APPEAL NO. 002758

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 November 8, 2000. The hearing officer determined that the appellant/cross-respondent (claimant) did not sustain a compensable repetitive trauma injury to his right wrist on _____; that the claimant did not have disability from June 14, 2000, through September 7, 2000, because he did not sustain a compensable injury; that the respondent/cross-appellant (self-insured) was relieved from liability under Section 409.002 because of the claimant's failure to timely notify his employer pursuant to Section 409.001; and that the claimant timely filed an Employee's Notice of Injury or Occupational Disease and Claim for Compensation (TWCC-41) with the Texas Workers' Compensation Commission (Commission) within one year of the injury as required by Section 409.003.

The claimant appealed the adverse determinations that he did not sustain a compensable injury, did not have disability, and failed to timely notify his employer, contending that these determinations were against the great weight and preponderance of the evidence. The self-insured filed a response to the claimant's appeal urging that the hearing officer's determinations as to compensability of the injury and notice to the employer should be affirmed as sufficiently supported by the evidence. However, the self-insured appealed the finding that due to the claimed injury of _____, the claimant was unable to obtain and retain employment at wages equivalent to his preinjury wage beginning on June 14, 2000, and continuing through September 7, 2000, and the conclusion of law that the claimant timely filed a claim for workers' compensation benefits, arguing that the hearing officer erred in applying Section 409.003 to the evidence adduced at the hearing. The self-insured requested that the hearing officer's decision and order be reversed and a new decision rendered that the claimant failed to timely file a claim for workers' compensation benefits.

DECISION

Affirmed in part; reversed and rendered in part.

The claimant offered evidence at the CCH and contended that he sustained a repetitive trauma injury to his right wrist in the form of tenosynovitis on _____. The claimant acknowledged that he had been diagnosed and previously treated for this condition in 1998, but asserted that this condition/injury completely healed by the time he was certified on February 10, 1998, by Dr. N, his treating doctor, to be at maximum medical improvement (MMI) with a 0% impairment rating. The claimant stated that he never missed time from work as a result of the January 6, 1998, injury, and argued that he sustained a new injury as a result of additional repetitive trauma to his wrist caused by working conditions from February 10, 1998, through _____. He asserted that on _____, after discussing his condition with Dr. N, he knew he had another injury to his wrist. The self-insured argued at the CCH that the claimant was merely experiencing symptoms from his 1998 injury and that he had not sustained another new injury.

The claimant testified that his right hand started hurting on _____, so he went to his supervisor and told her that his hand was hurting and asked to see a doctor. On the same day, the claimant presented to Dr. N who, the claimant contended, told him that the claimant had sustained an injury to a different part of his hand. A report from Dr. N dated _____, reflects that he examined the claimant for recurring complaints of right hand and wrist pain. Dr. N noted that the claimant was experiencing the same burning discomfort on the top of his hand and numbing sensation to his fourth finger, but that he was also experiencing pain to his proximal forearm and elbow area which he had not previously experienced. Dr. N wrote:

> This may represent a progression or a re-occurrence and execeration [sic] of the previous condition. However, [the claimant] does have a new area that is affected although in the same extremity but it was not present in the prior problem. This relates to the pain and tenderness to the proximal forearm extension muscles and tendons.

The claimant testified that after seeing Dr. N on _____, he told his supervisor the next day that he had an injury to a different part of his right hand/wrist and that Dr. N would send in a report. He returned to work at his regular duties but worked at a slower pace to accommodate the pain in his hand. The claimant did not miss any time from work because of hand complaints. On December 20, 1999, he returned to Dr. N for a reevaluation because of increasing pain and swelling to the right wrist. Dr. N noted that the complaints were in the same wrist/hand area that was treated and rendered at MMI with residual intermittent aches and pains. Dr. N believed that due to the nature of the claimant's work and operation, it was felt that he could be at risk for reoccurring symptoms or event progression. After examination, Dr. N opined that the claimant was "experiencing a progression and reaggravation of the right wrist, specifically to the flexor tendon." Dr. N recommended modified work activities.

A patient ledger from Dr. N reflects that the claimant received treatment from Dr. N in April 1998, then again on January 12 and 27, 1999. The claimant presented to Dr. N thereafter on a monthly basis through April 1999 and did not return again until December 20, 1999, and received extensive physical therapy through March 6, 2000. All of Dr. N's medical records reflect a date of injury of January 6, 1998. The last record of March 6, 2000, indicates a diagnosis of "strain, de Qervian's tendonitis [sic] and carpal tunnel syndrom [sic][CTS] of the right wrist/hand [by EMG/NCV study]." The claimant was referred to Dr. B with surgery pending. The claimant was requested to return on March 27, 2000.

A report dated March 2, 2000, from Dr. B relates a two-year history of right wrist/hand problems for which the claimant received treatment. Dr. B wrote that the claimant "was allowed to return to his original position and gradually had a reoccurrence of his symptoms, at which time an EMG nerve conduction study was performed which was consistent with mild to moderate CTS." Dr. B advised that the claimant's work duties be modified and that he return in four weeks. If the symptoms still persisted, surgery would

be scheduled. The claimant returned to Dr. B on March 21, 2000, with continuing complaints of right wrist/hand pain. Because the claimant's symptoms had not decreased with modified work activities, surgery was actively scheduled.

