve. Dr. P's operative report of March 9, 1999, reflects the surgery on the right wrist. Dr. P's note of April 15, 1999, states that claimant has noticed some worsening problems with her left hand similar to the right with numbness and tingling, especially since being forced to use her left hand since the surgery, and Dr. P stated the impression as bilateral CTS. Dr. P wrote on June 17, 1999, that when claimant's right hand is healed and the therapy completed, he plans to proceed with a median nerve release on her left hand.

Claimant indicated that in June 1999 she had discussions about treatment for her left hand injury with both the adjuster and the Texas Workers' Compensation Commission (Commission); that she had a discussion with the adjuster and was advised that she needed a separate report for the left hand injury; and that on November 16, 1999, she signed an amended Employee's Notice of Injury or Occupational Disease and Claim for Compensation (TWCC-41) to change the date of injury for her claimed repetitive trauma injury to both arms from _____, to October 31, 1999.

Mr. B testified that claimant did not report a work-related injury to him in October or November 1998 nor did she then mention any physical problems with her hands or ask him for help in reporting such an injury. He further stated that in January 1999, claimant told him she hurt herself carrying catsup bottles and that he took her to the doctor.

Ms. S, the employer's district manager, testified that the only work-related injury to claimant that she and Mr. M were aware of was the single event injury of _____.

In evidence is an unsigned and undated TWCC-41 which reflects it was hand delivered to a Commission field office on January 15, 1999. This form states that claimant sustained a strained right wrist injury on " _____ " while picking up a case of catsup.

Also in evidence is a Payment of Compensation or Notice of Refused or Disputed Claim (TWCC-21) dated "5-3-99" which reflects the date of injury as " _____ " and which states that the carrier disputes medical and disability related to the left hand and that the left hand is not causally related to claimant's _____, injury which is limited to the right upper extremity.

Also in evidence is a Dispute Resolution Information System (DRIS) note of June 17, 1999, stating that claimant came to the Commission's office to state that her doctor requested tests on her left arm which the adjuster denied; that the adjuster was then called and the adjuster stated that claimant needed to file a new TWCC-41 for a new injury of the left and right wrists as bilateral repetitive; and that claimant was given a TWCC-41 form which she is to complete and return.

Also in evidence is claimant's TWCC-41 dated "6-24-99" which states an injury to both hands, arms, and shoulders from "pull strain & carpal" with the date of injury as "_____." The form also states that the injury occurred "over period of time" and continues to state on the back of the form, with some portion illegible, "and due to this injured left hand when lifting ketchup box on this day." Attached to this TWCC-41 in evidence is a Commission facsimile transmission form to an agent of the carrier, dated June 14, 1999, stating that "Mr. H at work (supervisor) told Clmt NOT to enter 2 different injuries. He said it was the same inj. And now we are sending this as you had told us on 6/17/99. ER will not fill out 01 for Clmt." The fax transmission data on the attachment indicates the result of the transmission as "OK" and the fax number as _____.

Also in evidence is a DRIS note of "08/30/1999" stating that claimant states that the carrier is denying that both hands are involved in her on-the-job injury; that claimant was informed that she needed to get with her doctor and get medical information from the inception of the claim to show that both hands have been treated from the beginning; and that claimant indicated she would comply. A DRIS note of September 2, 1999, states that the adjuster called to advise that the carrier is denying the left arm as part of the injury and will forward a TWCC-21 so stating.

A DRIS note of "09/03/1999" states that claimant called stating that her left hand was being denied, that the Commission has nothing on this, and that she was told to bring her copy in and it would be disputed. A DRIS note of "09/07/1999" states that claimant called about the carrier disputing her left hand injury; that upon investigation, claimant has two claims; that her left hand injury is being denied; that the carrier has accepted the _____, right hand and arm injury; that the adjuster was not sent a copy of the TWCC-41 and "needs a copy to establish a new claim as these are getting mixed together and no CRR # for this one"; and that a copy of the TWCC-41 was faxed to the adjuster.

Also in evidence is a Commission facsimile transmission form to the carrier's agent dated "9-7-99" stating, "41 per our telephone conversation earlier _____ inj." The fax transmission data on this form indicates the result as "OK" and the fax number as _____, the same number to which the June 24th TWCC-41 was transmitted.

Also in evidence is the carrier's TWCC-21 dated "9-13-99" which reflects the injury as "multiple upper extremities"; the date of injury as "_____"; the date the carrier received first written notice of injury as "9-7-99"; and which states that the carrier disputes an injury to the left arm.

