APPEAL NO. 010852
FILED JUNE 6, 2001

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 March 14, 2001. With respect to the issues before him the hearing officer determined that the respondent/cross-appellant (claimant) sustained a compensable occupational disease injury; that the date of the injury was _____; that the claimant did not have disability; and that the claimant failed to timely report the claimed injury. Appellant/cross-respondent (carrier 1) conditionally appeals the finding that the claimant sustained an occupational disease injury, namely bilateral carpel tunnel syndrome (CTS); and that due to this injury she was unable to "obtain or [sic] retain" employment at her preinjury wages from September 21, 2000, to the date of the CCH. The claimant appeals the finding that the date of injury is _____, and that the delay in reporting the injury to her employer until September 13, 2000, was not reasonable or prudent. She also points out that Conclusion of Law No. 3 states that she did not sustain a compensable injury despite a contrary determination in Findings of Fact Nos. 2 and 3. Respondent (carrier 2) has not filed a response.

DECISION

Affirmed in part; reversed and remanded in part.

It is undisputed that on February 28, 2000, the claimant commenced employment with (employer 1), which had workers' compensation insurance with carrier 1; that the claimant was assigned to work at the facility of (employer 2), which had workers' compensation insurance with carrier 2; that the claimant's daily duties consisted of wringing out by hand the water from enough pieces of soaking material to make approximately eight dozen hats; that when she began to complain of symptoms in her hands, she was sent to employer 2's human resources office for treatment which included the spraying on of "fire freeze" and the use of hand wraps and was advised that her symptoms would eventually resolve once she got used to the work; that she visited an emergency room on April 3, and again on _____, complaining of numbness and tingling in both hands and was referred to a neurologist; that on June 19, 2000, she was hired by employer 2 and continued to perform the same duties for employer 2 until June 29, 2000, when the plant closed for maintenance for about a month; that when she resumed working her symptoms returned; that on August 16, 2000, she requested employer 2 to assign her to a different department; that on August 23, 2000, she saw her family doctor, who ordered nerve testing and referred her to another doctor who diagnosed CTS; and that on September 21, 2000, she was taken off work by her treating doctor.

As noted, Finding of Fact No. 6, which states that the claimant notified "the Employer" about her injury on September 13, 2000, has not been appealed. We also note that in his discussion of the evidence the hearing officer states that "it was agreed that Claimant did not report a work-related injury in regard to her hands and wrists until September 13, 2000, . . ." In this regard, we observe that aside from the stipulations concerning the dates of employment with employer 1 and employer 2, the hearing officer

in his discussion and findings merely refers to "the Employer" and fails to distinguish between employer 1 and employer 2.

The hearing officer is the sole judge of the weight and credibility of the evidence (Section 410.165(a)) and, as the trier of fact, resolves the conflicts and inconsistencies in the evidence (Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ)). As an appellate-reviewing tribunal, the Appeals Panel will not disturb the challenged factual findings of a hearing officer unless they are 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). Applying this standard of review, we are satisfied that the evidence is sufficient to support the following challenged findings:

FINDINGS OF FACT

2. Claimant did sustain damage or harm to the physical structure of her body in the form of an occupational disease, to-wit: bilateral [CTS].

3. Claimant was injured in the course and scope of employment in the form of an occupational disease.

4. Claimant knew or should have known that her injury may be related to her employment on _____.

5. Due to the claimed injury, Claimant was unable to obtain or [sic] retain employment at wages equivalent to claimant's preinjury wage beginning on September 21, 2000 and continuing through the date of this hearing.

Notwithstanding these findings, which we affirm, and the unappealed finding establishing that the claimant reported her injury to "the Employer" on September 13, 2000, we are nevertheless compelled to reverse and remand this case for further consideration by the hearing officer and for such further factual findings and conclusions of law as may be appropriate for the following two reasons: (1) the hearing officer's decision reflects that he may have misapprehended the law concerning the duration of good cause for not reporting an injury within 30 days of its occurrence; and (2) the hearing officer made no findings concerning whether either employer had "actual knowledge" of the injury (Section 409.002(1)) despite the evidence of the claimant's having received treatment at work for her wrist symptoms on several occasions.

