APPEAL NO. 012022
FILED OCTOBER 15, 2001

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 August 1, 2001. The hearing officer resolved the disputed issues by determining that the appellant (claimant) did not sustain a compensable injury in the form of an occupational disease, more specifically bilateral carpal tunnel syndrome (CTS); that the date of the claimant's repetitive trauma injury, specifically bilateral CTS, is _____; that the claimant did not report an injury to his employer within 30 days after his date of injury, and no good cause exists for failing to do so; that the respondent (self-insured) did not waive its right to contest compensability of the claimed injury by failing to timely contest the compensability of the claimant's injury pursuant to Section 409.021; that because the claimant did not sustain a compensable injury, he did not have disability; and, the claimant is not barred from pursuing workers' compensation benefits, as he did not make an election to receive benefits under his group health insurance plan or his accident/disability insurance policy. The hearing officer's determination that the claimant is not barred from pursuing workers' compensation benefits, as he did not make an election of remedies was not appealed and has, therefore, become final pursuant to Section 410.169. The claimant has appealed all of the other above-listed determinations on sufficiency grounds and the self-insured responded, urging affirmance.

DECISION

Affirmed as to the date of injury. Reversed and rendered in part, reversed and remanded in part.

WAIVER ISSUE

Because the issue concerning whether the carrier waived the right to dispute compensability is dispositive of many of the other issues, we will discuss it first. We agree that the hearing officer erred by finding that the carrier did not waive its right to dispute compensability. In so holding, we note that it was the carrier's position that it timely disputed, not that it had newly discovered evidence allowing it to reopen the issue of compensability.

The self-insured is a small municipality for which the claimant worked. The claimant's injury is bilateral CTS. The undisputed facts show that the claimant filed a Employee's Notice of Injury or Occupational Disease and Claim for Compensation (TWCC-41) with the Texas Workers' Compensation Commission (Commission) in early December 2000; the Dispute Resolution Information System (DRIS) notes for the claim record that on December 8, 2000, the Commission created a claim file and printed an "EES-11" notice of the claim to the carrier/self-insured on that date, and mailed the notice to the self-insured on December 11, 2000.

An adjuster for an association that handled the workers' compensation insurance claims for the self-insured testified that he had not seen or received any correspondence

indicating that a claim was filed until February 27, 2001, and it was on that date that he became the adjuster for the claim. He said he was contacted on that date by an employee of the Commission asking whether the self-insured disputed the claim, and he then requested that copies of claim information be faxed to him. The adjuster testified that if a phone call had been received previously from the Commission about the claim, no note would have been made because there was not an open claim file established earlier. A Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) was filed by the self-insured, and received by the Commission on March 2, 2001.

In his Statement of the Evidence, the hearing officer recites this as his basis for holding that there was no waiver by the carrier:

> The claimant relied solely on an automated computer entry on December 11, 2000, that the EES-11 notice letter was printed and mailed on December 11, 2000. Of course, the computer only assumed that the letters would be mailed. The normal Commission procedure would be to mail out the EES-11 letter to a carrier and put a copy in the carrier's representative's box at the Commission. The claimant did not say anything about receiving an EE-41 letter. The preponderance of the evidence, with the conclusions to be drawn therefrom, showed that the Commission did not actually send mail [SIC] the letter nor put it in the box, as there is no letter in existence.

