APPEAL NO. 030020
FILED FEBRUARY 20, 2003

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 December 2, 2002. The hearing officer determined that the respondent (claimant herein) suffered a compensable injury in the form of work-induced hearing loss, an occupational disease; that the date of the injury was _____; that the appellant (carrier herein) is not relieved of liability due to the claimant's failure to timely report the injury because the employer had actual knowledge of the work-related injury on _____; that the carrier is not relieved of liability for the claimant's failure to file a claim within one year of the date of injury as the time for filing a claim was tolled due to the employer's failure to file a report of injury; and that the carrier is the proper carrier for the claimant's injury of _____. The carrier appeals each of these determinations. The claimant responds, requesting that we affirm the decision of the hearing officer.

DECISION

Finding sufficient evidence to support the decision of the hearing officer and no reversible error in the record, we affirm the decision and order of the hearing officer.

The claimant worked for the employer in a manufacturing plant for 33 years, retiring at the end of May 2002. In the spring of 2001 the claimant asserted that he has sustained work-related hearing loss due to noise levels in the plant, alleging a date of injury of (alleged date of injury). (Carrier 2), the workers' compensation insurance carrier who had coverage for employer for this date disputed the injury and the claim proceeded to dispute resolution. The hearing officer in the present case held a CCH on this dispute on October 15, 2001, to resolve the issue of whether the claimant had sustained a compensable repetitive trauma injury with a date of (alleged date of injury). The hearing officer resolved this dispute by finding no compensable injury with this date of injury, although he also made findings that the claimant had suffered a hearing loss as result of long-term, protracted exposure to high levels of noise in the workplace.

In Texas Workers' Compensation Commission Appeal No. 012707, decided December 20, 2001, the Appeals Panel reversed and remanded the case to the hearing officer, holding that the hearing officer was required to find a date of injury based upon the evidence before him. The rationale of the Appeals Panel is set out in our decision in that case. On remand, the hearing officer found that the claimant sustained a compensable repetitive trauma injury in the form of work-induced hearing loss, with a date of injury of _____. In Texas Workers' Compensation Commission Appeal No. 020586, decided May 6, 2002, the Appeals Panel affirmed the decision of the hearing officer on remand.

In the present case, the carrier, who had workers' compensation for the coverage on _____, disputes that the claimant suffered a compensable injury; that the date of that injury is _____; that it is not relieved of liability because the claimant failed to timely report his injury; that it is not relieved of liability because the claimant did not timely file a report of injury; and that it is the proper carrier because the claimant's last injurious exposure to noise at work took place when carrier 2 was the employer's workers' compensation carrier.

INJURY

The carrier argues that the claimant did not present sufficient evidence to establish that he suffered a compensable injury in the form of hearing loss. We have held that the question of whether an injury occurred is a question of fact. Texas Workers' Compensation Commission Appeal No. 93854, decided November 9, 1993. Section 410.165(a) provides that the contested case hearing officer, as finder of fact, is the sole judge of the relevance and materiality of the evidence as well as of the weight and credibility that is to be given the evidence. It was for the hearing officer, as trier of fact, to resolve the inconsistencies and conflicts in the evidence. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701, 702 (Tex. Civ. App.-Amarillo 1974, no writ). When reviewing a hearing officer's decision for factual sufficiency of the evidence, we should reverse such decision only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986). Applying this standard, we find that there was certainly sufficient evidence to support the hearing officer's finding of injury in the present case.

DATE OF INJURY

The date of injury of a repetitive trauma injury is the date the claimant knew or should have known the trauma was job related. Section 408.007. The date of injury is a factual matter. While there was conflicting evidence on this issue, we find sufficient evidence to support the hearing officer's finding of _____, as the date of injury.

TIMELY REPORT OF INJURY

The 1989 Act generally requires that an injured employee or person acting on the employee's behalf notify the employer of the injury not later than 30 days after the injury occurred. Section 409.001. The 1989 Act provides that a determination by the Texas Workers' Compensation Commission (Commission) that actual knowledge of the injury by the employer can relieve the claimant of the requirement to report the injury. Section 409.002. Also, the actual knowledge exception requires actual knowledge of an injury. Fairchild v. Insurance Company of North America, 610 S.W.2d 217, 220 (Tex. Civ. App.-Houston [1st Dist.] 1980, no writ). The burden is on the claimant to prove actual knowledge. Miller v. Texas Employers' Insurance Association, 488 S.W.2d 489 (Tex. Civ. App.-Beaumont 1972, writ ref'd n.r.e.).

In the present case, the hearing officer found that the employer had actual knowledge of the claimant's injury. The hearing officer based this determination on the fact that the employer had the results of hearing tests that it conducted on the claimant—the same test upon which the hearing officer based his determination that the claimant should have known that he had suffered a job-related injury. We find this evidence to support the hearing officer's finding of actual notice of the claimant's injury by the employer.

TIMELY FILING OF CLAIM

Section 409.003 requires that a claimant file a claim for compensation with the Commission with not later than one year after the date of injury. Pursuant to Section 409.004, failure to do will relieve the carrier of liability. However, Section 409.008 provides that time for the claimant to file his claim is tolled when having been given notice or having knowledge of the injury, the employer or carrier fails to file a Employer's First Report of injury or Illness (TWCC-1). In the present case it is undisputed that the claimant filed his claim with the Commission more than one year after the date of injury. The resolution of the timely filing issue revolves around whether the time for filing was tolled. This hinges on when the employer had actual knowledge of the injury. Having affirmed the hearing officer's determination that the employer had actual knowledge of the claimant's injury, we find that there was sufficient evidence to support the determination of the hearing officer that the time for the claimant to file his claim of injury was tolled and that the carrier is not relieved of liability on the basis of an untimely filing of claim.

PROPER CARRIER

The carrier contends that it is not the proper carrier, applying the doctrine of last injurious exposure. The carrier cites the Appeals Panel decision in Texas Workers' Compensation Commission Appeal No. 931180, decided February 14, 1994, in support of this contention. We disagree. In Texas Workers' Compensation Commission Appeal No. 960238, decided March 21, 1996, we distinguished and limited the decision in Appeal No. 931180, applying Hernandez v. Travelers Indemnity Company of Rhode Island, 855 S.W.2d 786 (Tex. App.-El Paso 1993, no writ). Under the holding of these cases, the doctrine of last injurious exposure does not apply under the facts of the present case.

We affirm the decision and order of the hearing officer.

The true corporate name of the insurance carrier is **TRAVELERS INDEMNITY COMPANY OF CONNECTICUT** and the name and address of its registered agent for service of process is

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

_____
Gary L. Kilgore
Appeals Judge

CONCUR:

_____
Thomas A. Knapp
Appeals Judge

CONCUR IN THE RESULT:

_____
Robert W. Potts
Appeals Judge