APPEAL NOS. 002800
AND 002810

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A consolidated contested case hearing (CCH) was held on November 9, 2000. The issues at the CCH were as follows:

Docket No. SA-00-084815-01-CC-SA48 (Appeal No. 002800):

1. Is the compensable injury of _____, a producing cause of the current right and left elbow injury (cubital tunnel syndrome [CTS])?

2. Did the Claimant have disability resulting from the injury sustained on _____, and if so, for what period(s)?

3. Is an injury on January 10, 2000, the sole cause of the Claimant's current right and left elbow injury [CTS]?

Docket No. SA-00-035341-01-CC-SA48 (Appeal No. 002810):

1. Did the Claimant sustain a compensable injury on _____?

2. Did the Claimant have disability resulting from the injury sustained on _____, and if so, for what period(s)?

The hearing officer concluded that appellant/cross-respondent (claimant) sustained a compensable right wrist, hand, and forearm injury on _____, and not on _____; that the claimant sustained a compensable bilateral CTS injury on _____, and not on _____; that the employer at the time of the claimant's _____, bilateral CTS injury was employer 1 (based on a finding of last injurious exposure); that the carrier responsible for medical benefits for the right wrist, hand, and forearm injury is respondent/cross-appellant (carrier 1); that the carrier responsible for medical and income benefits for the _____, bilateral CTS injury is respondent (carrier 2); and that the claimant had disability as a result of the compensable _____, bilateral CTS injury from January 22 through April 30, 2000.

The claimant appeals, on sufficiency of the evidence grounds, the findings that she was last injuriously exposed to the hazards of bilateral CTS during her employment with employer 1 after she left the employment of employer 2; that her bilateral CTS arose out of and in the course and scope of her employment with employer 1; and that the period of her disability was from January 22 through April 30, 2000.

Carrier 1, who provided workers' compensation coverage for employer 2, appeals, on sufficiency of the evidence grounds, the finding that neither the claimant's employment with employer 1 nor any other agent was the sole cause of the claimant's bilateral CTS.

Carrier 1 also urges the Appeals Panel to strike as error so much of the hearing officer's decision as provides that "[t]he benefit review officer's interlocutory orders in both dockets are affirmed and superceded by the decision and order."

Carrier 1 filed a response to the claimant's appeal urging the sufficiency of the evidence to support the challenged findings and objecting to the claimant's attempting to raise an average weekly wage issue for the first time on appeal. Carrier 2 filed a response to both appeals.

DECISION

Affirmed.

We note at the outset that while the parties stipulated that both employers had workers' compensation insurance with carrier 1, they apparently differentiated between the two respective insurance-servicing companies involved and treated the case as involving separate carriers.

The claimant testified that she commenced employment with employer 1 in June 1981 as a production employee; that after a transfer to another city her work for the past several years involved the duties of an office manager which required the substantial use of a desk-top computer; and that she began experiencing symptoms in her right wrist, hand, and forearm in July 1999. She said that on October 14, 1999, she commenced additional employment, a seasonal, part-time, job with employer 2 as a customer sales representative and that this work required her use of the smaller keyboard of a laptop computer for 15 to 20 hours per week, in addition to all the keyboard work she did for employer 1. The claimant further testified that on _____, she filed an accident report with employer 1 for her right arm and sought an appointment to see Dr. G, a hand specialist, but could not get an appointment before _____; and that she was laid off by employer 1 on November 26, 1999. It was not disputed that carrier 1 accepted liability for a repetitive trauma injury to the claimant's right wrist, hand, and forearm with a date of injury of _____. The claimant stated that when she saw Dr. G on _____, she was advised that she had bilateral CTS; a finding that at least as of _____, the claimant has bilateral CTS, an occupational disease (repetitive trauma) injury, is not appealed. The claimant said, variously, that Dr. G took her off work because of her pain and that she continued to work for employer 2 until January 22, 2000, when, apparently, this seasonal job ended. She further stated that on May 1, 2000, she commenced employment as a production manager with another employer, a position which did not involve computer use, and that her wages from this job are less than her wages from employer 1 but more than her wages from employer 2. Dr. G wrote on April 24, 2000, that the claimant was unable to work using computers.

Dr. G wrote on March 1, 2000, that, in his opinion, the claimant's CTS is probably related to the computer terminal work which she did for both employer 1 and employer 2 and that he would therefore have to assume that her bilateral CTS began when she worked

for employer 1 and continued to be aggravated by her new job with employer 2. Dr. G wrote on July 24, 2000, that the claimant spent a lot of time on the computer keyboard for both employer 1 and employer 2 with her elbows flexed and that, in his opinion, this has been the major, ongoing cause of her CTS. Dr. G wrote on September 18, 2000, that it was his opinion that the claimant's symptoms were contributed to by her jobs for both employers because in both positions she used computer keyboards and that he thinks "it is impossible to try to assign all of her symptoms exclusively to one or the other of her jobs." Dr. L, who apparently examined the claimant and reviewed Dr. G's records, reported on April 4, 2000, that he feels that the claimant's new job (referring to the job with employer 2) "contributed to her problem and aggravated her condition."

The claimant contended that although her last exposure to using a computer keyboard was while continuing to work for employer 2 until January 22, 2000, such exposure was not "injurious" and, thus, did not implicate the provisions of Section 406.031(b). This section provides that "[i]f an injury is an occupational disease, the employer in whose employ the employee was last injuriously exposed to the hazards of the disease is considered to be the employer of the employee under this subtitle." The claimant further argued, apparently in the alternative, that her work for employer 1 caused her right CTS while her work for employer 2 caused her left CTS. Carrier 1 maintained that carrier 2 is liable for the bilateral CTS because the claimant's last injurious exposure occurred during her employment with employer 1 and that the sole cause of the bilateral CTS was the claimant's work for employer 1. Carrier 2 contended that at least the right CTS was caused by the work for employer 1 and that the left CTS could also be found to have originated in that employment. Concerning the disability issue, the claimant urged that she continued to have disability after April 30, 2000, because her wages from her current employer are less than the wages she received from employer 1, notwithstanding that they exceed the wages she received from employer 2.

The hearing officer, who is the sole judge of the weight and credibility of the evidence (Section 410.165(a)), states in his discussion of the evidence that he found Dr. G's opinions to be credible and probative and he lucidly explains how such evidence, together with the last injurious exposure statute, was determinative of the injury on _____, issue as well as the producing cause and sole cause issues. We are satisfied that the factual findings and legal conclusions challenged on appeal, including those addressing disability, are not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951); Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986). Further, we see no basis to disturb that portion of the hearing officer's decision which states that "[t]he Benefit Review Officer's interlocutory orders in both dockets are affirmed and superceded by this decision and order."

The decisions and orders of the hearing officer are affirmed.

Philip F. O'Neill
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Judy L. Stephens
Appeals Judge