APPEAL NO. 972387

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 October 14, 1997. The issues at the CCH were whether the respondent, TG, who is the claimant, sustained a repetitive trauma carpal tunnel syndrome (CTS) injury on or about _____; whether the appellant (carrier) was relieved from liability because the claimant failed to timely notify the employer of her injury in accordance with Section 409.001; and whether the claimant had disability from her injury, and, if so, for what period. There was no dispute over the date of the alleged injury, which, in accordance with Section 408.007, is the date on which the employee knew, or should have known, that her occupational disease may be related to her employment.

The hearing officer, in determining the issues in favor of the claimant, essentially determined two dates for the injury. He held as a conclusion of law that the claimant sustained a work-related occupational disease on _____. He found that she had the inability to obtain and retain employment at wages equivalent to the preinjury wage (disability) because of this injury beginning on August 2, 1996, and continuing through the date of the CCH. However, the hearing officer further found as fact that January 7, 1997, was the date that she knew or should have known that her injury was related to her employment "as that was the date of first diagnosis of bilateral [CTS]," and that she gave notice of this to her employer on January 9, 1997. Based upon this, the hearing officer held that the carrier was not discharged from liability.

The carrier has appealed. The carrier first argues that the hearing officer abused his discretion and created harmful error by admitting two documents over its objection that they should be excluded for the failure to timely exchange. The carrier argues that the claimant failed to show good cause. Second, the carrier complains that the finding of fact that the claimant first knew or should have known that she had a new injury on January 7, 1997, was so against the great weight and preponderance of the evidence so as to be manifestly unfair or unjust. The carrier points out that the claimant's own testimony supported her belief that she had work-related hand and wrist pain well before the date of diagnosis, as early as sometime in _____. The carrier argues that her notice occurred well beyond the 30-day period required in the 1989 Act. Finally, the carrier appeals the finding that the claimant has asserted compensable injury and argues facts from the record in support of its point of appeal. The carrier says that the evidence supports that it was claimant's broken wrist, occurring well after she was off work on leave of absence, that resulted in her claimed wrist pain. The claimant responds that admission of the disputed evidence was correct, that the claimant first knew that she had CTS on January 7, 1997, and gave timely notice, and that she proved her CTS resulted from her employment, which the claimant asserts for the first time on appeal resulted not only from

her activities after she returned to work but from her previous nine years working experience. The claimant argues that she broke her wrist in December 1997. The claimant argues that the decision should be affirmed.

DECISION

Reversed and remanded.

The claimant was employed by the (employer), a self-insured state agency that shall be referred to herein as either employer or carrier, depending upon the context of the reference. Claimant agreed that she had been off work due to a (prior date of injury), work-related injury affecting her right arm and left shoulder, for which she had had surgery. Claimant said she was an office manager and computer operator; there was little description of her job duties, although the claimant said that her primary duty was typing. She also said that she was responsible for filing forms and answering the telephone. Her supervisor, Mr. M, testified in more detail about claimant's return to work. He said that an ergonomic chair and headset were ordered to accommodate her work restrictions, which he said were in effect until June 1, 1996, and limited claimant's typing to no more than 10% of her time. Claimant agreed that she started back half days beginning April 8, 1996, and Mr. M said that she gradually worked to full-time work throughout April and May, and then began working eight- and nine-hour days the first week of June.

Claimant contended that it was impossible for her to comply with her restrictions given her workload. Mr. M said that claimant was to come to him whenever she could not do her work and that he worked with her to accommodate her. Mr. M said that he recalled that claimant came to him to complain about shoulder pain and was allowed to leave early. Mr. M said that he also recalled claimant complaining about being given too much filing work. However, Mr. M could not recall any complaints about hand or wrist pain, or that typing was being assigned in excess of her restrictions. Mr. M agreed that assignment of work was by others in the office.

