APPEAL NO. 950411

On February 14, 1995, a contested case hearing was held in (city), Texas, with (hearing officer) presiding as the hearing officer. The hearing was held under the provisions of the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). With respect to the issues at the hearing, the hearing officer determined that the respondent (claimant) sustained a compensable repetitive trauma bilateral carpal tunnel injury on (date of injury); that the date of injury is (date of injury); that the claimant notified her employer of her injury within 30 days of the date of injury; and that the claimant had disability from August 31, 1994, to December 13, 1994. The appellant (carrier) appeals the hearing officer's determinations on date of injury, timely notice, and disability. No response was received from the claimant.

DECISION

Affirmed in part and reversed and remanded in part.

Prior to quitting her job on May 28, 1994, the claimant, who is 38 years old, had worked for the employer for 12 years, the first year as a checker and the last 11 years as a meat wrapper. She described the repetitive hand movements that were required in her meat-wrapping job. The claimant testified that she has had problems with her hands for four or five years, that the problems would come and go for the first few years, and that about (month year), she started to have constant pain in her hands. She said she would have pain and numbness in her hands at night, and more so when she had done a lot of wrapping at work. She also testified that in February 1994 the pain in her hands began to wake her up at night and that in late April and early May she had real sharp pains and her hands would be numb all night. She said most of the pain was in her left hand. She said she didn't go to a doctor because she thought the pain was something she could live with. According to the claimant and her husband, in late April or early May 1994, the claimant's husband made an appointment for her to see (Dr. K), a hand surgeon, because the claimant's pain at night was getting a lot worse. The claimant said she was originally scheduled to see Dr. K on (date), but Dr. K's office rescheduled the appointment for (date of injury). The claimant testified she did not know what was wrong with her when the doctor's appointment was made.

The claimant said she had an argument with her supervisor, (RO), on May 28, 1994, and she quit work. She said the argument was not about her hand problems. The claimant said that on May 30, 1994, (SN), a market manager, called her and that she told him that she had a doctor's appointment coming up in (month) for her hands and that she was going to keep the appointment. When the claimant was asked whether she knew at that time that the injury to her hands was related to her work, she said: "I felt like it was, but I -- I'm not -- you know, I'm not a doctor. I don't know." When the claimant was asked "and you said that at that time you felt it was work-related?", she said "yes." She testified that she did not know at that time what was wrong with her hands.

When the claimant was asked "when did you first report this injury?", she said "(month) the (day)." She said she called the employer "to let them know that I was going to the doctor." But when she was asked "did you report the injury on the (day), or did you call to let them know about the doctor's appointment?", she said "just to let them know about the doctor's appointment." However, later when the claimant was asked "you testified that you first reported an injury -- on (day) of (year), you called [employer], is that correct?", she said "yes." She then testified that she just wanted to let them know she had a doctor's appointment, and when she was asked why she wanted to let them know that, she said "because I felt it was a work-related injury." When the claimant was again asked "on (day) of (year), you say you reported the injury to [employer]?", she said "yes."

The claimant was seen by Dr. K on (date of injury), and he noted on that date that the claimant told him she had had problems with her hands for about five years and that in the last year it had gotten worse causing fitful sleeping. Dr. K diagnosed long standing bilateral carpal tunnel syndrome (CTS) and prescribed wrist splints to be worn continuously. The claimant testified that she was not aware what her injury was or that her injury was work related until (date of injury), when Dr. K diagnosed bilateral CTS. In a Notice of Injury or Occupational Disease and Claim for Compensation (TWCC-41) dated September 1, 1994, which was received by the Texas Workers' Compensation Commission (Commission) on September 12, 1994, the claimant gave a date of injury of May 29, 1994. The claimant explained that when she talked with an employee of the Commission about filling out the form she told the employee that there was no actual date of injury and that the employee told her that there needed to be a date of injury and to put May 29th as the date of injury. The claimant said there was no reason for the May 29th date of injury on the notice.

