APPEAL NO. 980048

On December 3, 1997, a contested case hearing (CCH) was held, with the hearing officer. The CCH was held under the provisions of the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). The issues at the CCH were: (1) whether the appellant (claimant) sustained a compensable injury in the form of an occupational disease on _____; and (2) whether the claimant has had disability as a result of an injury on _____, and if so, for what periods. The claimant appeals the hearing officer's decision that she did not sustain a compensable injury in the form of an occupational disease on _____, and that she has not had disability because she did not sustain a compensable occupational disease injury. The respondent (carrier) contends that the claimant's appeal is not sufficient and that the evidence supports the hearing officer's findings, conclusions, and decision, and it requests affirmance.

DECISION

Affirmed in part and reversed and remanded in part.

The carrier contends that the claimant's "letter" does not meet the minimum requirements for an appeal under Section 410.202(c) and Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 143.3(a) (Rule 143.3(a)). The claimant is unrepresented on appeal. The document she filed with the Texas Workers' Compensation Commission (Commission) states "I [claimant] would like to appeals [sic] the decision made on my case." In Texas Workers' Compensation Commission Appeal No. 92292, decided August 17, 1992, we found that a statement by an unrepresented claimant that "I hereby appeal the decision of the hearing officer in my case" met minimum standards for an appeal. Two Appeals Panel decisions cited by the carrier, Texas Workers' Compensation Commission Appeal No. 951079, decided August 16, 1995, and Texas Workers' Compensation Commission Appeal No. 951478, decided October 17, 1995, in which we found that requests for review did not meet minimum standards for an appeal, involved cases where a claimant was represented by an attorney on appeal and the hearing officer's decision involved multiple (five in each case) issues.

In Appeal No. 951079, *supra*, we noted the provisions of Section 410.202(c) and Rule 143.3(a) and stated that "[t]he Appeals Panel has given, particularly where an unrepresented claimant appeals, a broad reading to these provisions where it is clearly or readily ascertainable what matter or issue is being appealed." More recently, in Texas Workers' Compensation Commission Appeal No. 971637, decided September 26, 1997 (J R dissenting), the majority opinion held that where there were two issues at the CCH, injury and disability, and the claimant was unrepresented on appeal, the claimant's appeal which simply stated that "I [claimant] would like to appeal the decision of [hearing officer] because I fill [sic] that this hearing was unfair," was not inadequate as an appeal. The majority opinion in Appeal No. 971637 construed the appeal as a challenge regarding the sufficiency of the evidence to support the hearing officer's injury and disability

determinations. (J R) in a dissenting opinion would have held that the appeal did not meet minimum requirements of a request for review. Based on our previous decisions in this area, we conclude that the claimant's appeal is adequate for perfecting an appeal to the Appeals Panel.

The claimant said that she has worked for the employer as a warehouse technician for eight years and that her job requires her to lift parts up from a carousel, put the parts in a tote, and put the tote on the conveyor line. She said that the parts can weigh up to 30 pounds and that a tote with parts in it can weigh up to 75 pounds. The employer's written description of the claimant's job generally matches the claimant's testimony on her duties. The claimant said that during the two weeks that immediately preceded _____, she was off work with the flu, that she did not have any sick time to cover that absence, that she was not paid while off work with the flu, that she was disciplined for being off work with the flu without having any sick time, and that her workers' compensation claim is not in retaliation for being disciplined. The time records provided by the employer reflect that on January 29 and 30, 1997, and February 12 and 13, 1997, the claimant was "AWOL" from work and that for a two-week period beginning on February 14, 1997, the claimant was on disciplinary leave.

The claimant said that she returned to work at 9:30 a.m., her usual starting time, on _____, and performed her normal work activities for two and one-half hours, until 12:00 p.m.; that while she was working on _____ she suddenly felt sharp pains in her hands and wrists; that she had not previously had hand and wrist pain; that she immediately reported her pain to her supervisor; and that her supervisor told her to go to a doctor. The claimant testified that she is claiming that she sustained a work-related injury in the form of an occupational disease on _____, and that the injury is to her hands, wrists, and elbow. The claimant went to (Dr. G) on _____ and he reported that the claimant gave a history of having injured her hands and wrists at work, with a date of injury of _____, and that the claimant had swelling, tenderness, and severe pain in her hands and wrists. The claimant said that Dr. G took her off work on _____, that she has undergone five months of physical therapy, and that she has been unable to return to work due to pain in her hands and wrists. Dr. G wrote on March 7, 1997, that the claimant had been injured on the job, that she was unable to work, and that she has carpal tunnel syndrome (CTS). In another report Dr. G wrote that the claimant has severe CTS, that the CTS is job related, that the claimant would have therapy, and that the claimant would be off work for six weeks until April 21, 1997.