According to the claimant, she returned to see her treating doctor, Dr. O, on _____, when she began having hand and wrist pain and swelling, which got so bad she could not work. Claimant said that Dr. O told her it was probably a flare-up of reflex sympathetic dystrophy (RSD) from her 1994 injury. However, the claimant repeatedly testified that she felt the pain was new and different and related to her work, that she did not agree with Dr. O and, in fact, urged him to let her have another EMG. She reported that Dr. O opined she had RSD because an EMG taken in January 1996 had not shown any problems.

Claimant said she first approached her direct supervisor, Mr. H, about doing homebound work and the request was denied. Near the end of July, claimant said Dr. O

told her she would have to take a leave of absence and she made this request. Claimant said it was her wrist pain that caused her to be off work beginning August 2, 1996. She said she worked until this date because it was the next pay period.

Dr. O's treatment notes indicate that claimant was treated by him on _____, for right shoulder and left arm pain. On July 18th, Dr. O recorded neck stiffness, RSD, and left arm pain, and that claimant had trouble driving. On July 26, 1996, Dr. O wrote a letter stating that she continued to suffer from pain from her "ongoing problems" relating to thoracic outlet syndrome and RSD and that she could not continue working. He treated her with medication and referred her to a chiropractor and to Dr. W on August 14th. On August 15th, Dr. O saw claimant for a gynecological complaint and for swelling of her hands, fingers, and feet. Dr. O indicated that approval was granted the following week for an EMG. His next active treatment of claimant was for the gynecological problem in September 1996. On October 25th, claimant was treated for swelling of hands, knees, and feet, and persistent neck and arm pain. On a date which is somewhat illegible but appears to be November 1, 1996, Dr. O treated her for these persistent problems and listed CTS on his assessment of problems for the first time. On November 13th, Dr. O treated claimant for chest pains and "real bad swelling," and he recommended a repeat MRI for brachial plexus. He treated her on the 19th, a few days later, for her fractured right wrist. There were follow-up treatments for her wrist on three dates in December. Dr. O indicated that he removed claimant's cast on December 30th.

Claimant agreed that she broke her right wrist on November 16, 1996, while roller skating with her son. No one asked whether the accident involved any impact to her left hand as well. Claimant also contended that Dr. O finally concurred in referring an EMG, although she maintained this happened prior to her fracture. We note that medical records indicated that Dr. W had previously administered EMG testing to the claimant at least in April 1995 and that no CTS evidence was found. Claimant had EMG testing with Dr. W on January 7, 1997. Claimant said that due to casting of her right wrist for eight weeks, it felt better than the left. She said she still had her cast on when the EMG test was done, and that Dr. W pronounced that she had CTS after testing only her right wrist, and therefore did test her left wrist.

She said she called the employer's insurance adjuster, located in another city, to report her CTS and ask what to do. She said that an adjuster, Mr. F, whom she also knew personally, urged her to file this under her 1994 injury because that was the only way they would be paid. Claimant agreed that she did so. Mr. M agreed being called shortly before January 10, 1997, by claimant who told him that she had CTS and possible rheumatoid arthritis. She told him she was filing a workers' compensation claim. Mr. M said he did not really know what CTS was and assumed this related to her previous injury in some way and, while he denied that she specifically said her CTS was work related, he did agree that claimant asserted she would seek workers' compensation coverage for her treatment. The

claimant agreed that she initially filed her claim with the Texas Workers' Compensation Commission (Commission), asserting that her CTS was part of her 1994 injury, and that she changed this after medical coverage for her CTS was denied. She said her first changed report was filed in March 1997 but that the Commission was unable to locate it and she filed another dated April 28, 1996, which date apparently should be 1997 because the date of the CTS injury cited in this claim is _____. The Employer's First Report of Injury or Illness (TWCC-1) was filed almost a month later. The carrier had disputed the compensability of CTS on March 7, 1997.

At the beginning of this CCH, the claimant submitted two exhibits to which the carrier objected as not having been exchanged 15 days after the benefit review conference (BRC). One was a June 30, 1997, letter from Dr. W. The other were notes of Dr. O from the period March 13, 1996, through February 1997. The claimant responded that both documents were produced at the BRC and considered by the benefit review officer (BRO). Both are specifically mentioned in the BRC report. The hearing officer found good cause for not exchanging these documents again after the BRC and admitted them. The parties both referred to the fact that there had been another CCH immediately preceding the one at hand, during which related evidence was developed. There was no separate objection by the carrier to apparent interlineations made on the treatment notes by claimant.

