

APPEAL NO. 94101

On March 19, 1993, a contested case hearing was held in (city), Texas, with the record being closed on December 9, 1993. (hearing officer) presided as the hearing officer. The hearing was held under the provisions of the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. Section 401.001 et seq. (1989 Act). The issue at the hearing was whether the claimant's current inability to work is due to the injury of (date of injury), or due to a pre-existing condition. The hearing officer determined that after December 4, 1992, the claimant's compensable injury of (date of injury), did not cause him to be unable to obtain and retain employment at wages equivalent to his preinjury wage, and concluded that after December 4, 1992, the claimant did not have disability based on his compensable injury of (date of injury). The claimant disagrees with the hearing officer's decision and requests that it be reversed. The respondent (carrier) responds that the decision is supported by the evidence and requests affirmance.

DECISION

The hearing officer's decision is reversed and the case is remanded for further consideration and development of the evidence.

The carrier states in its appeal that "[c]laimant's receipt of the Contested Case Hearing Officer's Decision and Order on January 9, 1994, results in a January 24, 1994, deadline for Claimant to file his Request for Appeal." The carrier further states that "[c]laimant missed his January 24, 1994, deadline as his appeal was not filed with the Commission's central office in (city) until January 26, 1994." The appeal, however, is postmarked January 22, 1994, and was thus mailed to the Commission on or before the 15th day after the date of receipt of the hearing officer's decision, and the appeal was received by the Commission on January 26, 1994, which date was not later than the 20th day after the date of receipt of the hearing officer's decision. Thus, the appeal is presumed to be timely under the provisions of Tex. W.C. Comm'n, 28 TEX. ADMIN CODE Sec. 143.3(c) (Rule 143.3(c)) and will be considered. However, the claimant's subsequent appeal dated February 23, 1994, was not timely filed and will not be considered. The carrier's assertion that we should not consider the claimant's original appeal because it was not timely served with a copy of the appeal is without merit. First, the claimant indicated in his original appeal that he did serve the carrier with a copy of the appeal. Second, we have previously held that the failure of the appellant to properly serve the respondent with a copy of the appeal does not affect the timeliness of the appeal, but may extend the response time. Texas Workers' Compensation Commission Appeal No. 92051, decided April 30, 1992.

In October 1986, the claimant began working for the employer, (employer), as an electronic assembler. In April 1987, the claimant lifted a recliner chair over his head at home and experienced neck pain. He reported the incident to the employer's nurse on (date), and complained to her that he had discomfort on backward extension of his neck and in side to side motion of his neck. (Dr. P) diagnosed "myofascitis" in August 1988 and recommended physical therapy and a leave of absence from work until September 2, 1988, due to neck pain. The claimant was off work until September 26, 1988. The claimant took

another leave of absence from work from May 22, 1989, to October 30, 1989, due to "cervical radiculopathy" and "cervical spine pain." An MRI scan of the claimant's cervical spine was done on June 8, 1989, and it revealed a large herniation in the left paracentral portion of the C5-6 disc which compressed the left portion of the cervical cord and the left C6 nerve root and extended into the left neuroforamen. A small osteophytic ridge was also noted in the left portion of the C3-4 canal.

(Dr. MA) noted in a July 25, 1989, report that the claimant stated that his "neck pain was still there" and that he still had numbness in the thumb of the left hand. Dr. MA indicated that the claimant was off work and said he could not determine the date the claimant would be able to return to work. In August 1989, Dr. MA reported that the claimant was back on physiotherapy and that he still was having posterior neck pain. Dr. MA noted that the claimant was adamant about non-surgical treatment and that the claimant wanted to continue with conservative treatment. On October 30, 1989, Dr. MA reported that the claimant had requested to be returned to regular duties and that he was released to return to work on that day. The claimant took a third leave of absence from work from September 27, 1990, to February 25, 1991, because of "cervical disc pathology." In a report dated November 19, 1990, (Dr. MC) diagnosed a cervical disc herniation and noted that the condition was not caused by the claimant's employment but also noted that the claimant's employment aggravated the condition. During this third leave of absence, (Dr. W) gave the claimant epidural steroid injections. Dr. W noted on a report dated December 21, 1990, that the claimant's cervical disc pathology was not caused by the claimant's employment.

