APPEAL NO. 012844
FILED JANUARY 14, 2002

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 25, 2001. The hearing officer held that the respondent (claimant) sustained a repetitive trauma injury, that the date of injury was _____, when she actually knew that she had a work-related injury (as opposed to pain), and that she gave timely notice of this injury to her employer. The appellant (self-insured) has appealed, pointing out that the hearing officer has applied a subjective standard of when the claimant was diagnosed with a condition over an objective "reasonable person" standard, and that the date of injury is _____, when the claimant agrees she had a shoulder pain she felt was related to her employment, or in _____, when she sought medical treatment for her shoulder pain. The self-insured points out that her notice was untimely under either date of injury and that she lacked good cause. The self-insured finally points out that there is a dearth of evidence of any repetitious or traumatic activities that would remove the claimant's condition from being an ordinary disease of life.

DECISION

We reverse and render a decision that the claimant did not sustain a compensable repetitive trauma injury.

The claimant worked as a sales associate at a retailer, the self insured. She had initially started working in the food preparation area but transferred in September 2000 to clothing. The claimant also worked a second job at another retailer (against whom she has not made a claim) and, in a statement to the adjuster, stated that her duties were virtually the same. The only differences she identified to the adjuster was that her job for the self insured was busier and involved transferring clothing items to sales racks on the floor. She agreed that her work for the other retailer would also entail hanging up clothing that had been tried on and bending down to pick up clothing that had dropped to the floor. Her work hours for the employer were 36-38 hours a week, and eight to 10 hours a week for the concurrent employer.

The claimant's description of the rack activities takes up less than two pages of transcript. She said that twice a week, sometimes three times, a truck of stock would come in and others would load the clothing items onto racks. These racks are not described, but they apparently were propelled by pushing. The claimant said that she and sometimes another associate would push the racks to particular garment racks on

the sales floor where the items on hangars would be transferred. The claimant said that the racks "could" be heavy when full.

The claimant said that her right shoulder began to bother her in October, and that sometime during the first week of _____, she mentioned this to her mother at a family gathering. Her mother had had an injury to her own shoulder and said that she had pain also. The claimant testified many times that she believed at this time that her work for the employer was causing the shoulder pain, in part because the "grapevine" at work told of a predecessor in her position who had the same problem. When asked to describe her pain at that time and continuing to the CCH, the claimant said her arm did not hurt her at work, even when she was pulling the racks; rather, she would wake up with stiffness and pain, or would experience pain at night. The claimant said that she would take an over-the-counter pain reliever in the morning and it would help her get through work.

Although the claimant maintained she did not realize she had an "injury," she agreed that when she went to her family doctor in _____ for another condition, she also brought up her shoulder pain and at that time was given prescription pain medication. At that point in time, the claimant said the pain was so bad that she could not lift her arm to comb her hair. Although the hearing officer has stated that the claimant did not discuss her work activities with her family doctor, the claimant testified that she could not recall whether she discussed work or not.

On _____, the claimant called a chiropractor for her husband and decided to make an appointment with the doctor for herself. She said she discussed her activities with this doctor and was told that her pain was work-related and she had an injury (a strain). The chiropractor helped her complete an Employee's Notice of Injury or Occupational Disease and Claim for Compensation (TWCC-41) which stated that the date of injury was _____. In a letter to the self-insured after the claim was controverted, the chiropractor cited the basis for this date of injury as the date that a reasonable person knew, or should have known, that she had an injury related to employment. The claimant reported her injury to her employer on May 1 or 2, after being examined by the chiropractor. An amended TWCC-41 was filed changing the date of injury to _____, after the self-insured denied the claim in part for untimely notice.

Concerning her back, the claimant just generally stated that her back began to bother her several months after her shoulder. In a statement given to the adjuster on May 4, 2001, the claimant said her back began to hurt a month and a half earlier, when she bent down to pick up a laundry basket.

MRIs of the shoulder and lumbar spine were conducted in July 2001. The claimant was found to have a small herniated disc at L5-S1 with associated dessication. However, the MRI report in the record is for the left shoulder (it shows some fluid in the joint). She was diagnosed by her doctor with right shoulder sprain and lumbar sprain with possible herniated disc.

The reports of the chiropractor offer the following theories of repetitive trauma injury, based upon the history given by the claimant: heavy manual work which includes unloading bundles of clothes; turning and twisting to put clothing on racks (back); and/or hanging “heavy bundles” of clothing on “overhead” racks. The chiropractor stated her understanding that the claimant did this “several times” a week. By contrast, the claimant stated her belief that it was pulling on heavy racks that caused her soreness. The only comment that the chiropractor makes about the claimant’s back injury is that “the lifting and twisting motion of lifting and hanging clothing on racks is classic to low

The claimant said she did not know that she had “an injury” before she saw the chiropractor, because she assumed an injury resulted from an accident and she could recall no specific incident. She said that she early on assumed she had muscle soreness from changing jobs that would go away. The claimant concluded that it was her work causing her pain because she did not have shoulder or back problems prior to her transfer to the clothing department and she did nothing at home to cause this. The claimant said she had not lost time from work although she was put on restricted duty.

REPETITIVE TRAUMA INJURY

The hearing officer’s determination that the claimant sustained a burden of proving repetitive trauma injury to either her shoulder or back is against the great weight and preponderance of the evidence.