The brief June 30, 1997, letter from Dr. W reads as follows:

> I have been asked to write a letter stating [CTS] can be related to work activities. This has been closely studied and the concensus [sic] of mainstream medical thought is that highly repetitive activities do in fact contribute to [CTS]. This can be considered approximate [sic] cause of [CTS] in a number of professions including work which requires quite a bit of keyboard work such as secretarial or data entry positions.
>
> Therefore, it is within reasonable medical probability that the patient's work environment is the cause of her [CTS].

A peer review report performed for the carrier is dated March 7, 1997, and recommends that the CTS is not related to the 1994 injury. This report further noted that the claimant had been diagnosed with adult onset diabetes, and that the EMG was not conclusive of CTS. The report further argues that the EMG results from Dr. W are below those that are truly positive for CTS and normal in one measurement. Claimant was not asked at the CCH about the reference to diabetes in this report.

On January 9, 1996, an EMG was reported by Dr. H as showing some abnormality but this was related by the doctor to RSD rather than CTS. On July 2, 1996, a consulting report written by Dr. M to Dr. O stating his understanding that the claimant was referred to

him for pain management of arm, hand, neck, and shoulder pain, mostly on her right side. This report records claimant's conviction that her 1994 injury actually started as early as 1992. Dr. M opined that while the claimant may have had RSD in the past, she did not have it now. He felt that depression could be contributing to claimant's pain. He said that she suffered from neuropathic pain of the brachioplexus and recommended various treatments, including injections, medications, and physical therapy. He undertook treatment of her with medication and injections.

The medical records concerning treatment by Dr. W after _____ indicated that claimant saw Dr. W beginning August 27, 1996. Dr. W treated the claimant for upper right extremity pain. He treated her for right shoulder pain which radiated to her little finger. Wrist and hand pain is not otherwise mentioned. Dr. W's assessment was myofascial pain and dysfunction, involving primarily the right shoulder area, and RSD. Dr. W's treatment notes for September 12 and October 4, 1996, change the RSD assessment to thoracic outlet syndrome. Neither report mentions complaints of hand or wrist pain. The January 7, 1997, EMG report by Dr. W noted that the claimant had had "significant hand and wrist pain" since her fall at the skating rink on November 16, 1996. Comparing her results to his previous April 1995 study, Dr. W reported that claimant had evidence of an early sensory CTS.

On January 28, 1997, claimant was examined by a designed doctor for her 1994 injury. The designated doctor reports a history of diagnosis of left CTS six months before. He found negative Tinel signs, and did not test Phalen's due to her right wrist fracture. This report indicates that the 1994 injury was in the nature of an aggravation and that in 1992, in a non-work-related occurrence, the claimant fell asleep with her right arm in an unnatural position and this initiated her problems. The designated doctor noted that while the claimant recently complained of CTS, this was too remote from the original injury and he did not consider it as part of what he evaluated. Claimant was found to have reached maximum medical improvement (MMI) on January 28, 1997, with a four percent impairment rating (IR).

Claimant said she had already had right CTS surgery, which alleviated her problems; however, she said she was still unable to work due to her inability to type with her left hand. We note that none of claimant's treating or referral doctors document any diagnosis of diabetes, as alluded to in the peer review report.

First of all, we do not agree that the hearing officer abused his discretion in admitting the documents to which the carrier asserted objection. Exchange of documentary evidence under Section 410.160 is to be made in accordance with rules of the Commission. The applicable Commission rule, Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE ? 142.13(b) (Rule 142.13(b)) requires exchange of documentary evidence "not previously exchanged." The hearing officer evidently believed the claimant's assertion that

the documents had been previously exchanged at the BRC. Although the carrier argued in final argument that it had been prevented from developing a defense to Dr. W's statement, this would have been a situation of its own making. We do not find error, therefore, in admission of either document.

