APPEAL NO. 002701

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 October 31, 2000. The hearing officer determined that: (1) appellant/cross-respondent (claimant) sustained a repetitive trauma injury to her bilateral wrists, bilateral shoulder, and cervical spine; (2) the date of injury is _____; (3) claimant did not timely report the injury or timely file a claim; (4) the second Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) filed by respondent/cross-appellant (self-insured) was based on newly discovered evidence; and (5) claimant did not have disability. Claimant appealed the adverse determinations regarding date of injury, disability, timely notice, and timely filing of a claim, all on sufficiency grounds. The file does not contain a response from self-insured. Self-insured filed a cross-appeal challenging the determination that claimant sustained a repetitive trauma injury. The file does not contain a response from claimant.

DECISION

We affirm in part and reverse and render in part.

Claimant contends the hearing officer erred in determining that her date of injury is _____. She contends that the earliest she knew or should have known that her injury may be work-related is _____. She also contends that, because the hearing officer found an incorrect date of injury, he also erred in determining that she did not timely report her injury and did not timely file a claim. It appears that the hearing officer found that claimant's date of injury is _____, based on a medical record from Dr. MC of that date. However, in that record, Dr. MC did not state that claimant had a work-related injury. He noted: (1) claimant's positive rheumatic factor; (2) claimant's mandibular pain; and (3) positive Tinel's signs at both wrists and generalized edema in the hands. Under "impression," Dr. MC stated:

> 1. Aching of the upper extremities and temporal mandibular joint with patient having strongly positive ANA[1] with a speckled pattern. I suspect that she has one of the variants of scleroderma.[2] I would not be surprised to see a positive anti-[illegible] antibody or anti-[illegible, but appears to be "RN" or "RNP"] anti-body to be present [sic].
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> 2. Intermittent carpal tunnel, symptoms which are predominant in the morning and which have been more limited to her.

Dr. MC also said:

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[1]By ANA, it appears that the doctor meant "anti-nuclear antibodies."

[2]Scleroderma is a thickening of the tissues.

> [Claimant] has continued to work for [employer] and she works as a seamstress. She has been carrying out her work responsibilities, although with increasing difficulty. She states that the ten hours a day are extremely demanding for her and that she feels much better on the days when she is not working.

Dr. MC said claimant should start on an anti-inflammatory program, that he would obtain a Lupus profile, and that he has asked claimant to stop working for two weeks. Dr. MC never said that claimant's condition with her jaw and upper extremities was work-related and he did not say that he discussed any such possibility with claimant. Claimant did not testify that she suspected, back in 1998, that her aching and other problems were work-related. Claimant said she thought she had arthritis. From claimant's medical records over the years, it appears that her doctors were attempting to diagnose her problems and that they suspected Sjogren's syndrome, lupus, arthritis, scleroderma, and mumps. A work-related injury was not mentioned. Given claimant's preexisting condition, the fact that claimant's work was difficult for her to do with her condition is not evidence that claimant knew or should have known that her condition was work-related. The fact that claimant had pain in her jaw as well as her upper extremities indicates that, if anything, claimant would not have related her condition to her work with her hands. After considering the evidence in this case, we reverse the determination that the date of injury was _____, because that determination is so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust.

Claimant said she was working with her hands sewing and lifting garments on April 18, 2000, when she experienced extreme pain that was more severe than she had felt previously. She said she decided to go to the doctor because she was not sure it was her arthritis that was causing the pain and that her doctor told her that it was carpal tunnel syndrome. Claimant said she believes her current problems are work-related because the pain is more severe. Although date of injury is a fact question, in this case we need not remand and we render a determination that claimant's date of injury is _____.

The hearing officer determined that claimant reported her injury on April 26, 2000. We have rendered a decision that claimant's date of injury is _____; we also reverse the hearing officer's determination that claimant did not timely report her injury and render a decision that claimant timely reported her injury within 30 days. Similarly, we reverse the determination that claimant did not timely file a claim for compensation within one year. The hearing officer determined that claimant filed a claim on April 27, 2000, which is within one year of _____. We render a decision that claimant timely filed a claim within one year of _____.

Claimant contends the hearing officer erred in determining that she did not have disability. The hearing officer determined that, "the workplace injury did cause claimant to be unable to obtain and retain employment at wages equivalent to her preinjury wages from April 26, 2000, to the date of the hearing." The hearing officer determined that claimant did not have disability because her claim is not compensable. However, because

we have reversed the timely notice and timely claim determinations, we also reverse the determination that claimant's claim is not compensable and we render that claimant's injury is compensable and that she had disability from April 27, 2000, to the date of the hearing.

