APPEAL NO. 962650

Following a contested case hearing held on November 19, 1996, pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act), the hearing officer resolved the disputed issues by concluding that the appellant (claimant) did not sustain a compensable injury to her right shoulder, arm and neck; that the date of injury was more than 30 days before April 5, 1996; that claimant did not timely notify the employer within 30 days of the date of injury and did not show good cause for her failure to do so; that the respondent (carrier) is relieved of liability under Section 409.002 because of claimant's failure to timely notify her employer; and that claimant did not have disability as a result of a claimed injury. Claimant has challenged on evidentiary sufficiency grounds the corresponding findings of fact which support these legal conclusions. The carrier has responded, asserting the untimeliness of claimant's request for review and urging the sufficiency of the evidence to support the decision.

DECISION

Affirmed in part; reversed and remanded in part.

Texas Workers' Compensation Commission (Commission) records reflect that the hearing officer's decision and order was distributed to the parties on December 5, 1996. In that claimant's request for review does not state otherwise, claimant is presumed to have received the decision and order five days later, that is, on December 10, 1996. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE ' 102.5(h) (Rule 102.5(h)). Section 410.202(a) provides that claimant had 15 days from the date of her receipt of the decision and order to file a request for review. Since the 15th day fell on a legal holiday, which was followed by another legal holiday, her filing deadline extended to Friday, December 27, 1996. Claimant's request for review, dated December 19, 1996, was mailed on December 19, 1996, and was received at the Commission's central office on December 20, 1996. It was, thus, timely. Rule 143.3(c).

The carrier asserts that we must affirm the decision and order because claimant, while challenging Findings of Fact Nos. 1, 4, 6, 7, and 8, did not "disagree with" any conclusion of law. The carrier cites no authority for this assertion which we find lacks merit.

Ms. B, a human resources specialist for claimant's employer, testified that claimant commenced employment in August 1994. Claimant testified that she worked as a stepper machine operator (also described as a 5500 ASM) which involved the use of a keyboard and the lifting of reticle pods filled with wafers. She said she worked 12-hour shifts, three and one-half days per week, and that she used both arms to lift the pods. Ms. B described the pods as looking like a CD holder and weighing 2.8 pounds when full. Claimant was not asked nor did she state the frequency with which she used a keyboard and lifted reticle pods or about other repetitive upper extremity motions

associated with her job. She indicated that in March 1996, she spoke with a supervisor about a change in duties because of arm pain and stated that on (last possible date of injury), she saw Dr. M to obtain his "confirmation" of her arm pain. She said that Dr. M took her off work until May 3, 1996, when she returned to work and was given different duties. Claimant stated that her injury included her neck, shoulder and arm.

Claimant insisted at the CCH that her date of injury, pursuant to Section 408.007, was (last possible date of injury), the date she first saw Dr. M about her arm pain. According to the report of the benefit review conference (BRC) held on September 26, 1996, claimant took the position at that proceeding that she started working on the _____ machine in _____, that she knew her problems were related to her employment on (second possible date of injury), and that the latter date should be the date of her injury. The carrier's position was stated as being that claimant's date of injury was (first possible date of injury). In her response to the BRC report, claimant stated that her date of injury, referencing Section 408.007, was the date she "went to see [Dr. M] -- (last possible date of injury)." Ms. B testified that claimant's supervisor, Mr. L, completed an injury report which reflected the date of injury as (first possible date of injury), and that she completed the Employer's First Report of Injury or Illness (TWCC-1), dated April 14, 1996, based on the information in Mr. L's report. Ms. B said she asked claimant about the injury date and that claimant responded with the date of (first possible date of injury), stating that she experienced the onset of the pain shortly after she commenced employment. Ms. B also stated that Mr. L advised her that claimant had given him the (first possible date of injury), also. Ms. B said she reviewed the information in the TWCC-1 with claimant after she completed it. The TWCC-1 stated the date of injury as (first possible date of injury), and the date it was reported to the employer as "4-5-96."

Dr. M's record of (last possible date of injury), states that claimant complained of left arm and shoulder pain, that she said it had been present for six months, that she was "vague with details" concerning how long she had been experiencing the pain, that she did a lot of repetitive motion with her arm, and that she was convinced that "if she gets transferred in a different place at work it will be better." Dr. M's assessment was myofascial pain of questionable etiology and he stated, "[a]pparently this is Worker's Comp and will pull her off work and place her in some physical therapy [PT]." Dr. M reported on April 26, 1996, that claimant had been moved to "a different department where there will not be as much lifting or repetitive motion" and his assessment was "muscle strain, improving." Dr. M reported on May 8, 1996, that claimant was "very inconsistent about her responses and about how much pain she is having and it is very difficult to figure it out." Dr. M reported on June 25, 1996, that he had seen claimant "on and off for the last two years," that she recently came in for treatment of right arm and upper shoulder pain, that she gave a history of "repetitive use at her job and does very little other activities except normal daily living activities," and that in his medical opinion, "this is work related and if she wasn't doing repetitive work, she probably wouldn't have

this type of pain." Dr. M reported on August 20, 1996, that claimant was originally seen on (last possible date of injury), for left arm and shoulder pain "that had been present for six months." Dr. M stated that he took her off work for two weeks and prescribed a course of PT, that the pain persisted, that while it seemed that claimant had been transferred to several different places, it was unclear to him exactly what activity she was doing, and that he was concerned that "there may be some language barrier to really understanding this." Claimant stated that Dr. M's references to having seen her off and on for two years and to having pain for six months were erroneous.

