

## APPEAL NO. 002533

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 September 20, 2000, with the record closing on September 28, 2000. The issues at the CCH were (1) did the appellant (claimant) sustain a compensable injury in the form of an occupational disease; (2) what is the date of injury; (3) is the respondent (carrier) relieved of liability for the claimed injury because the claimant failed to timely notify his employer; (4) did the claimant file a claim for compensation with the Texas Workers' Compensation Commission; (5) is the claimant barred from pursuing Texas workers' compensation benefits because of an election to receive benefits under a group health insurance policy; and (6) was the carrier's contest of compensability filed on April 24, 2000, based on newly discovered evidence that could not reasonably have been discovered at an earlier date, thus allowing the carrier to re-open the issue of compensability?

The hearing officer found that the claimant sustained a compensable bilateral carpal tunnel syndrome (CTS) injury and a right shoulder injury but did not sustain a neck or back injury; that the date of injury for the right CTS and right shoulder was \_\_\_\_\_, and the date of injury for the left CTS was \_\_\_\_\_; that there is no date of injury for the neck or back as there was no injury; that the claimant reported his right CTS injury and right shoulder injury to the employer on or about November 30, 1998, and reported his left CTS injury to the employer on June 9, 1999; that the claimant did not have good cause for his failure to timely notify his employer of his bilateral CTS and right shoulder injury; that the claimant did not timely file a claim for compensation for this right CTS and right shoulder injury, but provided good cause for not doing so; that the claimant timely filed a claim for compensation for his left CTS; that the claimant is not barred from pursuing Texas workers' compensation benefits of an election to receive benefits under a group health insurance policy; and, the carrier's contest of compensability filed on April 24, 2000, was not based on newly discovered evidence that could not reasonably have been discovered at an earlier date.

The claimant only appealed the adverse findings and conclusions regarding the date of injury and reporting of the bilateral CTS and right shoulder injuries to his employer. The carrier filed a response contending that the evidence was sufficient to support the hearing officer's determinations and that the decision and order should be affirmed. Neither party appealed the remaining determinations and they are final by operation of law. Section 410.169.

## DECISION

Affirmed in part and reversed and rendered that the claimant sustained a compensable bilateral CTS injury.

The hearing officer addressed the evidence and we adopt her rendition for purposes of this appeal. Section 409.011(a) provides that 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:

- (1) the injury occurs; or
- (2) if the injury is an occupational disease, 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) [relating to notice of injury to the employer] relieves the employer and the employer's insurance carrier of liability under this subtitle unless:

- (1) the employer, a person eligible to receive notice under Section 409.001(b), or the employer's insurance carrier has actual knowledge of the employee's injury;
- (2) the commission determines that good cause exists for failure to provide notice in a timely manner; or
- (3) the employer or the employer's insurance carrier does not contest the claim.

The claimant testified that he did not know that his right CTS was work-related until November 11, 1998, when testing was done to find out why he was having pain in the right side of his upper extremity; that prior to this date, his physician wanted to rule out blockage in his right carotid artery due to the possibility of a stroke. He stated that an EMG was performed on November 11, 1998, and Dr. B told him he had right CTS which the claimant attributed to his work. The claimant contended that he told Mr. E, his supervisor, in late November 1998 that his right-sided CTS was work-related and that Mr. E suggested that he get a second opinion. The hearing officer documents this evidence in her decision and order and wrote:

Although no accident report was filed as a result of this alleged conversation and the claimant continued to work, I believe that the claimant reported his right upper extremity problems at that time. He could not, however, have reported his left upper extremity problems in that conversation, because those problems had not been diagnosed.

The claimant stated that he started having problems with his left wrist and arm in:

"probably the fall, September, October. I mean, it - - after my right side, I started during '98 using my left arm more. But I didn't notice really notice anything until probably November or December as it being numbness and

having any issue there. So, it had just manifested itself at that time. . . .1998, I'm sorry."

The claimant testified that he was referred for additional testing. An EMG/nerve conduction test was performed on January 25, 1999, and confirmed that the claimant had CTS in his left hand and wrist. He contended that earlier he had told Mr. E in December 1998, and then again on January 20, 1999, that he had CTS in his left wrist and that it was work-related. The claimant stated:

I told him [Mr. E] I was starting to have some problems with my left side, and that's - - I told him I had the appointment to have the left side - - I mean, I was going to go to another doctor to get the second opinion, and I would have it checked out. . . . Everybody kept on working. And I was wearing wrist splints and doing things to try to minimize - - precautionary things. . . . We talked in a sales meeting in (city) on January 20th, I believe of 1999, was our office - - was the actual meeting, and Mr. [E] brought it up again. I was still pending seeing Dr. [G] for the left side. And we talked about it, and I just mentioned that I thought that it was caused by, you know, the use of the ladder and the excessive use of the phone and just the job-related issues."

Dr. D testified that the claimant called him in \_\_\_\_\_ because his right shoulder was hurting along with both of his hands. Dr. D testified:

When I saw him on June of '99 is when I had asked him, well, how long have you been - - when did you report this? Have you had any injury? Have you had a history? He [the claimant] said, well, December of '98 is when I really started having pronounced symptoms enough to seek an EMG study. And I said, well, assuming this what the employer had is December of '98, you know, that's what I put."

