APPEAL NO. 061994
FILED NOVEMBER 16, 2006

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 21, 2006. With regard to the issues before him the hearing officer determined that the "[appellant (claimant)] sustained a compensable repetitive trauma injury," that the date of injury (DOI) is _____, that the "claimant had disability due to the claimed injury from April 13, 2006 to and continuing through August 21, 2006 [the date of the CCH]," that the respondent (carrier) did not waive the right to contest compensability of the claimed injury and that the "carrier is relieved from liability under TEX. LABOR CODE ANN. § 409.002 because of the claimant's failure to timely notify her employer pursuant to TEX. LABOR CODE ANN. § 409.001." The hearing officer's determinations regarding the compensable repetitive trauma injury, disability and carrier waiver have not been appealed.

The claimant in her appeal states that she is "not" appealing the determinations regarding, among other findings and conclusions, that the claimant sustained a compensable repetitive trauma injury and that the claimant had the period of disability found by the hearing officer. The claimant appeals the _____, DOI, and that the carrier is relieved of liability because of the claimant's failure to give timely notice to the employer. The claimant specifically contends that the hearing officer's comments regarding carpal tunnel syndrome (CTS) are not supported by the medical evidence and that the hearing officer was imposing a new standard regarding the determination of the DOI in all occupational disease cases. The carrier responds, asserting that the hearing officer was just applying "his common sense" regarding CTS and that the hearing officer was granting the claimant "leeway" and "more latitude than which she probably was entitled" on the DOI determination.

DECISION

Reversed and remanded.

First we note that the hearing officer's determinations in Conclusion of Law Nos. 3 and 5 are inconsistent with Conclusion of Law No. 7. The hearing officer in Conclusion of Law No. 3 determined that the claimant sustained a compensable repetitive trauma injury. A compensable injury is defined in Section 401.011(10) as "an injury that arises out of and in the course and scope of employment for which compensation is payable." That determination is incompatible with the determination in Conclusion of Law No. 7 which relieves the carrier of liability. Similarly the hearing officer determined in Conclusion of Law No. 5 that the claimant had disability, which by definition in Section 401.011(16) requires a compensable injury which, as indicated, is incompatible with Conclusion of Law No. 7 relieving the carrier of liability. In that Section 410.203(b) no longer allows the Appeals Panel to reform the hearing officer's decisions, and in that there has specifically been no appeal of the findings of a

compensable repetitive trauma injury and disability, we must reverse the hearing officer's decision for the reasons stated.

The claimant was employed on an assembly line assembling electric motors utilizing a hand held "air gun" driving screws into metal parts. The hearing officer comments that the evidence is persuasive that the claimant's job activities were repetitive and traumatic and more likely than not caused the claimant to sustain at least mild bilateral CTS. There was considerable testimony from the claimant when she first began having pain in her hands and wrists. There is testimony that the claimant first began to notice the symptoms in (alleged date of injury). The carrier contends that the claimant knew or should have known that she had an occupational disease injury in (alleged date of injury) or in October or November 2005 when the claimant's assistant (or coworker) went on maternity leave. In an unappealed determination the hearing officer found that the claimant first reported a work-related injury to the employer on January 30, 2006. The claimant's testimony attempted to distinguish between mere pain in 2005 and more severe symptoms of "burning," "swelling" and "numbness" that she began to experience in late January 2006 and more specifically the weekend prior to January 30, 2006, the date when she reported the injury to her supervisor. The claimant first sought medical treatment for her claimed occupational disease at a hospital emergency room on February 6, 2006. On February 2, 2006, one of the carrier's adjusters contacted the claimant by telephone and took a statement. There is some confusion on who initiated a second telephone call between the adjuster and the claimant later in the day on February 2, 2006, in order to either amend the claimant's statement or obtain further information. In any event, only a partial transcription of those statements is in evidence as the first part of the statement was either erased or taped over. The carrier asserts that the "recorded statement in this case is largely going to settle it [the DOI]." The transcribed statement is not helpful in establishing a DOI other than to state the claimant first noticed having problems with her right hand and wrist "two months or three months [before she reported her injury on January 30, 2006]. It was right before [the claimant's coworker] went out on maternity leave." (There was conflicting testimony regarding when the coworker went on maternity leave.) The adjuster testified, at the CCH, that he "honestly believed the claimant felt that she knew she had a work related injury on (alleged date of injury)." The adjuster also testified that the claimant was unable to determine the exact DOI. Medical records of February 21 and 28, 2006, and March 28, 2006, document "a gradual onset of right wrist and right hand and arm pain up to the elbow" which "finally got so bad she just couldn't function."

Section 408.007 provides that the DOI for an occupational disease is the date on which the "employee knew or should have known that the disease may be related to the employment." Section 409.001 provides that an employee or a person acting on the employee's behalf shall notify the employer of an injury that is an occupational disease not later than the 30th day after the date on which the employee knew or should have known that the injury may be related to the employment.