In a written report dated (date of injury), the claimant reported to his employer that about four weeks previously he started having cramps, weakness, swelling, and sharp pains in his right hand and wrist and that he had been asking people about carpal tunnel syndrome (CTS). He also stated that he wondered if his job had been the cause of his neck problems and wrote that his "past problems" included myofascitis and a large disc herniation. The next day the claimant reported to his employer that his left hand was hurting and stated that he was concerned that "all of the conditions may be work-related." The claimant stopped working for the employer on or about October 8, 1991, and has not returned to work since that date. In a written report to the employer dated November 12, 1991, the claimant reported that his tedious and stressful work which continuously required him to look down had aggravated his neck "until herniation occurred." He also stated that his hands, wrists, and elbows were injured due to repetitive motions in working on circuit boards.

Also on November 12, 1991, (Dr. M) reported that the claimant "sustained apparently a cumulative trauma type disorder while working on the assembly line" and that the problem began in 1986. Dr. M diagnosed cervical disc disease at two levels and "possible carpal tunnel syndrome or cubital tunnel syndrome." A cervical myelogram was performed on December 16, 1991, and it revealed a prominent disc herniation to the left at C5-6 which compromised the left neural foramen, a mild central disc bulge at C7, and mild posterior osteophytic ridging at C3-4. In January 1992, Dr. M reported that a cervical myelogram showed a large disc herniation at the C5-6 level and he referred the claimant to (Dr. MY), a neurosurgeon. Dr. M also reported that the claimant's symptoms of bilateral CTS continued

to persist and he referred the claimant to (Dr. I) for consideration of endoscopic carpal tunnel relief. In a report dated February 10, 1992, Dr. M diagnosed cervical disc herniations at the C5-6 and C6-7 levels and bilateral CTS and noted that the conditions were caused by the claimant's employment. Dr. M stated that repetitive neck and hand motions in the claimant's work caused swelling in the thumbs and fingers with pain in the elbow and the neck. Dr. M anticipated that the claimant would be able to return to work on March 13, 1992. An EMG study of the claimant's wrists done on February 25, 1992, was reported to be normal. There was no well defined electrodiagnostic evidence for neuropathy, radiculopathy, or myopathy. An MRI of the claimant's right wrist done on April 23, 1992, was also reported to be normal with no evidence of tenosynovitis.

Dr. MY reported on March 9, 1992, that the claimant had a cervical disc rupture at C5-6, that the condition was caused by the claimant's employment, and that cervical disc surgery was scheduled in two or three weeks. Dr. MY anticipated that the claimant could return to work on June 1, 1992. On June 29, 1992, Dr. MY reported that the claimant had neck surgery at the C5-6 level on March 24, 1992, and that the claimant continued to relate that he had pain and numbness in his hands and arms and that he had neck and back pain. Dr. MY further reported that the claimant was "unable to engage in any substantial gainful activity." On March 26th, Dr. MY diagnosed C6 radiculopathy on the left. On September 11, 1992, Dr. My reported that the claimant continued to have recurrent neck and back pain and numbness in his hands and that it was "unknown" when the claimant would be able to return to work.

In an Employee's Notice of Injury or Occupational Disease and Claim for Compensation form dated (date), the claimant claimed that he injured his back, neck, and both hands and wrists. He stated that the injury occurred by "continual gripping of syringes, air hoses, tweezers, tedious stress with neck-head facing down, broken down chairs, then aggravation by toxic chemicals." The nature of the injury was described as "cumulative trauma, repetitive motion, nerve damage & disruption, bilateral carpal tunnel syndrome, toxic chemical exposure." In response to the question "When did you first know disease was work related?" the claimant wrote (date of injury).

A third MRI scan of the claimant's cervical spine was done on August 27, 1992, and it showed a disc protrusion at C5-6. An MRI of the thoracic area done the same day showed a probable disc herniation at T11-12 and a probable disc protrusion at T6-7. And, an MRI of the claimant's lumbar spine also done on August 27th showed a mild disc bulge at T12-L1 and a mild congenital narrowing of the lumbar canal.

On January 11, 1993, Dr. M reported that the claimant had "[p]ostop residual radicular symptoms secondary to disk protrusion at C5-6" and that the claimant had "[c]linical carpal tunnel syndrome, bilaterally." He stated that the claimant was "not fit for duty." On March 4, 1993, the insurance carrier that provides life insurance and other benefits to the employer's employees notified the claimant that his claim for long term disability benefits had been approved.

