APPEAL NO. 002841

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 November 16, 2000. The hearing officer held that the respondent (claimant) sustained a repetitive trauma injury in the course and scope of employment; that her date of injury was _____; that she timely notified her employer of her injury on March 29, 2000; and that the appellant (carrier) was limited to the defenses that it raised in its timely filed Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) and had no newly discovered evidence upon which to base a challenge that the claimant sustained carpal tunnel syndrome (CTS) in the course of performing her work activities. The hearing officer held that there was no election of remedies when the claimant filed some of her medical treatment through her regular group insurance.

The carrier has appealed, raising several arguments. It asserts that it need not have ever disputed the work-relatedness of the claimant's CTS due to the case of Continental Casualty Company v. Williamson, 971 S.W.2d 108 (Tex. App.-Tyler 1998, no pet. h.). The carrier further argues that the claimant knew or should have known that her CTS may be related to her employment at several times earlier than the date of injury found by the hearing officer. The carrier argues that CTS must be proven through expert medical evidence that it is occupational, since it is rarely so. The carrier argues that an election of remedies is made when regular health insurance covers medical treatment and that the use of health insurance equates to manifest injustice. The claimant responds that the decision should be affirmed.

DECISION

We affirm the hearing officer's decision on all appealed points.

The claimant was employed as an executive assistant to the district director of her employer, a nonprofit agency, for 15 years. Her duties involved inputting grant information and typing invoices and letters on a computer. She at first estimated that this was 80% of her day, but then conceded that this was based upon the four weeks prior to the CCH. The claimant said that she worked on a average of 15 grant files per day, typed about 15 invoices a day, and then performed other keyboard tasks, such as typing letters, on a variable basis. She said that the information involved more than numbers, which she would input from the number pad portion of the keyboard.

In 1994, she was involved in a nonwork-related automobile accident involving eight cars, and had resulting pain in her neck, shoulder, and arms. Testing at that time discovered that she had herniated discs, for which she ultimately had surgery. She was also found to have CTS, a condition about which she knew nothing. When she asked the doctor what could have caused the CTS, she said that he somewhat vaguely alluded to many causes but that nothing concrete was discussed. He urged her to concentrate on

her neck problem. The claimant said that after her neck surgery, her problems with her arms went away.

The claimant said that although she had occasional pain in her neck and shoulder, it was not until about three weeks before December 1, 1999, that she began to have numbness in her fingers. She made an appointment with her primary care doctor, who referred her to Dr. P. The claimant said that Dr. P prescribed rehabilitation for nearly nine weeks; he also began to have the claimant undergo testing. The claimant agreed that she was contacted by her regular health insurance, through whom she sought treatment, sometime during the first week in January. When asked by them if this condition was work-related, she indicated that her doctor was leaning in that direction but whether this would be done would depend upon the outcome of further testing and analysis, including an analysis of her workstation. The claimant said that on _____, her doctor first conveyed the results of this testing, which were that her CTS was work-related. He urged her to file for workers' compensation. She notified her employer on March 29, 2000, by verbal notice to a person in a supervisory capacity, and thereafter undertook to give written notice. An Employee's Notice of Injury or Occupational Disease & Claim for Compensation (TWCC-41) was also filed by the out-of-state headquarters for her employer on August 7, 2000, after she had completed certain portions of the form. When this claim was denied by the carrier, the claimant was advised by persons in her human resources office to continue to file her health care under her regular insurance. There was no evidence that the claimant sought any disability benefits that may have been provided privately by her employer. The claimant said that she did not realize that her CTS was work-related until Dr. P confirmed this on _____.

Dr. P's medical report of December 8, 1999, characterized the claimant's work as involving "mild to moderate" computer work. His reports until March 24 document treatment and not causation. However, in that report, he stated that her work-related activities had certainly caused or aggravated her CTS. In a subsequent report, Dr. P said that he first discussed the work-relatedness of claimant's condition with her on March 29, 2000, and that she was not aware it was work-related until that conversation.

A January 5, 2000, EMG report stated that the claimant had moderate to severe bilateral CTS. The claimant agreed that she has been treated for thyroid problems since 1996, but her doctor for that condition, Dr. B, wrote that the claimant's particular condition would not have resulted in CTS.

On June 23, 2000, the carrier filed a TWCC-21. It was not disputed that this was filed within 60 days after it received written notice of injury. In this TWCC-21, the carrier disputed compensation because of election of remedies, failure to report the injury within 30 days to the employer, and failure to report to the Texas Workers' Compensation Commission within one year. The carrier asserted that the claimant had the condition since 1994. There is nothing in the TWCC-21 which asserted that the claimant did not sustain CTS through her job. Several coworkers and her supervisor signed statements that the claimant had not complained about her hands or pain until recently.

DATE OF INJURY

Section 408.007 states that the date of injury for an occupational disease (which includes a repetitive trauma injury) is "the date on which the employee knew or should have known that the disease may be related to the employment." This will not, in every case, mean the date on which concrete diagnosis is rendered. 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. In this case, there is evidence that the 1994 CTS could reasonably be linked to the claimant's automobile accident; her symptoms arose at this time and were resolved by neck surgery, and she testified that no concrete discussion on cause of CTS occurred. These facts, believed by the hearing officer, refute a finding of a 1994 injury.