A DRIS note of "09/14/1999" states that a Commission employee called the adjuster, who was not in, and a message was left for the adjuster to return the call. This note also states that the purpose of the call is to ascertain if the TWCC-41 was received and to see if a claim has been established and a claim number assigned so that the Commission "could update file to distinguish the two inj claims we have"; that "the injuries are so close this is all getting intertwined and this will separate the clms"; that the adjuster called to advise that the carrier still disputes this injury but does accept the other injury; and that a benefit review conference will need to be set.

A DRIS note of October 25, 1999, states as follows: "Combining [docket no. 1] to this file to set as it appears Clmt had a worsening in left hand due to overuse."

A DRIS note of "11/8/1999," apparently made by a Commission ombudsman, states that after an extensive review of the claim with claimant, including a potentially separate on-the-job injury, claimant will file an amended TWCC-41 to [docket no. 1] to correct the date of injury; that both cases will be set; and that it appears that claimant has separate claims with the 1999 claim being a specific injury and the "X claim" being an occupational disease.

A DRIS note of "11/15/1999" states that this is set with claim number [docket no. 2] and that claimant is to file an amended TWCC-41 to amend the date of injury as this claim is an occupational disease.

In evidence is a TWCC-41 signed by claimant on "11-16-98." Claimant testified that the year she wrote was an error and that she signed this form on November 16, 1999. This form states the date of injury as _____, and describes the injury as being to both hands from repetitive movement.

Claimant also introduced a Commission computer data sheet reflecting the claim number as [docket no. 2]; the date established as "06/24/99"; the "conv. date" as "11/18/99"; the "prev. ID" as "[docket no. 1]"; and the received date of the "*41" which created the claim as "06/24/1999."

Many of the hearing officer's factual findings are not disputed by claimant on appeal. However, claimant does challenge, in addition to the dispositive legal conclusion, findings that claimant did not sustain a work-related repetitive trauma injury to her wrist and hands on _____, while working as a waitress for the employer; that claimant did not notify her employer of a work-related repetitive trauma injury to her hands or wrists at any time during October, November, or December 1998; that claimant did not act as a reasonably prudent person by not notifying her employer of a work-related injury for more than two months after the date that claimant is alleging an injury; that the Commission faxed a copy of claimant's TWCC-41 dated June 24, 1999, to the carrier on June 24, 1999, but that this document was not received by the carrier; and that the carrier timely disputed this claim on September 13, 1999.

The hearing officer is the sole judge of the weight and credibility of the evidence (Section 410.165(a)) and, as the trier of fact, resolves the conflicts and inconsistencies in the evidence (Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ)). As an appellate reviewing tribunal, the Appeals Panel will not disturb the challenged factual findings of the hearing officer unless they are so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). Although the evidence was in conflict, and while another fact finder may have drawn different inferences from the evidence, we cannot say that the disputed findings relating to the occupational injury and timely notice issues are against the great weight of the evidence.

Claimant focuses much of her appeal on the contention that the Commission facsimile transmission data sheet accompanying the June 24, 1999, TWCC-41 establishes that the TWCC-41 was received by the carrier on that date and, thus, the carrier had written notice of the claimed bilateral repetitive trauma injury to the upper extremities as of that date and did not contest the compensability of that claimed injury until filing its TWCC-21 disputing the injury on September 13, 1999.

Not appealed is a finding that on September 7, 1999, the Commission contacted the carrier by telephone inquiring into the status of this claim and was informed that the carrier did not have a copy of the TWCC-41 for the second claim whereupon the Commission faxed a copy to the carrier on that date. The hearing officer states the following in his discussion of the evidence:

Under the circumstances of this case, I find that the Carrier did not receive the fax transmission dated June 24, 1999, from the Commission and that the Carrier's first written notice of this claim was on September 7, 1999, when it received the second fax from the Commission. The Carrier timely disputed the compensability of the claim on September 13, 1999.

Claimant contends that the TWCC-41 faxed to the carrier on June 24, 1999, provided written notice of claimant's claimed repetitive trauma injury to both upper extremities and cites Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 102.5(d) (Rule 102.5(d)), effective August 29, 1999, "unless the great weight of evidence indicates otherwise," the carrier is deemed to have received that faxed TWCC-41 on the date it was faxed. Claimant contends that the hearing officer's reference to "under the circumstances of this case" simply fails to explain how the great weight of the evidence indicates that the carrier did not receive that TWCC-41 on June 24, 1999. We agree that the hearing officer does not indicate how it is that the carrier did not receive the June 24, 1999, TWCC-41, given the Commission's fax transmission sheet data. We remand for such further consideration, findings, and conclusions as are appropriate concerning why the carrier did not receive this fax on the date reflected on the copy in evidence.

Pending resolution of the remand, a final decision has not been made in this case.

However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Commission's Division of Hearings, pursuant to Section 410.202. See Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

Philip F. O'Neill
Appeals Judge

CONCUR:

Alan C. Ernst
Appeals Judge

Elaine M. Chaney
Appeals Judge