APPEAL NO. 950086
FILED MARCH 3, 1995

This case returns for review pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act), following this panel's decision in Texas Workers' Compensation Commission Appeal No. 941288, decided November 8, 1994. In that case the Appeals Panel reversed and remanded the hearing officer's decision because the hearing officer who heard the case did not sign the decision and order, and to allow for clarification of discrepancies in findings of fact and conclusions of law regarding the claimant's date of injury. A hearing on remand was convened on December 14, 1994, before the hearing officer. At that time the parties stipulated that this hearing officer wrote the original decision even though it was signed by another individual. In addition, the hearing officer determined that claimant's date of injury was _____. The carrier appealed, contending that the hearing officer's findings as to date of injury and timely reporting are not supported by sufficient evidence; it also contended that the findings and conclusions that the carrier waived its right to contest compensability are not supported by the evidence, that the hearing officer abused her discretion in not adding maximum medical improvement (MMI) as an issue, and that the Texas Workers' Compensation Commission (Commission) failed to comply with Rule 142.16(d) [Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 142.16(d)] in failing to timely distribute the hearing officer's decision to the parties.

DECISION

Affirmed.

The claimant was employed as a production attendant by (employer), a job which required him, among other things, to perform repetitive pulling motions. He stated that he first began experiencing shoulder pain in July 1993, and that he mentioned this to his supervisor, (Mr. S), around that time when Mr. S was questioning employees after another employee had injured his shoulder. It was Mr. S's testimony that he did not remember this event. On (date of injury), the claimant was ordered to submit to a random drug test given by (Dr. T), the company doctor; the claimant failed the drug test and was fired. However, claimant said before going for the test he asked for and received permission to mention his shoulder pain to Dr. T. When he saw Dr. T he was told he had a rotator cuff tear; however, because he had been fired he saw Dr. T only a few more times and did not receive further medical care until July 1994. Claimant also said he informed Mr. S about his shoulder injury on _____.

On remand, the hearing officer made a finding of fact that on or about _____, the claimant learned from a doctor that he had a work-related, repetitive trauma injury which he reported to his employer on that date; she thus concluded that claimant knew or should have known that the rotator cuff tear was a compensable injury on

_____, which was claimant's date of injury. In its appeal the carrier contends that the evidence shows that claimant sustained the injury on _____, noting that Dr. T's report references that date. Therefore, it argues, any injury in November would have been an aggravation, which was not an issue before the Commission. It further argues that the evidence as to an injury in November points to the date of (date of injury), rather than _____. It likewise argues that claimant's _____ notice to his employer was not timely for a _____, injury and, while timely for a (date of injury), aggravation, the latter was not an issue.

The 1989 Act provides that the date of injury for an occupational disease, which includes a repetitive trauma injury, is the date on which the employee knew or should have known that the disease may be related to the employment, Section 408.007, and that an employee must notify his employer of the injury no later than the 30th day thereafter, Section 409.001(a)(2). Whether and when an employee knew or should have known that a physical problem was work related is a question of fact. Texas Workers' Compensation Commission Appeal No. 941374, decided November 23, 1994. While there is evidence that the claimant experienced shoulder pain in July 1993 and that he expressed concern about it, the hearing officer as the sole judge of the evidence could choose to believe that the claimant did not have reason to believe that it was causally connected to his employment until he saw Dr. T. Texas Workers' Compensation Commission Appeal No. 91097, decided January 16, 1992. Further, to the extent that Dr. T wrote that claimant "reported his date of injury being _____," the hearing officer could choose to believe that statement referred, in the context of Dr. T's letter as a whole, to when claimant became symptomatic rather than when he suffered a repetitive trauma injury, as contemplated by the 1989 Act. To the extent the evidence was in conflict, the hearing officer was entitled to resolve such conflict in one party's favor. Garza v. Commercial Insurance Co. of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). While the record does contain evidence in support of the carrier's contentions, that fact alone does not provide a sound basis for overturning the decision of the fact finder. Salazar v. Hill, 551 S.W.2d 518 (Tex. Civ. App.-Corpus Christi 1977, writ ref'd n.r.e.). The carrier's argument--that since the injury occurred in July, any event occurring in November is an aggravation and not an issue at this hearing--is thus moot; however, we would point out that the claimant was alleging a repetitive trauma injury, whose date of "occurrence," as mentioned above, is keyed solely to the date the claimant knew or should have known it was related to his work. In Texas Workers' Compensation Commission Appeal No. 941659, decided January 23, 1995, we reversed a hearing officer's determination that every day of exposure to an occupational disease constituted a new date of injury. We would also note that, contrary to the carrier's assertions, pleadings as such, are not required by the 1989 Act; therefore, the hearing officer can reach his or her decision based upon the evidence as a whole. *See* Texas Workers' Compensation Commission Appeal No. 91123, decided February 7, 1992.

As to the precise date of the injury, the record contains evidence to support both the (date of injury) and ____ dates, and the hearing officer's selection of the latter date is not against the great weight of the evidence. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

As to the remaining points on appeal, we have held that time requirements for filing and distributing hearing officers' decisions are not mandatory and such failure to comply is not grounds for overturning the hearing officer's decision. Texas Workers' Compensation Commission Appeal No. 92456, decided October 8, 1992. The hearing officer's failure to add the issue of MMI was considered and found not to be error in Appeal No. 941288, *supra*. That decision further noted that the carrier did not appeal the hearing officer's determination that the carrier's TWCC-21 did not provide a full and complete statement of the grounds for the carrier's refusal to begin payment of benefits, that the carrier presented no evidence concerning claimant's claim which could not have reasonably been discovered within 60 days of its notification of the claim, and that thus the carrier has waived its right to contest compensability of the claimant's claim. As we stated in Appeal No. 941288, "That being the case, the hearing officer's signing of the decision and correction of the date of injury on remand will not in any way affect the ultimate decision, which is that the claimant's injury is compensable."

Based upon the foregoing, the hearing officer's decision and order are affirmed.

Lynda H. Nesenholtz
Appeals Judge

CONCUR:

Gary L. Kilgore
Appeals Judge

Tommy W. Lueders
Appeals Judge