Claimant's appeal disputes findings that on (first possible date of injury), (second possible date of injury), and (last possible date of injury), she was the employee of the employer; that the preponderance of the evidence showed she did not sustain a compensable injury to her right shoulder, arm and neck; that she knew or should have known that her claimed injury was work related more than 30 days prior to April 5, 1996; that she reported a claimed injury to the employer as of April 5, 1996; and that her date of injury was more than 30 days prior to April 5, 1996.

Claimant had the burden to prove by a preponderance of the evidence that she sustained a compensable injury, the date of that injury, the timely reporting of that injury, and that she had disability resulting from that injury. As for the injury issue, it was, apparently, claimant's contention that she sustained an occupational disease injury in the form of a repetitive trauma injury. In Texas Workers' Compensation Commission Appeal No. 92272, decided August 6, 1992, the Appeals Panel stated that to recover for a repetitive trauma injury, an employee must prove not only that repetitious, traumatic activities occurred on the job but must also prove that a causal link existed between these activities and the incapacity, that is, "the disease must be inherent in that type of employment as compared with employment generally." The Appeals Panel has also stated that a claim of repetitive trauma injury should be supported by evidence of the extent and nature of the work performed and some description of the repetitive activities involved that would affect the employee in a way not common to the general population. *See e.g.* Appeal No. 92272; Texas Workers' Compensation Commission Appeal No. 950502, decided March 23, 1995. *Compare* Texas Workers' Compensation Commission Appeal No. 94941, decided August 25, 1994. The hearing officer is the sole judge of the weight and credibility of the evidence (Section 410.165(a)) and he makes clear in his decision that he did not find claimant's testimony persuasive. We cannot say that the finding that claimant did not sustain a compensable injury to her right shoulder, arm and neck is 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); In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). The hearing officer could consider the paucity of evidence from claimant's testimony and in her medical records concerning the types and frequency of right upper extremity motions involved in her duties operating the stepper machine.

Similarly, we are satisfied that the evidence sufficiently supports the finding that claimant was the employee of the employer on (first possible date of injury), (second possible date of injury), and (last possible date of injury). Claimant even states in her appeal that she was the employee of the employer from August 15, 1994, to the present and that she was "unemployed due to arm injury from (last possible date of injury), to May 2, 1996."

Claimant has not challenged the finding that she "was not unable to obtain or retain employment at preinjury wages as a result of a claimed compensable injury" nor has she appealed the conclusion that she "did not sustain disability as a result of a claimed injury." Accordingly, those determinations have become final. Section 410.169.

With regard to Finding of Fact No. 7, that claimant reported a claimed injury to the employer "as of April 5, 1996 [emphasis supplied]," claimant states in her appeal that she reported the injury on "(last possible date of injury), around noon." The hearing officer's phrasing of this finding is problematic because it does not state a date certain and admits of an inference that the injury may have been reported earlier than April 5, 1996. Since one of the disputed issues was whether claimant timely reported her injury, that is, whether she reported it within 30 days of the date she knew or should have known that her injury may be related to her employment (Section 408.007), it is necessary that the hearing officer find a specific date (day, month and year) the injury was reported.

Finding of Fact No. 6, that claimant knew or should have known that her claimed injury "was [sic] work related" more than 30 days before April 5, 1996, is similarly problematic. First, Section 408.007, which provides for the date of injury for an occupational disease, states that such date "is the date on which the employee knew or should have known that the disease may be related to the employment. [Emphasis supplied.]." Second, this date, like the report of injury date, is unspecific. The Appeals Panel stated in Texas Workers' Compensation Commission Appeal No. 94713, decided July 12, 1994, an occupational disease (repetitive trauma) case, that "establishing a date of an injury is an essential matter in resolving the compensability of a claim," that "[o]nce there is an injury, it is the date of injury that starts the time clock on significant milestones that determine whether benefits are due," that "[d]etermining when a repetitive trauma injury occurs is sometimes an imprecise exercise and is, at best, frequently confusing when a claimant is required to state a specific date of injury," that this is provided for in Section 408.007, and that this is "a factual call for the hearing officer to make based upon the evidence before him. [Citation omitted.]"

Accordingly, we reverse Findings of Fact Nos. 6, 7, and 8 and Conclusions of Law Nos. 4, 5 and 6 and remand for findings of specific dates of injury and reporting of

the injury. We affirm Findings of Fact Nos. 1, 2, 3 and 5 and Conclusions of Law Nos. 1,2,3, and 7.

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 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.

Philip F. O'Neill
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Gary L. Kilgore
Appeals Judge