Dr. G referred the claimant to (Dr. T) for neurological testing, and Dr. T reported on April 29, 1997, that nerve conduction studies of the left median and ulnar nerves were within normal limits, that an EMG did not show any evidence of denervation, and that the claimant had pain and tenderness of the left wrist and mid-palm area with numbness in her fingers, which, he stated, is suggestive of mild CTS and tenosynovitis of the wrist. The employer sent the claimant to (Dr. N) on May 13, 1997, and Dr. N wrote that the claimant had positive Tinel's and Phalen's signs bilaterally, left greater than the right, and decreased grip strength, and he diagnosed the claimant as having CTS. In another report Dr. N

diagnosed the claimant as having left CTS and wrote that the claimant's status was "no activity." In October 1997 Dr. N wrote that when he examined the claimant on May 13, 1997, it was his opinion that the claimant had early CTS despite a normal EMG on the left, and as to a causal connection to work, wrote that "repetitive use or over use of an extremity over time can cause CTS or at least a tenosynovitis in this case. [Claimant] did do repetitive work in pulling parts at her job site, thus in my opinion her condition could be work related."

In October 1997, a workers' compensation representative of the employer wrote to Dr. N, advising him that prior to the claimant's injury of _____, the claimant had been off work for attendance and performance problems; that she had been on "disciplinary action" since February 14, 1997; that _____, was the claimant's first day back at work; that the claimant reported to work at 11:00 a.m.; that she filed her claim for CTS and tendinitis at 12:00 p.m., one hour later; and that she reported that her CTS developed suddenly. Dr. N was asked whether the claimant's description of her injury and working one hour match that of a repetitive trauma injury. Dr. N replied on October 30, 1997, that CTS would not develop in one hour as it is a condition which develops over a period of time and from repetitive use or over use of an extremity.

In June 1997 Dr. G wrote that the claimant was injured on _____, doing repetitive work for eight hours, that she developed bilateral CTS and tendinitis, and that she had been unable to work since then because of that.

The claimant was examined by (Dr. L) in July 1997 at the carrier's request and Dr. L reported that the claimant complained of pain in her hands and forearms, that Phalen's and Tinel's signs were negative bilaterally, and that the claimant is right-hand dominant. Dr. L diagnosed the claimant as having a "strain/tendinitis of the wrist (left) resolved" and stated that there was "no clinical evidence of [CTS] at the wrist crease on the left with a reported normal EMG/NCV study performed on 04/29/97 and interpreted by [Dr. T]." Dr. L also wrote that the claimant had reached maximum medical improvement with a zero percent impairment rating and that she should be able to return to work with no restrictions. Dr. L also wrote that the claimant "may have had a strain and/or tendinitis (which has resolved) which could have lead to the sudden onset of pain, but there is certainly no relationship of the diagnosis of [CTS] and the injury reported."

On August 14, 1997, Dr. G wrote that the claimant continued to complain of severe wrist and hand pain bilaterally, and that she could return to light duty on September 22, 1997. On November 6, 1997, Dr. G wrote that "EMG/NCV revealed mild [CTS] and tenosynovitis of the wrist," and that "repetitive use or over use of an extremity over time can cause CTS or at least tenosynovitis in this case. Claimant did do repetitive work in pulling parts at her job site, thus in my opinion her condition could be work related." On November 24, 1997, Dr. G wrote that the claimant had been totally disabled since _____, and that the claimant is unable to continue her job duties due to "EMG/NCV -- diagnosis CTS." The claimant said that her condition has not improved.

The issues before the hearing officer were whether the claimant sustained a compensable injury in the form of an occupational disease on _____, and whether the claimant has had disability as a result of an injury on _____, and if so, for what periods. "Injury" means damage or harm to the physical structure of the body and a disease or infection naturally resulting from the damage or harm. The term includes an occupational disease. Section 401.011(26). An "occupational disease" means a disease arising out of and in the course of employment that causes damage or harm to the physical structure of the body, including a repetitive trauma injury. The term includes a disease or infection that naturally results from the work-related disease. The term does not include an ordinary disease of life to which the general public is exposed outside of employment, unless that disease is an incident to a compensable injury or occupational disease. Section 401.011(34). The hearing officer found that on _____, the claimant experienced a sudden onset of pain from an injury caused in the course and scope of her employment; that the cause of the injury was not from repetitive trauma; that on _____, the claimant worked only about two and one-half hours before she experienced pain; that there was no evidence of similar pain or injuries prior to about noon on _____; and that due to the "claimed injury," the claimant was unable to obtain and retain employment beginning on March 5, 1997, and continuing through the date of the CCH. The hearing officer concluded and decided that the claimant did not sustain a compensable injury in the form of an occupational disease on _____, and that the claimant did not have disability because she did not sustain a compensable occupational disease injury. The claimant appeals the hearing officer's decision.