Regarding notice of injury and good cause for not timely reporting an injury, Section 409.001(a) provides that an employee shall notify the employer of an injury no later than 30 days after the date on which: (1) the injury occurs; or (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 Texas Workers' Compensation Commission Appeal No. 91026, decided October 18, 1991, the Appeals Panel stated that "[u]nder the 1989 Act, if the injury is an occupational disease, the employee or person acting on the employee's behalf must notify

the employer of the injury not later than the 30th day after the date on which the employee knew or should have known that the injury may be related to the employment." Section 409.002 provides, in part, that failure to notify an employer as required by Section 409.001(a) relieves the employer and the carrier of liability unless the employer (or the carrier) has "actual knowledge" of the employee's injury or the Texas Workers' Compensation Commission (Commission) determines that good cause exists for failure to provide notice in a timely manner.

The hearing officer finds in Finding of Fact No. 8 that "Claimant did not have good cause for failing to notify the Employer of her injury within 30 days after _____." We again note that the hearing officer does not identify "the Employer" as employer 1 or employer 2. Further, in his discussion of the evidence the hearing officer states that "[f]or the same reasons as enumerated above, good cause for failure to report the injury could not continue to exist more than 30 days after the date of injury, and certainly not beyond August 23, 2000 when Claimant went to her family doctor." These statements convey the impression that the hearing officer may have confused the 30-day period for providing notice of the injury with the good cause exception and misapprehended that there is a 30-day limit to the duration of good cause for not reporting an injury within 30 days of its occurrence. Good cause must exist up to the time the report of injury is made. Texas General Indemnity Company v. McIlvain, 420 S.W.2d 56 (Tex. Civ. App. Houston [14th Dist.] 1968, writ ref'd.). However, the Appeals Panel has not required a claimant to "immediately" report an injury upon the termination of good cause. Texas Workers' Compensation Commission Appeal No. 93544, decided August 17, 1993. It has been held that while a reasonable time should be allowed for filing a claim after the seriousness of the injury is suspected or determined, no set rule has been established for measuring diligence in this respect and each case must rest upon its own facts. Hawkins v. Safety Casualty Company, 207 S.W.2d 370 (Tx. 1948).

The test for good cause is that of ordinary prudence, that is, whether the employee has prosecuted his or her claim with the degree of diligence that an ordinarily prudent person would have exercised under the same or similar circumstances. Hawkins. In Texas Workers' Compensation Commission Appeal No. 94050, decided February 25, 1994, the Appeals Panel stated: "Our review of the Texas case law reveals that the reasons or excuses commonly recognized as 'good cause' include the claimant's belief that the injury is trivial, mistake as to the cause of the injury, reliance on the representations of employers or carriers, minority, and physical or mental incapacity, while the advice of third persons and ignorance of the law are frequently held not to constitute good cause." Whether good cause exists in a particular case is a question of fact for the hearing officer to decide (Texas Workers' Compensation Commission Appeal No. 93184, decided April 29, 1993) and a claimant's conduct must be examined in its totality to determine whether the test of ordinary prudence was met (Appeal No. 93544, *supra*). Upon remand, the hearing officer should consider all the evidence, identify the employer being referenced, correctly apply the law regarding good cause, and make findings as to whether or not the claimant had good cause for not reporting her _____, injury until September 13, 2000.

Concerning actual knowledge of the injury, the Appeals Panel in Texas Workers' Compensation Commission Appeal No. 93454, decided July 21, 1993, commented that such knowledge "would obviate the need for notice by the claimant altogether." That decision further stated that the employer's plant doctors and nurses had treated or consulted with the employee for his claimed injury "not once, but twice, a situation affirmed by the Texas Supreme Court as demonstrating actual knowledge of injury by the employer in DeAnda v. Home Insurance Company, 618 S.W.2d 529 (Tex. 1980)." Appeal No. 93454 went on to cite DeAnda for the propositions that the purpose of notice is to give the insurer the opportunity to investigate promptly the facts surrounding an injury and that the employee need not give the specific time, place and extent, but that the employer need only know the general nature of the injury and the fact that it is job related. In the case we consider, given the evidence of the claimant's treatments at work for complaints of hand pain, ostensibly by employer 2 personnel, the hearing officer should consider all the evidence and make appropriate findings concerning whether or not "the Employer" (properly identifying the employer) had actual knowledge of the claimant's injury.

We reverse the decision and order of the hearing officer and remand for further consideration and for such further findings of fact and conclusions of law as are consistent with the evidence of record and with this decision.

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.

Philip F. O'Neill
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Gary L. Kilgore
Appeals Judge