Instead of having surgery the claimant filed an Employee's Request to Change Treating Doctors (TWCC-53) with the Commission on March 21, 2000, apparently the same day that he saw Dr. B. The Commission approved the claimant's request to change to Dr. M, a chiropractor, on March 22, 2000. The document reflects that the claimant was requesting a change of doctors because, "I feel no improvement in my condition. I want to seek treatment with another doctor." The TWCC-53 reflected a date of injury of January 6, 1998. The adjusting firm received a copy of the document on March 30, 2000. The claimant did not return to Dr. N or Dr. B for the scheduled surgery.

The claimant presented to Dr. M on March 25, 2000, providing a history of right-hand pain due to repetitive motion at work. The claimant related an injury date of January 6, 1998. The claimant received extensive chiropractic therapy through June 7, 2000. All of the progress notes through this date carry a date of injury of January 6, 1998. After June 14, 2000, the records from Dr. M reflect a new injury date of _____. The claimant was given a work release by Dr. M on June 14, 2000.

The claimant stated that he continued to work until June 14, 2000. On this date he underwent a surgical consult by Dr. A at Dr. M's referral, for a posttraumatic cyst condition that had developed on the flexor surface of the right wrist. According to Dr. A's report, the claimant related that he had been having trouble with his wrist since January 1998 due to repetitive duties at work. An examination of the right wrist demonstrated multiloculated cyst formation over the volar radial aspect of the wrist. Phalen's and Tinel's tests were positive with obvious hypertrophy and hypertrophic synovitis involving the flexor tendons of the wrist. Surgery was scheduled and performed on July 6, 2000. All of Dr. A's reports reflect an injury date of January 6, 1998.

The claimant related that he was off work due to the surgery until September 7, 2000. On cross-examination the claimant admitted that he learned in June 2000 that he was not eligible to receive anymore weekly benefits for the 1998 injury.

Ms. Ramirez (Ms. R) testified that the claimant approached her in January 1999 to advise her that his right hand was still hurting and that he wanted to go back to the doctor. Ms. R stated that she arranged for the claimant to see Dr. N the next day and that he returned from Dr. N's office with a restricted work-release. Ms. R denied that the claimant told her that he had sustained a new injury to his right wrist/hand. She contended that it was not until July 31, 2000, that she became aware of a new claim for compensation filed by the claimant and, as a result, she completed an Employer's First Report of Injury or Illness (TWCC-1). This document was faxed to the adjusting firm on July 31, 2000. Ms. R stated that the claimant had earlier inquired about disability payments in June 2000 because he was going to have surgery and would be off work. Ms. R testified that she told the claimant that he was no longer eligible to receive weekly income benefits from his 1998

injury so they filled out paperwork for disability payments through (carrier), the company's disability insurance carrier. Ms. R claimed that the claimant did not assert any new injury of _____, during this conversation.

The hearing officer entered a finding of fact that the claimant sustained an injury to his right wrist on January 6, 1998, with a diagnosis of tenosynovitis of the right hand and wrist. She also made a finding that the claimant experienced a progression and re-aggravation of the January 6, 1998, injury on or about _____, as a result of his repetitive work activities and that he continued to suffer the effects of his January 6, 1998, compensable injury. The hearing officer found that the claimant did not sustain a new repetitive trauma injury to his right wrist in the course and scope of his employment with a date of injury of _____.

In Texas Workers' Compensation Commission Appeal No. 950125, decided March 10, 1995, the Appeals Panel noted that whether a claimant sustained a new injury or merely suffered a continuation of an original injury was normally a question of fact to be determined by the hearing officer; that to be considered a new injury, there must be evidence that an injury, as defined in the 1989 Act, has occurred; that an aggravation of a previous condition or injury could rise to the level of a new injury, but that to be compensable there must be a new injury and not merely a transient increase in pain from an existing condition. What must be proven is not a mere recurrence of symptoms inherent in the etiology of the preexisting condition that has not been completely resolved, but that there has been some enhancement, acceleration, or worsening of the underlying condition from an injury.

In the present, case the hearing officer made two conflicting findings of fact, one that apparently supported a new injury through the aggravation of a preexisting condition and the other supporting no new injury at all. Because of the conflicting findings, a remand would normally be required. However, a remand would serve no useful purpose as the hearing officer determined that the claimant was not to be entitled to workers' compensation benefits on other grounds. Further, we can infer from the evidence adduced at the CCH, the findings of fact entered by the hearing officer, and the Statement of the Evidence contained in the hearing officer's decision and order that the hearing officer determined that the claimant did not sustain a compensable, repetitive trauma injury to his right wrist on _____, and we affirm this portion of the hearing officer's decision and order.

