APPEAL NO. 981397

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, who is the claimant, sustained a repetitive trauma carpal tunnel syndrome injury on or about __________; whether the appellant, (referred to as carrier or employer depending on the context), 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 express 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 case was remanded by the Appeals Panel in Texas Workers' Compensation Commission Appeal No. 972387, decided January 5, 1998, because the hearing officer had found two dates of injury, one for purposes of disability and one for purposes of notice to the employer. A hearing on remand was therefore held on June 3, 1998, at which no new evidence was taken but additional argument was heard.

The hearing officer held that the date that the claimant knew, or should have known, that she had an injury related to her employment was __________. He further found that the appellant, carrier/employer, had actual knowledge of this matter. However, because of a prior work-related injury, as well as advice of claimant's doctor, both parties understood that this condition may be related to that prior injury. The hearing officer held that claimant did not give notice that she had a new injury until January 9, 1997, two days after she received the diagnosis that the cause of her problems was a new injury, and that she had good cause for late notice. Because the new injury caused the inability to obtain and retain employment beginning on August 2, 1996, the hearing officer held that claimant had disability beginning that day and continuing through the date of the CCH.

The carrier has now appealed this decision. The appeal disputes that the carrier is not discharged from liability for untimely notice, and argues that the claimant did not have continuous good cause to the date of injury. There is no response from the claimant.

DECISION

Affirmed.

The facts are fully set out in our previous decision and are incorporated herein.

Essentially, the case on notice to the employer concerns undisputed evidence that the claimant knew, and the employer knew, in __________, that she had a work-related injury involving her upper extremities. She was given time off from work for that reason. All that remained "unknown," and "unreported," was the precise inception date of that injury.

Neither the claimant nor supervisors for the employer were doctors. Although claimant began to suspect sometime in November 1996 that she might have something in addition to mere manifestations of her 1994 injury, this viewpoint was not supported by her physicians at the time. It was not until January 1997 that the inception of her injury was identified to a later point than 1994, to __________, when problems arose. Even in January 1997, she was actively advised by an adjuster for the carrier to claim it was related to the earlier date.

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. The date of injury for an occupational disease (when an employee knew, or should have known, that her condition may be related to her employment) is not necessarily the date of the first symptom. 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.). 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.

This is a complicated case because of the earlier injury. However, we affirm the hearing officer's determination that the carrier is not discharged, noting that it is based upon at least two exceptions to timely notice. The purpose of the notice requirement is to afford the employer with the opportunity to promptly investigate the circumstances of the injury. DeAnda v. Home Insurance Company, 618 S.W.2d 529, 532 (Tex. 1980). The need for notice can be dispensed with where there is actual knowledge of an injury. DeAnda. Actual knowledge could be found if the trier of fact believed that the employer had facts that would lead a reasonable person to conclude that a compensable injury had been sustained by the claimant in an accident which the supervisor witnessed. *See* Miller v. Texas Employers' Insurance Association, 488 S.W.2d 489 (Tex. Civ. App.-Beaumont 1972, writ ref'd n.r.e.). Actual knowledge on the part of the employer is an exception to timely notice. Section 409.002(1).

The test for existence of good cause is that of ordinary prudence, that is, whether the claimant prosecuted her claim with that degree of diligence which an ordinary prudent person would have exercised under the same or similar circumstances, which is ordinarily a question of fact to be determined by the trier of facts. Hawkins v. Safety Casualty Company, 207 S.W.2d 370 (Tex. 1948). Mistake as to the cause of an injury or disability may constitute good cause. Baca v. Transport Insurance Company, 538 S.W.2d 814 (Tex. Civ. App.-El Paso 1976, writ ref'd n.r.e.).

Under all the facts here, we cannot disagree with the hearing officer's determination that there was continuous good cause for claimant's delayed reporting of the nature and precise diagnosis of a work-related injury already well known to the employer.

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). We affirm the decision as being sufficiently supported by the record herein.

Susan M. Kelley
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Christopher L. Rhodes
Appeals Judge