At the hearing on March 19, 1993, the hearing officer advised the parties that he was going to have the claimant examined by a doctor in order for the doctor to provide an opinion as to whether the claimant ever had CTS or whether the claimant's pain was caused by cervical radiculopathy. At the request of the hearing officer, (Dr. W) examined the claimant on April 13, 1993. Dr. W stated that the claimant has degenerative disc disease in the cervical area with perhaps some involvement of the thoracic and lumbar areas, but that he didn't find any significant neurological deficit. Dr. W further reported that the claimant had recovered from cervical surgery "quite well," but that updated nerve conduction studies should be done to determine if the claimant has CTS. (Dr. G) performed nerve conduction studies on August 10, 1993, and reported that the abnormal EMG findings were consistent with a diagnosis of old, left C6 radiculopathy, and that there was a slowing of the left ulnar nerve conduction velocity around the elbow. On September 20, 1993, Dr. W reported that the EMG performed by Dr. G "showed an old left C6 radiculopathy and a slowing around the left ulnar nerve, thus indicating a tardy ulnar palsy but there is no indication that there is a carpal tunnel syndrome." The hearing officer sent Dr. W's reports to the parties and gave them ten days to submit additional comments or evidence.

The claimant testified that he first noticed that his neck was injured in 1988, but that he did not "notice" that it was work related. He said that late in 1989 he "woke up" with a herniated disc in his neck. He further testified that on or about (date of injury), he first noticed symptoms in his hands and wrists. He said that it was not until (date of injury), that he realized that "the whole problem was because of my work," and that he reported it to his employer on that date. He also said that during the period from (date of injury) to (date of injury), he recognized "an aggravation that had been happening on my neck, and so I believe that to be true, and that's why I'm here." The claimant further stated that "[m]y neck was pre-existed the (date of injury) injury, but it also happened that same day, aggravation. I'm saying every single day I believe my neck was being aggravated. And that's what I claim." The claimant further testified that "I had a cumulative trauma type disorder with my neck and back, and also at the same time, though it didn't show up until month of year the same thing happened with my hands and wrists and elbows, of which the elbows I'm no longer concerned about." And, he stated that "I believe that when it's cumulative trauma, I believe I was injured on that date of (date of injury) with my - -with all claims that I have mentioned, neck and back and hands and wrists."

As previously noted, the issue at the hearing was whether the claimant's current inability to work is due to the injury of (date of injury), or due to a preexisting condition. The hearing officer found that after December 4, 1992, the claimant's compensable injury of (date of injury), did not cause him to be unable to obtain and retain employment at wages equivalent to his preinjury wage, and the hearing officer concluded that after December 4, 1992, the claimant did not have disability based on his compensable injury of (date of injury).

We find no merit in the claimant's contention on appeal that evidence he offered at the hearing was not admitted. All evidence offered was admitted and is listed in the hearing officer's decision. We also find no merit in the claimant's contention that the hearing officer did not consider his submission of November 5, 1993. The hearing officer specifically noted

in his decision that he received the submission and listed it as a hearing officer exhibit. Further, the claimant's contention on appeal that the carrier had "improper contacts" with himself and with three of the doctors Dr. M referred him to is unsupported by any evidence in the record and does not present any basis for reversal.

The matter which causes us to reverse the hearing officer's decision and remand for further consideration and development of the evidence, as deemed appropriate by the hearing officer, is that the hearing officer stated in his statement of the evidence presented that "[i]t was undisputed that the claimant's neck injury was not work related and that it predated (date of injury)." In his appeal, the claimant contends that the statement is false because he said his neck injury was work related. While the claimant admits in his appeal that "neck injury did predate (date of injury)," he asserts that it was "reinjured or aggravated on (date of injury)/(date of injury)." He further asserts that "[b]etween August 2, 1988 and (date of injury), I slowly hurt myself at work, a little each day." Having reviewed the evidence, we think that it is clear that the claimant was asserting at the hearing that he sustained a work-related repetitive trauma injury to his neck as well as to his hands and wrists. We observe that in addition to his testimony on this matter, he also claimed a work-related neck injury in his claim for compensation and he had reported to his employer that repetitive work activity had aggravated his neck condition. Because of the hearing officer's statement in his decision that it was undisputed that the claimant's neck injury was not work related, when in fact the claimant was claiming that he is unable to work due to alleged work-related carpal tunnel syndrome as well as an alleged work-related neck injury, we are concerned that the issue before the hearing officer may have been decided based upon a misconceived notion of the claimant's position, rather than on the evidence presented. Thus, we reverse the hearing officer's decision and remand for further consideration and development of the evidence, as deemed appropriate by the hearing officer, and for further findings on the issue that was before the hearing officer. 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 Section 410.202. See Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

Robert W. Potts
Appeals Judge

CONCUR:

Lynda H. Nesenholtz
Appeals Judge

Thomas A. Knapp
Appeals Judge