Section 401.011(36) defines repetitive trauma injury as "damage or harm to the physical structure of the body occurring as the result of repetitious, physically traumatic activities that occur over time and arise out of and in the course and scope of employment." To recover for an occupational disease of this type, one must not only prove that repetitious, physically traumatic activities occurred on the job, but also must prove that a causal link existed between these activities on the job and one's incapacity; that is, the disease must be inherent in that type of employment as compared with employment generally. Davis v. Employer's Insurance of Wausau, 694 S.W.2d 105 (Tex. App.-Houston [14th Dist.] 1985, writ ref'd n.r.e.). We have stated that, at a minimum, proof of a repetitive trauma injury should consist of some presentation of the duration, frequency, and nature of activities alleged to be traumatic. Texas Workers' Compensation Commission Appeal No. 960929, decided June 28, 1996. This is

especially important where, as here, the claimant works concurrently for two different employers, performing duties that she states are in many ways identical.

While the doctor recites briefly the purported mechanisms of injury, opinion testimony does not establish any material fact as a matter of law and is not binding on the trier of fact. American Motorists Insurance Co. v. Volentine, 867 S.W.2d 170 (Tex. App.- Beaumont 1993, no writ). Expert evidence based upon inaccurate underlying facts cannot support a verdict. *See* Burroughs Wellcome Company v. Crye, 907 S.W.2d 497 (Tex. 1995); Texas Workers' Compensation Commission Appeal No. 990591, decided April 30, 1999. To the extent there is testimony from the claimant about her activities, it is clear that the need to lift "bundles" of clothing frequently was not supported by her testimony, in which she characterized the unloading of racks as a twice-a-week occurrence, occasionally three times a week, and asserted that she believed her injury came from pulling racks (not dealt with in the treating doctor's opinions).

There was no testimony detailing even minimally the actions that she considered caused injury to her back and little for her shoulder. There was no evidence that she was required to "twist" in order to hang clothing. By her own admission, her back did not feel sore until sometime into 2001. Her recorded statement indicated that her pain began when she lifted a laundry basket, and that she also would bend down at her concurrent employer to retrieve and hang clothing. The MRI indicates dessication of the involved disc. The very brief one line comment that the chiropractor makes about her back is that lifting and twisting is "classic" for low back injuries. There was no testimony from the claimant that she twisted, and she also stated that she hung clothing for the concurrent employer. There is no indication that her chiropractor was aware of an incident with the laundry basket. We reverse and render a decision that the claimant failed to prove repetitive trauma injury as opposed to an ordinary disease of life.

DATE OF INJURY AND NOTICE TO EMPLOYER

We agree that the hearing officer erred in applying a subjective standard of when the claimant actually knew she had a diagnosed "injury" as opposed to the reasonable person standard of when a reasonably prudent person would have recognized the seriousness, the nature, and the work-relatedness of the condition. While subjective knowledge of an injury may be considered in evaluating good cause for failure to timely report an injury, it does not operate to shift the deadline. See Texas Workers' Compensation Commission Appeal No. 000637, decided May 12, 2000.

The evidence suggests at least two dates prior to _____ that this realization occurred: early _____, when the claimant discussed her condition with her mother (at a time she agrees that she knew a former employee in her position had

"an injury"), or in _____, when the claimant was treated for her shoulder pain by her family doctor. The claimant was unequivocal in her testimony that she knew her pain to be related to her work in _____. While she stated that she assumed it was muscle pain that would go away, it worsened to the degree where she had trouble lifting her arm in the morning in _____. The hearing officer in this case bifurcated the awareness of pain from awareness of an injury, stating that "pain itself is not an injury." However, a failure to ask the cause of pain over a long period of time has been held not to support good cause for lack of knowledge of the work-relatedness of an injury, applying a standard of ordinary prudence. *See* Texas Employers Insurance Ass'n v. Leathers, 395 S.W.2d 601 (Tex. 1965). Thus, the issue before the hearing officer cannot simply be dispensed with the statement that pain alone is not an injury.

Although there is no requirement that a worker know more about an injury than the doctor, neither is there a requirement that only a diagnosis of the condition confers the requisite knowledge. Texas Workers' Compensation Commission Appeal No. 91097, decided January 16, 1992; Texas Workers' Compensation Commission Appeal No. 950411, decided May 2, 1995. We have noted that a specific diagnosis is not required to establish damage or harm to the physical structure of the body. Texas Workers' Compensation Commission Appeal No. 992713, decided January 20, 2000. The date of injury is when the injured employee, as a reasonable person, could have been expected to understand the nature, seriousness, and work-related nature of the disease. Commercial Insurance Co. of Newark, N.J. v. Smith, 596 S.W.2d 661 (Tex. Civ. App.-Fort Worth 1980, writ ref'd n.r.e.).

The evidence does not support a _____, date of injury; at the latest, the date when a reasonable person knew or should have known that she had an injury that may be related to employment would be sometime in _____, when she was treated by her family doctor for shoulder pain and could not raise her arm. The claimant was, of course, unequivocal that she knew her pain was work-related in _____. The claimant did not assert good cause and in light of the extent of her problems in _____, and treatment therefore, a finding of trivialization is not supported.

For the reason stated above, we reverse and render the decision that the claimant did not prove that she sustained a repetitive trauma injury to her shoulder and back due to her employment by the employer, and did not give timely notice of her injury to her employer and was without good cause for the failure to do so.

The true corporate name of the insurance carrier is **SELF-INSURED** and the name and address of its registered agent for service of process is

C.T. CORPORATION SYSTEM
350 NORTH ST. PAUL STREET
DALLAS, TEXAS 75201.

_____
Susan M. Kelley
Appeals Judge

CONCUR:

_____
Elaine M. Chaney
Appeals Judge

_____
Michael B. McShane
Appeals Judge