

APPEAL NO. 93537

This appeal arises under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-1.01 *et seq.* (Vernon Supp. 1993) (1989 Act). On May 6, 1993, a contested case hearing (CCH) was held in (city), Texas, with (hearing officer) presiding. The record was closed on May 26, 1993. The sole issue to be decided at the CCH was "whether the great weight of the medical evidence is against the designated doctor's assessment of an 8% impairment rating." The hearing officer determined that the appellant, claimant herein, has an impairment rating of eight percent and that the impairment rating of eight percent by the designated doctor is not against the great weight of the medical evidence. Claimant contends that the hearing officer erred in accepting the designated doctor's assessment that her cervical injuries were not considered and requests that we reverse the hearing officer's decision and render a decision in her favor. Respondent, carrier herein, responds that the decision is supported by the evidence and requests that we affirm the decision.

DECISION

Finding that there is a need to develop additional evidence in order to determine whether jurisdiction is properly before the Texas Workers' Compensation Commission (Commission) under the 1989 Act, we reverse and remand.

Although claimant testified at the CCH, there was virtually no testimony concerning the surrounding circumstances of the injury and most of the evidence concerned the designated doctor. Based principally on the documentary evidence, it appears claimant was employed as a cook by (employer). Apparently, claimant is contending a repetitious trauma injury to her right shoulder, arm and possibly her neck, caused by stirring food. Claimant's Notice of Injury (TWCC-41) stated her injury was "[d]ue to repetitious and demanding tasks I injured my right shoulder and arm," alleging a December 28, 1990, date of injury. Again, the circumstances of the injury, how it was discovered, the date of the injury and the sequence of doctors claimant saw were not in evidence. There is no dispute that maximum medical improvement (MMI) has been reached and the only issue left unresolved from the benefit review conference (BRC) was the designated doctor's impairment rating. The BRC recites "Date of Injury: date of injury."

(Dr. SH), D.O., was apparently the treating doctor. Claimant offered as an exhibit Dr. SH's narrative report and two Reports of Medical Evaluation (TWCC-69s) giving an October 5, 1993, certification of MMI with either a nine percent impairment rating or a 17% impairment rating (depending on the TWCC-69) for a "DOI" date of injury. In fact, all of Dr. SH's reports refer to a December 28, 1990, date of injury. Claimant relies almost solely on Dr. SH's reports to rebut the medical evidence of the designated doctor. Had only Dr. SH's reports shown a 1990 date of injury, we might have believed that it was an error in the doctor's records or a typographical error on the report; however, it is of greater concern since claimant's TWCC-41, which is the basis of claimant's claim, and to which the carrier makes frequent reference, also lists a "12-28-90" date of injury.

All the other reports and correspondence in evidence indicate either a (date) or (date), date of injury. We recognize that the date of injury for a repetitive trauma injury is the date on which the employee knew or should have known that the injury may be related to the employment. Article 8308-4.14. Perhaps at some time it was determined that the date of injury was January 1991, but this is not evident in the record nor can we make such an inference in view of the TWCC-41, clearly stating a December 28, 1990, date of injury.

We have noted that the 1989 Act applies only to injuries occurring on or after January 1, 1991. Texas Workers' Compensation Commission Appeal No. 92168, decided June 12, 1992; Texas Workers' Compensation Commission Appeal No. 93054, decided March 8, 1993. See Texas Workers' Compensation Act, Acts 1989, 71st Leg., 2nd C.S., Ch. 1, § 17.18(c), effective January 1, 1991. Consequently, the date of injury is jurisdictional and determines whether the case is decided under the 1989 Act or prior law. We conclude there is insufficient evidence, in light of claimant's TWCC-41 and Dr. SH's reports, for us to determine that there was a date of injury in January 1991.

Accordingly, this case is remanded for the development of evidence necessary to determine whether this body has jurisdiction over this case. 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 Article 8308-5.41. See Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

Thomas A. Knapp
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Gary L. Kilgore
Appeals Judge