APPEAL NO. 033305
FILED JANUARY 27, 2004

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 5, 2003. The hearing officer determined that the respondent (claimant) sustained a compensable (bilateral upper extremity) repetitive trauma injury; that the appellant (carrier) is not relieved of liability pursuant to Section 409.002; and that the claimant had disability from August 28, 2002, through the date of the CCH.

The carrier appeals, contending that the claimant's job was not repetitiously traumatic to cause the injuries, that the claimant had not timely reported her injury, and that since the claimant was able to continue some concurrent employment she did not have disability. The carrier further argues that the claimant did not have disability because her treating doctor had placed her at maximum medical improvement (MMI). The claimant responds, urging affirmance.

DECISION

Affirmed.

The claimant, a registered nurse, was employed both by the employer and a hospital, working 40 hours a week for both the employer and the hospital. The claimant alleges a bilateral repetitive trauma to her upper extremities working as a "telephone triage nurse" for the employer. It is relatively undisputed that the claimant's work with the hospital did not involve repetitive use of her hands. The claimant testified in detail about her duties with the employer and the hearing officer found that the claimant's duties "were repetitive, traumatic and hand intensive." The carrier simply alleges otherwise. The hearing officer's determinations on this point are supported by the evidence.

The timely reporting issue depends largely on the date of the injury (DOI). Section 408.007 provides that the DOI for an occupational disease is the date on which the employee knew or should have known the disease may be related to the employment. *See* Section 401.011(34) for the definition of an occupational disease which includes a repetitive trauma injury. It is undisputed that the claimant had sustained a cervical injury in 1997. When the claimant began experiencing hand and arm pain in August 2002 she testified that she believed it was due to the old cervical injury. There is some conflicting testimony as to exactly when the claimant realized her wrist and arm pain were related to her employment. The hearing officer determined the DOI to be _____. The hearing officer commented that the unrefuted testimony of the claimant reflects that she timely reported the injury to her supervisor on August 30, 2002. That determination is supported by the evidence.

Most of the carrier's appeal deals with disability as defined by Section 401.011(16). Regarding the carrier's first argument that without a compensable injury there can be no disability, we merely note that we are affirming the hearing officer's compensable injury determination. The second argument is that the claimant worked at a hospital concurrent with her employment with the employer and that she continued to work the hospital job "despite her alleged injuries with [the employer]." In Texas Workers' Compensation Commission Appeal No. 030164-s, decided March 3, 2003, the Appeals Panel held that Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 128.1(h) (Rule 128.1(h)) provides that for employees injured on or after July 1, 2002, who are employed by more than one employer on the date of injury and the employee submits the wage information from the other employer(s) in the form and manner prescribed by Rule 122.5, the carrier shall calculate the average weekly wage (AWW) using wages from all the employers. Rule 128.1(h)(2) further provides that the portion of the employee's AWW based upon employment with each "Non-Claim Employer" shall be calculated in accordance with Rule 128.3 except that the employee's wages from the non-claim employer(s) shall only include those wages that are reportable for federal income tax purposes. *See also* Section 408.042(c). In evidence is an Employee's Multiple Employment Wage Statement (TWCC-3ME) showing the wages from the non-claim employer, the hospital. The evidence is clear that the claimant's combined earnings from the hospital and the employer was substantially more than the post-injury earnings from the hospital alone. *See* Section 401.011(16) for the definition of disability. The hearing officer found that the claimant's job at the hospital did not contribute to the claimant's injury, that the hospital job did not involve repetitive hand use, and that, therefore, continuation of a noncontributing employment does necessarily not end disability. Nor does the claimant have a duty to seek employment within her limitations.

Finally, the carrier argues that the claimant's treating doctor had placed the claimant at MMI. We note that MMI was not an issue in this case, that the MMI date was in dispute, and that a claimant may have disability, as defined in Section 401.011(16), past the date of MMI (although pursuant to Section 408.101 would not be entitled to temporary income benefits (TIBs) after MMI). Disability and MMI are different concepts, although both impact on the payment of TIBs.

We have reviewed the complained-of determinations and conclude that the hearing officer's determinations are not incorrect as a matter of law and not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

We affirm the hearing officer's decision and order.

The true corporate name of the insurance carrier is **PACIFIC EMPLOYERS INSURANCE COMPANY** and the name and address of its registered agent for service of process is

ROBIN MOUNTAIN
ACE USA
6600 EAST CAMPUS CIRCLE DRIVE, SUITE 200
IRVING, TEXAS 75063.

_____
Thomas A. Knapp
Appeals Judge

CONCUR:

_____
Margaret L. Turner
Appeals Judge

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Edward Vilano
Appeals Judge