

APPEAL NO. 001998

On July 24, 2000, 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 hearing officer resolved the disputed issues by deciding that the respondent (claimant) sustained a compensable occupational disease; that the date of injury was _____; that the appellant (carrier) is not relieved of liability under Section 409.002; that the claimant had disability from February 15, 2000, through July 24, 2000; that the carrier did not waive its right to contest the compensability of the claimant's occupational disease; and that the claimant's average weekly wage (AWW) is \$428.32. The carrier requests that the hearing officer's decision that the claimant sustained a compensable occupational disease; that the date of injury is _____; that the carrier is not relieved of liability under Section 409.002; and that the claimant had disability from February 15, 2000, through July 24, 2000, be reversed and that a decision on those issues be rendered in its favor. There is no appeal of the hearing officer's decision on the issues of waiver and AWW.

DECISION

Affirmed.

The claimant testified that she had been a trim press operator at the same facility for 21 years and that the employer took over the operation of the facility in January 1995. The claimant said that the trim press cuts plastic cups from sheets of plastic and that she used both hands to take the cups from trays and place them on a 30-foot line that moved the cups into a lip roller machine. She said that she worked 48 to 56 hours a week and that she constantly used her hands to put the cups on the line. She said that she has four breaks a day, including lunch.

The claimant said that she is right-handed and that in June 1999 her arms started aching and that she had numbness and tingling in her hands, worse on the right, but did not realize that she had an injury. She said that in September or October 1999 she realized that her "symptoms" were caused by her employment but also said that she did not realize at that time that her symptoms were caused by her employment.

The claimant said that by _____, her hand symptoms were getting worse and that at that time she became scared that she would get to a point where she would not be able to use her hands. She said that on _____, she went to human resources to report that her job was giving her problems with her hands and that she wanted to see a doctor. She said that she was told to have her supervisor fill out a report. The claimant's supervisor stated in a written statement that the claimant asked him to fill out an accident report on February 8, 2000, because her wrists were hurting her.

The claimant said that she went to Dr. M on February 15, 2000; that that was the first time she had seen a doctor about her hands; and that she had not missed work

because of her hand problems prior to that. The claimant said that Dr. M took her off work and that she has not worked since February 15, 2000.

Dr. M noted in his report of the claimant's February 15, 2000, visit that the claimant had been a trim press operator for several years and that the claimant had felt a chronic and recurrent pain in both hands and forearms. Dr. M examined the claimant and, among other tentative diagnoses, gave a tentative diagnosis of bilateral carpal tunnel syndrome (CTS). Dr. M wrote that the claimant is unable to work. Dr. M referred the claimant to Dr. C, who also noted that the claimant is unable to work. Dr. M referred the claimant to Dr. MU, who diagnosed the claimant as having a repetitive soft tissue injury to the right hand, possible CTS of the right wrist, and a traumatic ganglionic cyst of the third finger of the left hand.

The claimant was examined by Dr. R in April 2000 and Dr. R wrote that the claimant had positive Phalen's and Tinel's signs of the right wrist and that the claimant's work would be expected to put her at risk for a repetitive motion injury and that it is reasonable to assume that the right CTS is directly related to and arose out of her work. Dr. R also wrote that the third finger of the claimant's left hand had a ganglion cyst and that due to the nature of the claimant's work, it would not be uncommon for such a cyst to form due to repetitive trauma.

Dr. C referred the claimant to Dr. MA for a neurological evaluation and Dr. MA wrote on May 10, 2000, that the claimant had a positive Phalen's sign in both hands but a negative Tinel's sign in both hands. Dr. MA performed an EMG of the claimant's right upper extremity and reported that that study was normal. Dr. MA performed a nerve conduction study of both upper extremities and appears to report that there was an abnormal finding of the right median nerve on one test but not on another and that there was some minor abnormality between the values found for the left median nerve and the left ulnar nerve.

The claimant had the burden to prove that she sustained an occupational disease, that she had disability, and that she gave timely notice of her injury to her employer. The hearing officer found that the claimant was exposed to repetitious, physically traumatic activities in her workplace; that the claimant's work-related activities caused or aggravated her bilateral upper extremity symptoms; that the claimant knew that she may have a work-related injury on _____; that the claimant reported her injury on February 8, 2000; and that the claimant was unable to work from February 15, 2000, through July 24, 2000, due to her injury. The hearing officer concluded that the claimant sustained a compensable occupational disease (repetitive trauma injury); that the date of injury is _____; that the carrier is not relieved of liability under Section 409.002; and that the claimant had disability from February 15, through July 24, 2000.

Whether the claimant sustained an occupational disease in the form of a repetitive trauma injury as defined in Section 401.011(36) was a fact question for the hearing officer to determine from the evidence presented. The hearing officer is the sole judge of the

weight and credibility of the evidence. Section 410.165(a). The conflicting evidence was for the hearing officer to resolve as the trier of fact. We conclude that the hearing officer's decision that the claimant sustained a compensable occupational disease (repetitive trauma injury) is supported by sufficient evidence and that it is not so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. We also conclude that the hearing officer's decision on the disability issue is supported by sufficient evidence and that it is not so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust.

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. 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. In Texas Workers' Compensation Commission Appeal No. 94546, decided June 7, 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.

Inconsistencies in the claimant's testimony in this case were for the hearing officer to resolve as the trier of fact. While the claimant may have related her symptoms to her work prior to _____, a matter on which there is contradictory testimony from the claimant, whether she knew or should have known that she had an injury (damage or harm to the physical structure of her body) that may be related to her employment prior to that date, was for the hearing officer to determine as the trier of fact. We conclude that the hearing officer's decision that the date of injury was _____, is supported by sufficient evidence and that it is not so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. The carrier does not contend that notice of injury was given to the employer any later than the February 8, 2000, date found by the hearing officer. Thus, since notice of injury was given within 30 days from the date of injury, we need not address the hearing officer's alternative findings regarding good cause for late reporting. Since the

claimant gave timely notice of her injury under Section 409.001(a), the carrier would not be relieved of liability under Section 409.002.

The hearing officer's decision and order are affirmed.

Robert W. Potts
Appeals Judge

CONCUR:

Tommy W. Lueders
Appeals Judge

Judy L. Stephens
Appeals Judge