Claimant contends the hearing officer erred in determining that self-insured's second TWCC-21, filed on August 16, 2000, was based on newly discovered evidence that could not have been discovered at an earlier date. Self-insured had asserted that, when it filed its first TWCC-21 on May 3, 2000, which was the seventh day after it received notice of the claimed injury, claimant was then claiming a specific injury. Self-insured filed this TWCC-21 within seven days and was limited to the defenses stated in the first TWCC-21 and could raise new defenses in another TWCC-21 based on "newly discovered evidence" only. Generally, when a carrier determines to initiate payment of benefits, it has a full 60 days to investigate any possible defenses. However, if the carrier disputes the claim within the first seven days after written notice of injury, the carrier is bound to the defenses set out in its initial TWCC-21. Sections 409.021 and 409.022; Texas Workers' Compensation Commission Appeal No. 931131, decided January 26, 1994. The hearing officer was, therefore, faced with analyzing whether the new TWCC-21 was based on newly discovered evidence.

Self-insured contended that, at a benefit review conference (BRC) in July 2000, it discovered for the first time that claimant was claiming a repetitive trauma injury. Self-insured asserted that it then investigated and determined for the first time that it had a defense based on failure to report an injury within 30 days. Self-insured contended that, because claimant knew or should have known in March 1998 that her condition may be work-related, claimant did not timely report her injury when she reported it in April 2000. However, self-insured has not offered any evidence, "newly discovered" or otherwise, that claimant knew or should have known that her condition was work-related back in March 1998. Even if self-insured did find out, after it filed its first TWCC-21, that claimant decided to pursue her claim as a repetitive trauma claim, self-insured would still have to have "newly discovered" *evidence that claimant also knew or should have known at an earlier time* of the work-relatedness of her condition, and that she did not timely report it. The fact that claimant was claiming a repetitive trauma injury, and that claimant had been experiencing *symptoms* over a period of time, considered alone, does not constitute evidence of an earlier date of injury or that she did not timely report her injury.

The hearing officer determined that "[t]he newly discovered evidence is Claimant's assertion at [the BRC] on [July 11, 2000], that her injury was an occupational disease rather than a specific injury and that she began experiencing problems with her upper extremities about three years ago. This newly discovered evidence could not reasonably have been discovered at an earlier date." When a carrier determines to initiate payment of benefits, it has a full 60 days to investigate any possible defenses; but if the carrier disputes the claim within the first seven days after written notice of injury, the carrier is bound to the defenses set out in its initial TWCC-21. Sections 409.021 and 409.022; Texas Workers' Compensation Commission Appeal No. 931131, *supra*. The carrier may

raise new defenses in a TWCC-21, but only if based on "newly discovered evidence," as indicated in Section 409.022. *See* Appeal No. 931131. The hearing officer was therefore faced with analyzing whether the record contained any such "newly discovered" evidence. After reviewing the record, we conclude that the hearing officer's determination that self-insured's second TWCC-21 was based on newly discovered evidence is 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). We reverse that determination and render a determination that self-insured was limited to the defenses stated in its first TWCC-21.

Self-insured contends the hearing officer erred in determining that claimant sustained a repetitive trauma injury to her bilateral wrists, bilateral shoulder, and cervical spine. There is evidence in the record, including the August 17, 2000, report from Dr. D, that supports the hearing officer's determination. We have reviewed the evidence and we conclude that this determination is not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust.

We affirm that part of the hearing officer's decision that determines that claimant sustained a repetitive trauma injury to her bilateral wrists, bilateral shoulder, and cervical spine. We reverse the determination that claimant did not timely report her injury and render that claimant timely reported her injury. We reverse the determination that claimant did not timely file a claim and render that claimant timely filed her claim for compensation. We reverse the determination that claimant's injury is not compensable and that she did not have disability. We render a decision that claimant's injury is compensable and that she had disability from April 26, 2000, to the date of the hearing. We reverse the determination that self-insured's second TWCC-21 was based on newly discovered evidence and we render a decision that self-insured was limited to the defenses stated in its first TWCC-21.

Judy L. Stephens
Appeals Judge

CONCUR:

Kenneth A. Huchton
Appeals Judge

Susan M. Kelley
Appeals Judge