We have also declined to attribute medical knowledge to lay persons whose own treating physicians are in doubt about the nature of an injury or its causation. Texas Workers' Compensation Commission Appeal No. 941583, decided January 9, 1995; Bocanegra v. Aetna Life Insurance Company, 605 S.W.2d 848 (Tex. 1980). In late 1999, the claimant's doctor made his conclusion about the possible work-related nature of the CTS contingent, according to the claimant, on further testing. This was what she conveyed to her private insurer. Reasonable prudence would seem to indicate some caution in asserting a work-related CTS while this was still in some doubt and in the process of being confirmed. The hearing officer's determination of the _____, date of injury and the dependent findings of timely notice within 30 days thereof and timely filing of a claim are supported by the evidence.

CTS AS A COMPENSABLE INJURY

The carrier has put into the record several articles and excerpts which question the work-relatedness of CTS at all. Having solicited some testimony from the claimant that she was overweight, the carrier argues that this, rather than her computer work, has caused CTS. The carrier asserts that expert medical evidence should be required to prove causation of CTS. We disagree, and decline to find error on the part of the hearing officer for considering lay testimony about her job-related functions and the opinion of Dr. P. The hearing officer is the sole judge of the weight and credibility of the evidence, and we cannot agree that his determination that the claimant sustained a work-related injury is against the great weight and preponderance of the evidence. Any acceptance in this state that CTS is inherently not work-related would have to follow a fully tried case in which experts on either side were subject to cross-examination, and not merely from reading articles unilaterally selected by the carrier in support of its argument.

WAIVER AND THE WILLIAMSON CASE

The ombudsman argued at the CCH that the carrier "waived" a dispute to compensability of the CTS by not disputing it in 60 days. The carrier argues that the Williamson case removed from it the obligation to ever dispute the work-relatedness of the CTS, and argues that the Appeals Panel is not correctly applying the Williamson case.

However, the hearing officer has correctly decided this not as a waiver case involving Williamson at all, but as a case involving whether a carrier who has *timely* disputed a claim for certain enumerated reasons on a TWCC-21 may add to those defenses later on. The applicable statutory provisions are therefore Sections 409.021(d) (the reopening provision) or 409.022.

The unambiguous language of these statutes makes clear that the carrier is limited to the grounds stated in its initial dispute and may only thereafter raise defenses that are based upon newly discovered evidence. There was no evidence produced by the carrier that it became aware, only after its TWCC-21 was filed, that it had another defense available for arguing that the claimant's work-related activities were the causative factors in her CTS, as opposed to thyroid disease, age, obesity, or the sundry other causes dealt with in its articles. Nothing in the Williamson case purports to construe any statutory language other than Section 409.021(c) and the definitions of injury and compensable injury, nor does anything in that case suggest that Section 409.022 has become a nullity. Failing to act at all and thereby waiving the right to dispute compensability under Section 409.021 is a quite different situation from acting to dispute compensability for specific reasons only, and being limited by statute to those reasons.

ELECTION OF REMEDIES

The carrier raises the argument, based upon two court of appeals cases, that a manifest injustice to the carrier is somehow inherent when a claimant has medical care paid for under a group health policy. However, Smith v. Home Indemnity Company, 683 S.W.2d 559 (Tex. App.-Fort Worth 1985, no writ) must be read in the context of its procedural history and facts. The claimant in that case had received not only medical health insurance but private disability benefits, and only after these ran out was a workers' compensation claim filed. The Smith case was also an appeal from a summary judgment in which unanswered requests for admissions established essential elements of an election. The factual context and benefits drawn are similar in Texas General Indemnity Company v. Hearne, 830 S.W.2d 257 (Tex. App.-Beaumont 1992, no writ), whose ultimate outcome is unknown because it was remanded to allow evidence relating to an election to be considered by the trial court. Neither case overruled the ruling of the Supreme Court in Bocanegra, *supra*.

The situations in those cases are quite different than here, where the claimant sought treatment in 1999 for a condition previously diagnosed in connection with her nonwork-related auto accident; promptly asserted a claim for workers' compensation when the contrary was known; and then obtained needed medical care through her private insurance after the claim was denied by the carrier and when advised to do so by her employer. Unlike the claimant in the Smith case, she did not know at the time she sought medical treatment for her numbness that her condition was work-related. The carrier argued, but never submitted evidence, that a few months of private health coverage for her medical treatment for which it was ultimately liable was in some fashion "unjust." We cannot agree that the hearing officer erred in this case by rejecting imposition of an election of remedies.

We find no merit on any of the points appealed, and affirm the hearing officer's decision and order as sufficiently supported in the evidence and in the application of the law to those facts on all appealed points.

Susan M. Kelley
Appeals Judge

CONCUR:

Elaine M. Chaney
Appeals Judge

Gary L. Kilgore
Appeals Judge