In Texas Workers' Compensation Commission Appeal No. 951726, decided December 4, 1995, we reversed a hearing officer's decision that a claimant had sustained a compensable injury in the form of an occupational disease (fibromyalgia) and rendered a decision that the claimant had not sustained a compensable occupational disease, noting that the claimant and her doctors had related her condition to discrete, nonrepetitive, identifiable injuries to equally discrete parts of her body, and that that was contrary to the fundamental concept of an occupational disease. In that decision we noted that, while an occupational disease constitutes an injury, Texas Courts have distinguished between injuries from a process occurring over time and those from an accident. We noted that in United States Fire Insurance Company v. Alvarez, 657 S.W.2d 463, 471 (Tex. App.-San Antonio 1983, no writ), the court stated:

> The Act includes occupational disease within the definition of injury, but we cannot say that "accidental injury" also encompasses occupational disease. An accidental injury is an injury traceable to a definite time and place and involves a specific mishap that causes harm to the body. On the other hand, "occupational disease" can be a disease that arises "out of and in the course of employment," with "disease" being given its common meaning. . . . The import of the Act is that for an injury to be an accidental injury, it must be traced to a specific happening, while an occupational disease requires extended exposure over hours or days. [Citations omitted.]

There is conflicting evidence on the issue of whether the claimant sustained a compensable injury in the form of an occupational disease on _____. The hearing officer is the judge of the weight and credibility of the evidence. Section 410.165(a). The hearing officer resolves conflicts in the evidence and may believe all, part, or none of the testimony of any witness. We conclude that the hearing officer's decision that the claimant did not sustain a compensable injury in the form of an occupational disease on _____, is supported by sufficient evidence and that it is not so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175 (Tex. 1986).

As noted, the second issue at the CCH was whether the claimant has had disability as a result of an injury on _____, and if so, for what periods. We note that this issue is not limited to an injury in the form of an occupational disease, but rather references "an injury on _____." The hearing officer found that on _____, the claimant experienced a sudden onset of pain from "an injury caused in the course and scope of employment." The carrier did not appeal the hearing officer's decision, and it states in its response that the hearing officer's findings are supported by the evidence. Dr. L's report reflects that the claimant may have had a strain and/or tendinitis which could have lead to the onset of pain, and she diagnosed the claimant as having "strain/tendinitis of the wrist (left) resolved." Thus there is evidence from the claimant's testimony and Dr. L's report to support the finding of the claimant's having sustained "an injury" in the course and scope of employment on _____. Again, we point out that the second issue at the CCH referenced "an injury" and did not limit such injury to an injury in the form of an occupational disease as did the first issue.

"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). The hearing officer found that "due to the claimed injury, claimant was unable to obtain and retain employment beginning March 5, 1997, and continuing through the date of this hearing." As noted, the carrier did not appeal the hearing officer's decision, and states in its response that the hearing officer's findings are supported by the evidence. The hearing officer concluded and decided that "claimant did not have disability because she did not sustain a compensable occupational disease injury." This conclusion fails to take into account the hearing officer's finding that on _____, the claimant had pain "from an injury caused in the course and scope of employment." It is evident from the hearing officer's decision that he did not consider the injury he found the claimant to have sustained on _____, to be in the form of an occupational disease. Nevertheless, he did find that the claimant sustained "an injury" in the course and scope of employment on _____, and thus the claimant could have had disability as a result of that injury, which is a compensable injury since it was sustained in the course and scope of employment, even though she did not sustain an injury in the form of an occupational disease. The hearing officer did not specify what the injury was that the claimant sustained in the course and scope of her employment on _____.

The hearing officer's finding that the claimant was unable to obtain and retain employment beginning on March 5, 1997, and continuing through the date of the CCH references "the claimed injury" and it is unclear if the hearing officer is referring to "an injury in the form of an occupational disease," as was stated in the first issue, or "an injury" as stated in the second issue. As noted, although we are affirming the hearing officer's decision that the claimant did not sustain an injury in the form of an occupational disease on _____, the claimant may have had disability from the injury the hearing officer found the claimant did sustain in the course and scope of her employment on _____. We reverse the hearing officer's decision that the claimant did not have disability because she did not sustain a compensable occupational disease injury, and we remand the case to the hearing officer for further consideration and development of the evidence, as deemed necessary and appropriate by the hearing officer, and to make further findings of fact, conclusions of law, and a decision on the issue of whether the claimant has had disability as a result of an injury on _____, and if so for what periods. In his decision on remand, the hearing officer should make findings regarding the nature of the injury the claimant sustained in the course and scope of her employment on _____, and whether she has had disability from that injury, and if so, for what periods.

The hearing officer's decision that the claimant did not sustain a compensable injury in the form of an occupational disease on _____, is affirmed. The hearing officer's decision that the claimant did not have disability because she did not sustain a compensable occupational disease injury is reversed and the case is remanded to the hearing officer on the issue of whether the claimant has had disability as a result of an injury on _____, and if so, for what periods.

Pending resolution of the remand, a final decision has not been reached 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.

Robert W. Potts
Appeals Judge

CONCUR:

Philip F. O'Neill
Appeals Judge

DISSENTING OPINION:

I dissent because the claimant did not file an adequate request for appeal. This case is analogous to Texas Workers' Compensation Commission Appeal No. 971637, decided September 26, 1997, and I dissent for the reasons stated in my dissent therein.

Christopher L. Rhodes
Appeals Judge