The primary reason for our remand in this case is that there cannot be two dates of injury. Notwithstanding that the claimant argued in final argument, and apparently at the BRC as well, that she promptly notified the employer after her date of diagnosis and was therefore timely, the operative definition of occupational disease in Section 408.007 is substantively identical to that used in the notice provisions under Section 409.001(a)(2). We have stated that a concrete diagnosis is not required in order to find a date of injury as defined in both of these sections. Texas Workers' Compensation Commission Appeal No. 950411, decided May 2, 1995; Texas Workers' Compensation Commission Appeal No. 94534, decided June 13, 1994. There was no express issue reported from the BRC over the date of injury, which had been claimed by the claimant as _____. However, the BRC report indicates that claimant, as part of her defense to the "notice" issue, argued that she first knew or should have known that her injury was related to her employment on January 7, 1997, because CTS was not diagnosed formally until then. Against this is claimant's testimony that while Dr. O believed she experienced symptoms related to that, she did not rely on this for more than a little while, that she did not agree because her pain was different and affected her wrists and hands, and that she kept asking Dr. O to allow EMG testing because she believed she could have CTS. Dr. O's notes document a suspicion of CTS in mid-November 1996, immediately prior to claimant's accident at the skating rink. On the other hand, there were several complaints by the claimant which Dr. O evidently believed related to her "ongoing problems." Without knowing which date the hearing officer finds the date of the occupational disease to be, we cannot begin to assess whether the great weight and preponderance of the evidence is against one or the other. We reverse the decision because two dates of injury cannot stand, and remand so that the hearing officer may further consider matters relating to the threshold date of injury and timely notice. Although he found that the claimant gave notice of her injury to a supervisor on January 9, 1997, and this was not appealed, this may have been influenced by his erroneous belief that an express diagnosis was required before notice could be given. Claimant testified throughout the CCH that she complained to her supervisor of hand and wrist pain starting in _____. If the hearing officer determines that notice was not timely, then we note that exceptions to the notice requirement have been held by the Appeals Panel to be subsumed in issues, Texas Workers' Compensation Commission Appeal No. 941722, decided February 6, 1995, and applicable findings of fact and conclusions of law would have to be made. Finally, because income benefits do not accrue until the eighth day "after the date of injury," Section 408.082(b), the finding as to the inception of any disability will have to be adjusted to match the date of injury found by the hearing officer.

Concerning the existence of a new work-related injury, and we agree that there is considerable conflict in the evidence, we cannot say until other issues are resolved whether the determination of the hearing officer that the claimant sustained a repetitive trauma injury is against the great weight and preponderance of the evidence so as to be manifestly unfair or unjust. We note that while the description of the claimant's activities, at least in this CCH, was not as complete as it might have been, there does not appear to be a question that after June 1, 1996, claimant was no longer under typing limitations and that she resumed full-time work once more, most of which consisted of keyboard typing. Generally, it is for the hearing officer, as trier of fact, to resolve the inconsistencies and conflicts in the evidence. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701, 702 (Tex. Civ. App.-Amarillo 1974, no writ). This is equally true of medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286, 290 (Tex. App.-Houston [14th Dist.] 1984, no writ). While we agree that Dr. W's brief of June 30, 1997, appears to be nothing more than a generalized concurrence about circumstances that can lead to CTS, such medical corroboration was not necessarily required for this injury, and the claimant's testimony alone was sufficient, if believed, to establish that an injury has occurred, and disability has resulted from it. Houston Independent School District v. Harrison, 744 S.W.2d 298, 299 (Tex. App.-Houston [1st Dist.] 1987, no writ). We would note that the carrier has the burden to prove that the sole cause of incapacity is a preexisting condition or subsequent injury.

Finally, as noted above, the date of inception of disability for purposes of accrual of income benefits must await further findings on the date of injury. We will generally comment that although much was clearly going on with the claimant beyond CTS, the record is not devoid of any evidence linking her inability to work to hand and wrist pain. We will defer further comment pending remand.

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

Susan M. Kelley
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Judy L. Stephens
Appeals Judge