On September 19th Dr. D noted that a nerve condition study was compatible with bilateral CTS, worse on the left side, and that the wrist splints had not helped much and so he recommended carpal tunnel releases. A left carpal tunnel release was performed on October 31, 1994. In a note dated November 14, 1994, Dr. K wrote that the claimant has been unable to work since her initial consultation due to splinting and the type of work she does. The claimant testified that she has not worked since she quit her job on May 28th and that Dr. K has not released her to return to work. On November 15, 1994, Dr. K noted that the claimant had good relief from the surgery, and on December 13, 1994, he noted that the claimant was healing well and was scheduled for surgery on the right hand the following month. The claimant said that the surgery for her right hand had been cancelled but was still pending. The claimant said that her left hand has improved but her right hand still occasionally goes numb and that she does not now wear splints.

The carrier took the claimant's recorded statement on (date), and in it the carrier questioned the claimant about her "workers" comp claim." The claimant's husband participated in answering questions posed by the carrier and when asked about reporting of the injury, the claimant's husband said "[i]t was work related, it's [CTS], I know exactly what it is, I'm in business for myself." He then said that the claimant had a doctor's appointment to obtain a diagnosis. He also said "it's something that she feels is work related."

On August 12, 1994, the carrier took the recorded statement of the claimant's supervisor, RO, and in it the carrier questioned him about the claimant's "Workers' Compensation Claim." He said he had first been notified about the claimant's claim by "[C]" in the employer's main office "this past week," and that that was "the first that I knew of it." He said that the claimant had written on the office calendar that she had an "appointment" on (date), but did not indicate the nature of the appointment. He said that the claimant never discussed with him an appointment to have her hands examined and he was not aware of the claimant having mentioned to him having difficulties with her hands.

On August 15, 1994, the carrier took the recorded statement of (PM), claimant's coworker, and in it the carrier asked about "a Workers' Comp claim that is being submitted by [claimant]?" PM stated that the claimant had been complaining about pain and numbness in her hands for three or four years. She also stated in regard to the condition of the claimant's hands that "they've just suddenly gotten worse."

The carrier introduced into evidence an employer's first report of injury dated (date), which states the date of injury as May 29, 1994, and the date the injury was reported as (date).

The issues at the hearing were: (1) what is the date of injury pursuant to Section 408.007, the date the employee knew or should have known the disease may be related to the employment; (2) whether the claimant reported an injury to her employer on or before the (day) day after the injury, and if not, does good cause exist for failing to report the injury timely; (3) whether the claimant sustained a compensable injury in the form of a repetitive trauma bilateral carpal tunnel injury on or about May 29, 1994; and (4) whether the claimant had disability resulting from the injury, and if so, for what period.

The carrier has not appealed the hearing officer's determination that the claimant sustained a compensable injury in the form of repetitive trauma bilateral CTS. The carrier has appealed the hearing officer's finding and conclusion concerning disability from August 31, 1994, to December 13, 1994. The hearing officer is the judge of the weight and credibility of the evidence. Section 410.165(a). The hearing officer can believe all, part, or none of the testimony of any witness, and resolves conflicts in the evidence, including the medical evidence, and determines what facts have been established. Texas Worker's Compensation Commission Appeal No. 950084, decided February 28, 1995. An appellate level body is not a fact finder and does not normally pass upon the credibility of witnesses or substitute its judgment for that of the trier of fact. Appeal No. 950084, *supra*. We conclude that the hearing officer's decision on disability is supported by sufficient evidence and is not so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175 (Tex. 1986).

The carrier contends that the hearing officer erred in concluding that the claimant's date of injury is (date of injury), and in concluding that the claimant notified the employer that she was alleging a work-related injury not later than the (day) day after the date of injury.

The carrier contends that the date of injury is in (month year) and that the injury was not timely reported to the employer.

Section 408.007 provides that "[f]or purposes of this subtitle, 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." An occupational disease includes a repetitive trauma injury. Section 401.011(34). The hearing officer made a finding that "Claimant's initial medical examination for her hand problems was by [Dr. K] on (date of injury), and this was the first time that Claimant was aware that she had bilateral [CTS] caused by repetitive movement of her hands and wrists." In Texas Workers' Compensation Commission Appeal No. 94534, decided June 13, 1994, we stated:

> Unlike the case of a specific injury, the date of injury in the 1989 Act for purposes of a repetitive trauma/occupational disease is "the date on which the employee knew, or should have known that the disease may be related to the employment." Section 408.007 (Emphasis added). Clearly, this standard is not as precise as a specific incident. 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.). While a definite diagnosis from a doctor is not required, neither is the employee held to the standard of a doctor's knowledge of causation. *See* Texas Workers' Compensation Commission Appeal No. 91097, decided January 16, 1992. The date of the first symptoms will not necessarily constitute the date of injury.