In evidence is a memorandum dated April 11, 2000, from Mr. E in which he recites that the claimant told him that he [the claimant] was having problems with his hands and arms in 1998 and that he told the claimant to go to the doctor and tell them what he could and could not do. Mr. E wrote that the claimant worked with his doctor to work out his problems with therapy and continued to work and told them in mid-1999 that it wasn't working and he would have to try another approach. A note to the memorandum reflects that "in 1998 we did not know if work related or not, we waited for doctor's report. . . . I sent a letter to [the claimant] in \_\_\_\_\_ (\_\_\_\_\_) to stop work til path forward was established, I believe this is when workers' comp was officially started."

The claimant admitted that he sought medical treatment on June 2, 1998, because he slipped on a curb, fell, and sustained an injury to his foot. The claimant subsequently testified that when he slipped and fell on the curb he also landed on his right side and had to brace himself with his right hand. The claimant admitted that after he fell he began having shoulder and right neck pain.

The hearing officer concluded that the dates of injury were \_\_\_\_\_, for the right CTS and right shoulder and \_\_\_\_\_, for the left CTS and that the carrier was relieved of liability for the claimed injuries because the claimant did not report the right CTS and right shoulder injury to his employer until November 30, 1998, and that he did not report the left CTS to the employer until June 9, 1999, and did not have good cause for his failure to do so.

The hearing officer made a finding that on \_\_\_\_\_, the claimant fell injuring his right shoulder while on the employer's job site. This finding was not appealed and is final. However, the record does not support \_\_\_\_\_, as the date of injury for the right CTS and the hearing officer made no finding that the CTS resulted from the claimant falling in \_\_\_\_\_. To the contrary, the hearing officer entered Finding of Fact No. 6 as follows:

[t]he Claimant began noticing pain in his right side in \_\_\_\_\_, which caused him to limit the use of his right upper extremity when performing employment duties for the Employer; the medical evidence presented shows or otherwise establishes by a preponderance that the Claimant's right [CTS] was caused by or the result of the repetitive nature of his employment duties.

This finding was not appealed and is final.

The date of injury for an occupational disease is defined as the date whenever an employee's symptoms manifest themselves to a degree or for a duration that would put a reasonable person on notice that he or she suffers from some injury and he or she know, or in the exercise of reasonable diligence should have known, that the injury is likely work-related. Safford V. CIGNA Ins. Co. of Tex., 983 S.W.2d 317 (Tex. App. - Fort Worth 1998). It is not necessarily the date of a concrete diagnosis. Texas Workers' Compensation Commission Appeal No. 980957, decided June 25, 1998. We reverse the hearing officer's finding that on \_\_\_\_\_, a reasonable person in the same situation as the claimant would have attributed the pain in his right side as being caused by or the result of his performance of his employment duties for the employer as this finding is against the great weight and preponderance of the evidence. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986). We render a decision that on \_\_\_\_\_, the claimant knew or should have known that his right CTS may be related to his employment. We find the evidence sufficient to support the hearing officer's finding that the claimant reported the right CTS to the employer on November 30, 1998, and affirm this portion of the decision and order. Cain. id.

The hearing officer made the following findings as to the left CTS:

12. On or about \_\_\_\_\_, the Claimant began noticing pain in his left upper extremity while performing his assigned employment duties for the Employer; the medical evidence presented shows or otherwise establishes by a preponderance that the claimant's left [CTS] was

caused by or the result of the repetitive nature of his employment duties.

13. A reasonable person in the same situation as the Claimant would have attributed the pain in his left upper extremity as being caused by or the result of his performance of his assigned employment duties for the Employer.

Finding of Fact No. 12 was not appealed as is final by operation of law. We infer from Findings of Fact Nos. 12 and 13 that the hearing officer found that the claimant knew or should have known on \_\_\_\_\_, that his left CTS injury may have been related to his employment. We find the evidence sufficient to support this finding and affirm. Cain. *Id.*

The hearing officer wrote that the claimant could not have reported his left upper extremity problems in the conversation with Mr. E in November 1998 because these problems had not been diagnosed. The claimant had the burden to prove that he timely reported his injury to his employer. Travelers Insurance Company v. Miller, 390 S.W. 2d 284 (Tex. Civ. App. - El Paso 1965, no writ). Texas Workers' Compensation Commission Appeal No. 94406, decided May 24, 1994. The hearing officer found that the claimant reported the left CTS on June 9, 1999. We find this date to be unsupported by the evidence as we have been unable to find anywhere in the record that the claimant reported his left upper extremities to any supervisor or manager on or about this date. We reverse the finding that the claimant reported his left CTS to the employer on June 9, 1999, as against the great weight and preponderance of the evidence. Cain. *Id.* We render a decision that the claimant reported his left CTS in December 1998 as testified to by the claimant and supported by the letter from Mr. E. There is no evidence to controvert the claimant's testimony that he made the report after December 1998.

Consequently, we affirm the finding that the claimant did not timely report his right shoulder injury to the employer and we also affirm the findings that the claimant reported his right CTS injury to the employer on November 30, 1998, and that the date of injury for the left CTS injury was \_\_\_\_\_. We reverse the determinations regarding the date of injury for the right CTS injury and the date of reporting to the employer for the left CTS injury and render a decision that the claimant's date of injury for the right CTS was \_\_\_\_\_, and that the claimant reported a left CTS injury in December 1998. The carrier is not relieved of liability for the bilateral CTS injuries because the claimant timely notified the employer within 30 days of the date of these injuries. The claimant sustained

a compensable bilateral CTS injury and is entitled to workers' compensation benefits in accordance with this decision.

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Kathleen C. Decker  
Appeals Judge

CONCUR:

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Thomas A. Knapp  
Appeals Judge

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Judy L. Stephens  
Appeals Judge