The hearing officer, in the Background Information portion of the decision, comments that "constant pain accompanying the same activity over a period of months"

is something that a reasonably prudent person would not be expected to ignore. The hearing officer then establishes as a standard that "a period of one month plus of significant pain accompanying the work activities, with no alternate explanation for the symptoms apparent, would trigger an obligation on a reasonable prudent employee to mention the situation to a supervisor." The hearing officer then adopts the adjuster's opinion that the claimant knew her hand and wrist pain was work related on (alleged date of injury), applied his 30 days of pain rule and determined the DOI to be _____ (Conclusion of Law No. 4), a date which was not advanced by either party. We do not subscribe or endorse the hearing officers enunciated standard. In Appeals Panel Decision (APD) 040256, decided March 29, 2004, citing APD 002012, decided October 16, 2000, the Appeals Panel held that "[t]he fact that a claimant has pain while working has not automatically meant that the [DOI] for a claimed occupational disease is the day the claimant knew the work activities caused pain." Nowhere in the statute, Texas Department of Insurance, Division of Workers' Compensation (Division) rules or precedent is there a requirement that one month of pain accompanying work activities, without other explanation, triggers a notice requirement to the employer. We hold the hearing officer erred in establishing and applying that standard. The Appeals Panel has further held that the DOI for an occupational disease is not necessarily the date of the first symptom. APD 981397, decided August 6, 1998, citing Commercial Insurance Company of Newark, New Jersey v. Smith, 596 S.W 2d 661 (Tex. Civ. App.-Fort Worth 1980 writ ref'd n.r.e.). APD 981397, *supra*, also held that the exceptions to the notice requirements in Section 409.002 have been held by the Appeals Panel to be subsumed in the issue of timely reporting. *See also* APD 962375, decided January 6, 1997.

Section 409.002 provides that failure to notify the employer as required by Section 409.001(a) relieves the employer and carrier of liability unless: (1) the employer or carrier has actual knowledge of the employee's injury or; (2) the Division determines that good cause exists for failure to provide notice in a timely manner; (3) the employer or carrier does not contest the claim. The hearing officer does not address possible good cause for failure to give timely notice. The carrier contends that the partially transcribed statement "is largely going to settle it" (the DOI issue). On page 5 of the statement (Carrier's Exhibit B, pg. 2) in response to the question "when did you first realize your condition was related to your work?" the claimant replies:

> Probably I know it's, it's, been a couple of weeks ago. I, I mean I, I knew of it, I knew when I was on the night shift because my hand just, it's just, it would always hurt but I, I felt like, you know, it would be something that will go away because, you know, we were working like seven days a week. So I felt like maybe my hand was just sore but that I don't know…

The claimant's testimony gives rise to the possibility that the claimant trivialized her injury by thinking the pain would go away and trivialization has long been recognized as a possible good cause for failure to timely give notice. APD 040462, decided April 9, 2004; APD 94114, decided March 3, 1994. The test for the existence of good cause is whether the claimant acted as a reasonably prudent person under the same or similar

circumstances. APD 060631-s, decided May 30, 2006. Whether the claimant had continuing good cause for her failure to timely report her injury is then the proper inquiry which is determined by examining the facts after the claimant knew her injury to be work related. "Good cause" is a legal excuse for failure to timely notify the employer, and it has been held that good cause must continue to the date when the injured worker actually gives notice. Lee v. Houston Fire and Casualty Insurance Company, 530 S.W.2d 294 (Tex. 1975).

The courts have noted that the legislature has provided a flexible standard in determining the date of injury for an occupational disease. Commercial Insurance Co. of Newark, N.J. v. Smith, 596 S.W.2d 661 (Tex. Civ. App-Fort Worth 1980, writ ref'd u.r.e.). APD 93184, decided April 29, 1993, citing Smith held that the trier of fact should consider when the claimant, as a reasonable person, recognized the nature, seriousness and work-related nature of the disease in determining the DOI. The Supreme Court in Lee, *supra*, in discussing timely notice and good cause held that the totality of a claimant's conduct must be primarily considered in determining ordinary prudence. (*id* at 297). In APD 980194, decided February 25, 1998, the Appeals Panel held:

> "The date which triggers notice requirements for an occupational disease is 'distinct to the claimant and reasonably sufficient to cause him to believe he has the occupational disease,' 'the date a reasonably prudent person would recognize the existence of the disease and recognize it was related to his employment.'" Texas Workers' Compensation Commission Appeal No. 94709, decided July 15, 1994, citing INA of Texas v. Adams, 793 S.W.2d 265 (Tex. App.-Beaumont 1990, no writ).

While the failure to discuss and make a finding on good cause does not necessarily require a remand, under the circumstances of this case, where there were inconsistent and conflicting factual determinations and Conclusions of Law, and where the hearing officer established and applied an improper standard, we reverse the hearing officer's determinations that the DOI is _____, and that the carrier is relieved of liability because of the claimant's failure to timely notify her employer of the claimed injury and remand the case to the hearing officer for reconsideration to determine a DOI that is supported by the evidence, and if the hearing officer finds the claimant failed to give timely notice to the employer, to address whether the claimant had good cause for failing to timely do so. No new evidence is to be taken but the parties should be allowed to comment on the matters raised in this decision.

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 Division pursuant to Section 410.202, which was amended June 17, 2001, to exclude Saturdays and Sundays and holidays listed in Section

662.003 of the Texas Government Code in the computation of the 15-day appeal and response periods.

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

CORPORATION SERVICE COMPANY DBA
CSC-LAWYERS INCORPORATING SERVICE COMPANY
701 BRAZOS STREET #1050
AUSTIN, TEXAS 78701.

_____
Thomas A. Knapp
Appeals Judge

CONCUR:

_____
Veronica L. Ruberto
Appeals Judge

_____
Margaret L. Turner
Appeals Judge