In regard to notice of injury, Section 409.001(a) provides that "[a]n employee or a person acting on the employee's behalf shall notify the employer of the employee of an injury not later than the (day) day after the date on which: . . . (2) if the injury is an occupational disease, the employee knew or should have known that the injury may be related to the employment." In the Statement of the Evidence portion of the decision, the hearing officer states "[p]rior to [Dr. K's] diagnoses, Claimant had advised her Employer of the medical appointment to have her hand examined, but she did not report it as a work related injury until she had a medical opinion as to her hand problems." However, the hearing officer makes a finding of fact that "On May 30, 1994, Claimant advised [SN], a management official, during her exit interview that she had an appointment to see [Dr. K] in (month) of (year), and she suspected that her hand problems may be related to her work activities." The hearing officer also found that the claimant filed a claim for compensation on September 1, 1994. He concluded that the claimant notified the employer that she was alleging a work-related injury not later than the (day) day after the date of the injury.

The overwhelming weight of the evidence in this case establishes that notice of injury was given to the employer sometime prior to (date of injury), the date of injury found by the hearing officer. The evidence shows that the carrier took the recorded statement of the claimant, her coworker, and her supervisor regarding the claimant's claim prior to (date of

injury), and prior to the date the claimant filed her claim for workers' compensation benefits with the Commission. Thus, the hearing officer's conclusion that the claimant notified her employer of her injury not later than the (day) day after the date of injury cannot stand in relation to the (date of injury), date of injury found by the hearing officer. However, finding that notice of injury was given prior to the date of injury in an occupational disease case is not appropriate. For example, in Texas Workers' Compensation Commission Appeal No. 950287, decided April 7, 1995, we stated:

> However, after specifically determining that the date of injury was July 22, 1993, 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 [day] 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.

The hearing officer's finding that "On May 30, 1994, Claimant advised [SN], a management official, during her exit interview that she had an appointment to see [Dr. K] in (month) of (year), and she suspected that her hand problems may be related to her work activities," is unclear as to whether the hearing officer is finding that the claimant reported her injury to SN on May 30, 1994. The hearing officer was probably not intending to make a finding of notice of injury on May 30, 1994, because he concluded that notice of injury came after the (date of injury), date of injury he found. We point out that there is no testimony from the claimant or anyone else that she reported the problems with her hands as a work-related injury to SN on May 30, 1994. The claimant testified that she told SN on May 30, 1994, only that she had a doctor's appointment for her hands in (month year). In DeAnda v. Home Insurance Company, 618 S.W.2d 529 (Tex. 1980), the court noted that to fulfill the purpose of the notice of injury provision, the employer need only know the general nature of the injury and the fact that it is job related. We further point out that the hearing officer's finding that "Claimant filed a written claim for compensation on September 1, 1994" by itself does not support notice of injury to the employer because the TWCC-41 dated September 1, 1994, was filed with the Commission and there is no evidence that it was sent to the employer. In any event, as previously determined, the overwhelming weight of the evidence demonstrates that notice of injury was given to the employer sometime prior to the (date of injury), date of injury found by the hearing officer.

Given the evidence of notice of injury at sometime prior to the (date of injury), date of injury found by the hearing officer, we are convinced that the hearing officer may not have applied the statutory definition of date of injury for an occupational disease found in Section 408.007 when determining the claimant's date of injury for her repetitive trauma injury. The claimant contended at the hearing that her date of injury is (date of injury), because that was when a doctor first diagnosed her CTS. However, as we pointed out in Appeal No. 94534,

supra, a definite diagnosis is not required to find a date of injury in an occupational disease case.

The hearing officer's decision in regard to a compensable injury and disability are affirmed. We reverse the hearing officer's decision on the date of injury and on notice of injury to the employer and remand the case to the hearing officer for further consideration and development of the evidence on those issues and on the issue of good cause for failing to give timely notice of injury if it is determined that timely notice of injury was not given to the employer. 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.

Robert W. Potts
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Gary L. Kilgore
Appeals Judge