This reasoning, however, runs afoul of the presumption set out in 28 TEX. W.C. Comm'n, ADMIN. CODE § 102.5(d) (Rule 102.5(d), which states that communications from the Commission which require action by a certain date shall be "deemed" to have been received five days after mailed, unless the great weight of evidence indicates otherwise. As a general rule, public officials are presumed to have performed their duties. Sanchez v. Texas Industries, Inc., 485 S.W.2d 385 (Tex. Civ. App.-Waco 1972, writ ref'd, n.r.e.). Consequently, the claimant's reliance "solely" on the DRIS records of the Commission which reflected mailing of proper notice of the claim to the carrier was well-placed, and it was error for the hearing officer to conclude, in the absence of a "great weight" of evidence (which we do not see reflected in the testimony of the adjuster for the association handling coverage), that the Commission did not actually mail notification to the self-insured as was recorded in its records. The notice of the claimant's claim is deemed to have been received by the self-insured on December 16, 2000; the last day for filing a TWCC-21 was February 14, 2001. As we held in a similar reversal in Texas Workers' Compensation Commission Appeal No. 970147, decided February 21, 1997, the hearing officer is not free to apply a preponderance standard where the evidence is insufficient to rebut the presumption of mailing by the Commission. We accordingly reverse findings of fact or conclusions of law that a timely dispute was filed and render a new decision that the self-insured was deemed to have received notice from the Commission of the claimant's claimed injury not later than December 16, 2000; that the self-insured did not contest compensability within 60 days as required by Section 409.021; that the self-insured has waived its right to contest the compensability of the claimed injury; and, that the claimant sustained a compensable bilateral CTS injury on _____.

Because this matter is being remanded for another reason, the hearing officer should issue a new decision that incorporates findings of fact and conclusions of law consistent with this decision.

DATE OF INJURY AND NOTICE TO EMPLOYER

The hearing officer did not err in determining that the date of the claimant's repetitive trauma injury in the form of bilateral CTS is _____. Although different inferences could be drawn from the evidence, there is some evidence in the form of a medical report indicating that claimant's doctor at that time told him he had CTS and that it could be work-related. We affirm the date of injury.

However, any finding that the claimant failed to give timely notice of injury to his employer (the self-insured) relates to a waived defense and the carrier may not be discharged from liability even if (as here) the evidence supports that timely notice to the employer was not given; the waiver "trumps" the notice defense. *See* Texas Workers' Compensation Commission Appeal No. 94224, decided April 1, 1994, and Texas Workers' Compensation Commission Appeal No. 941387, decided December 2, 1994. Therefore, although we agree that the evidence was sufficient to uphold a finding of fact that timely notice was not given, we must reverse the conclusion of law that holds that the claimant did not have a compensable injury, which was based on the finding of untimely notice to the employer.

DISABILITY

The hearing officer made no findings of fact as to whether the claimant was unable to obtain and retain employment equivalent to his preinjury average weekly wage because of his injury. His conclusion adverse to the claimant on disability is premised solely on the determination that the claimant's injury was not compensable, which we have here reversed. While there was evidence that the claimant left work in June 2000 due to his heart condition, an off-work slip taken to the employer in June 2000 also noted that he could not work due to thoracic outlet syndrome. A note from a neurologist dated June 16, 2000, stated that the claimant was disabled due to his heart condition and CTS. The claimant applied for disability through his employer/self-insured on July 12, 2000, stating that he had a heart condition but also referencing an "attached letter" which is not attached to the exhibit. Accordingly, the remand for the purpose of making findings of fact which assume that the CTS is a compensable injury.

REGISTERED AGENT INFORMATION

This case is remanded for the purpose of compliance with House Bill 2600 amending Section 410.164, effective June 17, 2001. Section 410.164 was amended by adding subsection (c), which provides as follows:

(C) At each [CCH], as applicable, the insurance carrier shall file with the

> hearing officer and shall deliver to the claimant a single document stating the true corporate name of the insurance carrier and the name and address of the insurance carrier's registered agent for service of process. The document is part of the record of the [CCH].

The address must be a street address for service of process, not a post office box. Because the address given in this matter was a post office box, this decision is also remanded for clarification of the street address and proper delivery to the claimant.

The hearing officer's decision and order is affirmed in part, reversed and rendered in part, and reversed and remanded in part.

Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Commission's Division of Hearings, pursuant to Section 410.202 (amended June 17, 2001). *See* Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

Susan M. Kelley
Appeals Judge

CONCUR:

Judy L. S. Barnes
Appeals Judge

Robert E. Lang
Appeals Panel
Manager/Judge