

APPEAL NO. 950287
FILED APRIL 7, 1995

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 6, 1994. He (hearing officer) determined that the respondent (claimant) sustained an occupational disease (carpal tunnel syndrome) to her right wrist, that the date of the occupational disease is _____, that the claimant timely reported the injury and that the average weekly wage was \$296.18. The appellant (carrier) urges that several of the hearing officer's findings of fact and conclusions of law are either supported by insufficient evidence or contrary to the great weight and preponderance of the evidence. Claimant argues that the evidence supports the hearing officer's decision and asks that it be affirmed.

DECISION

Finding error, we affirm in part and reverse and remand in part.

The claimant worked in an environmental laboratory from sometime in 1989 and her duties included using a pipette and a squeeze bulb to suck liquid from bottles in performing sampling duties. According to her testimony, this was repetitive type activity that she did frequently, that the squeeze bulb was somewhat hard rubber and that she noted pain in her hands or wrists sometime in 1992. She had gone to an emergency room in December 1992 and was led to believe her problem was arthritis. Although she had problems with her hands or wrist over a period of time, she did not know it was work related at the time. In any event, she continued working and the employer attempted to teach her to do her job putting less strain on her hands and wrist. Because the pain in her left wrist became so bad and because she had some sort of bump on her left wrist, she was sent to a doctor by her employer on March 5, 1993. She was advised by the doctor that she would have to have surgery on her left wrist and when she told her employer, she claims she was terminated. Although this is specifically denied by her employer who testified she quit and refused all offers of different or light duty, she did not return to work and apparently has not worked since. She testified that she had mentioned problems with both hands to her supervisor in March 1993, but that her main concern was with her left hand and wrist and that this was all that she went to the doctor for and all that the doctor examined. She subsequently had surgery on her left thumb and later on her left wrist. The left thumb and wrist are not a part of this claim; rather, were subject of a separate claim.

Sometime in July 1993, she saw a Dr. B about pain in her right hand. A November 9, 1993, letter from Dr. B states:

The [claimant] first described complaints referable to her right hand on _____. She did, however, indicate that she was having problems with the hand for approximately one year which she felt were attributable to her repetitive work related activities that apparently concluded in March of this

year.

* * * * *

[Claimant] has documented right carpal tunnel syndrome by EMG and nerve conduction studies performed by [Dr. R] on September 8, 1993. Clinically she has mild CMC osteoarthritis of the right thumb as well. Based on her history, these problems may indeed be work related due to the repetitive use of the right upper extremity in work related duties. No surgery has been recommended for the patient's right upper extremity at this time.

The employer testified that the first it was notified of an injury to the right hand or wrist was in September 1993 when it received a handwritten notice (an admitted exhibit) of injury from the claimant notifying the employer that the pain she had in her right hand was caused by the work she did for the employer while she was employed. Although there are other exhibits in evidence which reflect the claimant's complaint of problems with her hand or hands, there was no evidence that any were sent to or received by the employer regarding an injury to the right hand prior to September 8, 1993. The claimant testified that she sent in a claim form "a lot earlier than" September but "they lost it," apparently meaning the Commission. However, she also testified that the first written notice she gave was the one received by the carrier on September 8, 1993. She testified that it was before September that she sent the form but did not know when. She also testified that she first thought the problems she was having in her right hand were related to her work was when she saw the doctor in March 1993, although that appointment was for her left wrist. Because her right hand became worse, she went to Dr. B in July and he wanted to perform tests but told the claimant he could not do so without authorization. Apparently authorization was ultimately given and an EMG in September confirmed carpal tunnel syndrome.

The issues at the hearing and that are involved in this appeal concern whether the claimant sustained a compensable injury to her right wrist, the date of injury, and whether timely notice was given, and if not, whether there was good cause for failing to do so. Having found notice of injury to be timely, the hearing officer did not address any issue of good cause. Regarding the other issues, the hearing officer found that the claimant sustained an injury to her left wrist on March 5, 1993, and subsequently had surgery performed, that her right wrist was first examined on _____, resulting in a diagnosis of carpal tunnel syndrome which was a direct result of her work for the employer and that _____, is the date she knew she was suffering from an occupational disease in her right wrist. He also found that _____, was the date that she knew or should have known that the occupational disease was related to her employment, that the left and right wrist injuries arose out of the same repetitive activity at work, and that the claimant gave timely notice that she sustained an injury at work on March 5, 1993. The hearing officer concluded that the date of the occupational disease is _____, and that she timely reported

the injury to her employer on or before the 30th day "of" the injury.

While there is certainly some conflict in the evidence and some inconsistency in the testimony is apparent, this is a matter for the hearing officer to filter and make his factual findings. Section 410.165(a); Garza v. Commercial Insurance Co. of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). Regarding the determination that the claimant's right wrist injury was causally related to her work for the employer, the claimant's testimony together with Dr. B's opinion which is corroborative of her testimony, supports the hearing officer's finding. Given the circumstances present regarding the separate claim of the left wrist, the diagnosis and subsequent surgery on the left wrist, the testimony that she experienced similar problems with both wrists at about the same time although the left wrist was the primary concern in March 1993, the nature of the work, and the nature of the injury, the claimant's testimony could provide the preponderant level of evidence to sustain this finding. See Gee v. Liberty Mutual Fire Insurance Co., 765 S.W.2d 394 (Tex. 1989); Texas Workers' Compensation Commission Appeal No. 94920, decided September 8, 1994. The situation in this case is distinguished from that found in Texas Workers' Compensation Commission Appeal No. 93725, decided September 28, 1993, which did not involve repetitive work conditions causing the initial injury and where there was no causal relationship between the second asserted injury and the work. And, with regard to the date of injury issue, although there was contrary evidence, the claimant's testimony and her appointment with Dr. B on _____, provided a sufficient evidentiary basis for the hearing officer to determine that the date of injury was _____, that is, the date the claimant knew or should have known that the occupational disease she had was related to her employment. Section 408.007; Section 409.001. Section 408.007 provides that "the date of injury 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. Our review of the record does not lead us to conclude that these determinations by the hearing officer we so against the great weight and preponderance of the evidence as to be clearly wrong or unjust. Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986); Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986). Accordingly, we affirm these determinations.

However, after specifically determining that the date of injury was _____, the hearing officer went on to determine that the claimant gave timely notice of her work-related injury on March 5, 1993, some four and a half months before the date of the injury to the right wrist. This we find to be plain error and it cannot be sustained. Section 409.001 provides that notification to the employer of an injury shall be "not later than the 30th day after the date on which . . . if the injury is an occupational disease, the employee knew or should have known that the injury may be related to the employment." It strains the imagination how an injury can be reported before the defined date of the injury. We reverse this determination. However, since the hearing officer did not reach the second part of the notice issue, that is, if the claimant did not give timely notice, "does good cause exist for failing to report the injury timely," we remand for further consideration and

development of evidence as deemed appropriate and necessary by the hearing on this issue.

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 Texas Workers' Compensation Commission's division of hearings, pursuant to Section 410.202. See Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

Stark O. Sanders, Jr.
Chief Appeals Judge

CONCUR:

Philip F. O'Neill
Appeals Judge

Thomas A. Knapp
Appeals Judge