The hearing officer found that the claimant did not notify his employer of a _____, injury until on or about July 31, 2000, which was not within 30 days of the date the claimant knew or should have known that his injury may be related to his employment. The hearing officer found that the claimant did not show good cause for failing to timely report a work-related injury to his employer. The 1989 Act provides that the hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). Where there are conflicts in the evidence, the hearing officer resolves the conflicts and determines what facts the evidence has established. As an appeals body, we will not substitute our

judgment for that of the hearing officer when the determination is not so against the overwhelming weight of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Texas Workers' Compensation Commission Appeal No. 950456, decided May 9, 1995. We affirm that portion of the hearing officer's decision and order that the self-insured is relieved from liability under Section 409.002 because of the claimant's failure to timely notify his employer pursuant to Section 409.001.

The claimant asserted that he had disability from June 14, 2000, through September 7, 2000, as a result of a compensable injury of _____. The hearing officer found that the claimant was unable to obtain and retain employment at wages equivalent to his pre-injury wage beginning June 14, 2000, and continuing through September 7, 2000, due to the claimed injury of _____. Disability means the "inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage." Section 401.011(16). Disability, by definition, depends upon there being a compensable injury. *Id*. Since we have affirmed the determination that the claimant did not sustain a compensable injury on _____, the claimant cannot have disability.

The hearing officer found that the claimant filed a TWCC-41 with the Commission on July 21, 2000, which was the first filing with the Commission regarding a _____, date of injury and was sufficient to satisfy the requirements of Section 409.003. The hearing officer wrote that the date the claimant knew or should have known that his injury may be related to his employment was _____, and that the claimant did not report an injury of _____, to his employer until July 31, 2000. She also found that the employer filed its TWCC-1 on July 31, 2000, and the "carrier" disputed the _____, claim on August 17, 2000. She wrote that the claimant had one year to file with the Commission from the date of the first filing with the Commission, which was the TWCC-41 filed on July 21, 2000; therefore, the claimant timely filed with the Commission as required by Section 409.003.

The self-insured contended on appeal that the hearing officer erred in determining that the claimant timely filed his claim for compensation with the Commission. The record contains evidence supporting the statements by the hearing officer that the date of the claimed injury was _____, and that the employer received notice of the claimed injury on July 31, 1999. The record also reflects that the TWCC-1 was faxed by the employer to the adjusting firm on July 31, 2000, but does not contain any TWCC-41 from the claimant and there was no date offered during testimony other than from the claimant when he mentioned that he thought he filed it sometime in August 2000. In addition, the record does not contain any document or testimony referencing that the "carrier" disputed the claim on August 17, 2000. In evidence is a Payment of Compensation or Notice of Refused or Disputed Claim (TWCC-21) that is dated August 4, 2000, but it is not stamped "received" by the Commission.

Section 409.003 requires that the claimant or someone acting on his behalf file a claim for compensation with the Commission not later than one year after _____, the date the hearing officer found that the claimant knew or should have known that the

claimed injury was work-related. Section 409.004 provides that failure to file within one year relieves the self-insured of liability for the injury unless good cause existed for the failure to file or the self-insured did not contest the claim. The claimant advanced a theory during the CCH that he had good cause for not filing his claim within one year of _____, because the employer did not file the TWCC-1 until July 31, 2000. The self-insured contested the claim and there are no findings by the hearing officer regarding the good cause asserted by the claimant. The evidence is clear that the claimant did not file a claim for compensation with the Commission within one year of _____.

Under the provisions of Section 409.008, once an employer has notice of a claimed injury the period for a claimant to file a claim for compensation does not begin to run against the claim until the day the employer or carrier files the report with the Commission. However, this provision did not effect the outcome of the claimant's entitlement to workers' compensation benefits in this case because more than one year had already passed since the inception date of the occupational disease injury before the claimant gave notice to the employer. The tolling provision did not apply until the duty to file the first report of injury was met and it is not only knowledge of a specific injury that is required by the employer to invoke the tolling provision; rather, the employer must also have knowledge that time missed was due to this injury. *See* Texas Workers' Compensation Commission Appeal No. 000444, decided April 13, 2000.

We, therefore, reverse the determination of the hearing officer that the claimant did timely file a TWCC-41 with the Commission within one year of the injury as required by Section 409.003 and render a decision that the self-insured is relieved of liability for the claimed injury of _____, because the claimant failed to timely file a written claim for compensation with the Commission within one year of the date of the claimed occupational disease injury as required by Section 409.003 and Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 122.2(a) (Rule 122.2(a)).

We affirm that the claimant did not sustain a compensable, repetitive trauma injury to his right wrist on _____; that the claimant did not have disability; that the self-insured is relieved from liability under Section 409.002 because of the claimant's failure to

timely notify his employer pursuant to Section 409.001; and reverse and render that the self-insured is relieved of liability for the claimed injury of _____, because the claimant failed to timely file a written claim for compensation with the Commission within one year of the date of the claimed occupational disease injury as required by Section 409.003 and Rule 122.2(a).

_____
Kathleen C. Decker
Appeals Judge

CONCUR:

_____
Thomas A. Knapp
Appeals Judge

_____
Judy L. Stephens
Appeals Judge