

APPEAL NO. 980251
FILED MARCH 23, 1998

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 January 14, 1998, in (City), Texas, with (hearing officer) presiding as hearing officer.

With respect to the four issues before him, the hearing officer determined that respondent (claimant) had sustained a compensable occupational injury in the form of a cervical trapezius syndrome, that the date of injury, pursuant to Section 408.007, was _____, that claimant had disability from July 8 through August 11, 1997, but that claimant had failed to timely report the injury to the employer and did not have good cause for failing to do so; therefore, the appellant (carrier) was relieved of liability for the compensable neck injury.

The carrier appeals the determinations that claimant had cervical trapezius syndrome, that claimant had a compensable injury and that claimant had disability, in a timely appeal, alleging four "Points of Error" based on insufficiency of the evidence. Carrier requests that we reverse the hearing officer's decision in its favor on the points raised on appeal. The file does not contain a response from the claimant.

In that there has been no appeal on the determination that carrier has been relieved of liability based on claimant's failure to timely give notice to the employer, determinations on that issue have become final under Section 410.169 and will not be addressed further. Fifteen days after carrier timely filed its appeal (on the 15th day after it received the hearing officer's decision), carrier filed "Carrier's Brief in Support of Appeal," where carrier again sets out its four Points of Error and presents argument and citations for its position on the alleged points of error. Neither Section 410.202 nor Tex W.C. Comm'n, 28 TEX. ADMIN. CODE § 143 (Rule 143) have provisions for a separate delayed brief after a timely appeal. Consequently, we will consider only carrier's timely appeal, alleging the hearing officer's decision on the appealed points to be against the great weight and preponderance of the evidence. Carrier's brief in support of its appeal is untimely and will not be considered.

DECISION

Affirmed in part and reversed and rendered in part.

Claimant testified that she is a bus driver on a student shuttle route for a university. Claimant said that she drives various routes throughout the city, including a particularly rough and bumpy route (on E Road, referred to as the bumpy route). An Employer's First Report of Injury or Illness (TWCC-1) dated July 3, 1997, reports a date of injury of (TWCC-1 date of injury), an injury of "Pinched shoulder, neck pain - Migraine headaches" which occurred "Rt Shoulder began hurting while driving on [bumpy] route. Pain traveled [sic] from shoulder up to back of neck and then into rt side of head." An

Employee's Notice of Injury or Occupational Disease & Claim for Compensation (TWCC-41) dated July 17, 1997, also reported a date of injury of (TWCC-1 date of injury), with a description of the accident "Driving over [bumpy] route, right shoulder & neck became increasingly stiff & painful and remained so throughout day & evening. During night route, neck popped & headache began - later got worse & became full-blown migraine headache. [Bumpy] route is extremely bumpy due to road conditions & bus seat has little or no shock absorption."

Also in evidence is another TWCC-41 dated November 14, 1997, alleging a _____, date of injury while driving on the bumpy route. The injury was described as "Pain and stiffness in shoulders and neck with migraine headaches." Claimant on that TWCC-41 stated that she knew her injury was work related on _____.

In evidence is a medical record from the (clinic) dated _____, noting complaints of pain to the right shoulder and neck, no known injury, and "experiences pain only [with] driving." In an attached progress note, a Dr. H diagnosed a trapezius strain with tension headaches, prescribed medication and released claimant back to work without restrictions. Claimant was again seen at the clinic on January 24, 1997, and in a Specific and Subsequent Medical Report (TWCC-64) diagnosed with "Cervico - trap Syndrome," Claimant was again seen at the clinic by Dr. F on July 2, 1997, complaining of neck and shoulder pain due to driving on the bumpy route. Dr. F imposed a restriction of "Cannot do [bumpy] route." Claimant was again seen by Dr. F at the clinic on July 8, 1997, and was diagnosed a having trapezius strain, "headaches -Rt shoulder." On the following page, a form progress report, in the portion which asks for doctor's first visit date" are the following notations: "F/up _____" then a "6-2-97" date is crossed out and "7-8-97" is superimposed and the nature of the injury is described as "F/up/New Injury Rt shoulder" with a "DOI: (TWCC-1 date of injury)." Claimant continued to be seen for right shoulder/trapezius strain on July 25, and August 11, 1997, and was referred to physical therapy. Dr. F, in a report dated September 15, 1997, stated that he is treating claimant for injuries sustained on (TWCC-1 date of injury), diagnosed claimant as having "a right sided cervical trapezius strain" and stated that in Dr. F's opinion "the pain and discomfort that she is experiencing is definitely the result of her job." The rest of the report reiterates that opinion giving reasons. That opinion is repeated in a report dated October 15, 1997.

On the issue of disability, Dr. F's report of July 8, 1997, places claimant on light duty. Claimant testified that she did not work until she was offered a light-duty position by the employer in a memo dated July 15, 1997. Claimant returned to work July 17th in a light-duty position at her preinjury wage working roughly the same number of hours as she had prior to her injury. The hearing officer in his Statement of the Evidence commented:

The claimant was off work due to the cervical trapezius strain from July 8th through July 16th, full-time. She was working from July 17th through August 11th about twenty-eight hours a week. There was credible evidence in the record that the Claimant rarely worked forty hours a week, that her normal work rate was twenty-eight to twenty-nine hours as a part-time driver.

We agree that the hearing officer's comments are supported by the evidence; however, the hearing officer determined, in Finding of Fact No. 6 and Conclusion of Law No. 5 that claimant had disability "from July 8 through August 11, 1997." We find that based on the hearing officer's own discussion, claimant had returned to work, albeit in a light-duty capacity, at the preinjury wage on July 17th. Consequently, the hearing officer's determinations are not supported by the evidence and we reverse the determinations on disability and render a new decision that claimant had disability from July 8 through July 16, 1997.

Carrier also appeals the hearing officer's determinations that claimant had "cervical trapezius syndrome as of _____" as being against the great weight and preponderance of the evidence. Certainly, Dr. F and Dr. H at the clinic had made numerous diagnoses of such a condition beginning in November 1996. Although not discussed by the hearing officer, he could have determined, and apparently did, that claimant sustained a repetitive trauma injury (which is included in the definition of occupational disease in Sections 401.011(34) and (36)) driving on the bumpy route. Carrier, at the CCH, cited Texas Workers' Compensation Commission Appeal No. 960430, decided April 18, 1996, a case where the Appeals Panel affirmed the hearing officer's determination that claimant's neck and shoulder problems, sustained when he was driving on a very rough road, were the result of an ordinary disease of life. In Appeal No. 960430, the Appeals Panel cited and quoted from Texas Workers' Compensation Commission Appeal No. 92314, decided August 28, 1992, stating:

While we do not subscribe to any notion that driving a tank truck and all the requirements, duties and difficulties associated therewith, is something to which the general public is exposed, we view the hearing officer's position to be that, under the particular circumstances of this case, the level of any physical trauma to the back from driving the truck was not appreciably different from that level of trauma to which the general public is exposed in driving various motor vehicles.

In this case, the hearing officer certainly could have determined that the physical trauma to claimant's neck and back from driving the shuttle bus was not appreciably different from that level of trauma to which the general public is exposed to in driving various motor vehicles on the bumpy route. However, the hearing officer found that claimant had sustained a repetitive trauma injury and is supported by the medical reports of Dr. F. There is no medical evidence to the contrary. Consequently, we find that, under the unique facts of this case, and in the absence of medical evidence or cogent

argument to the contrary, that there is minimally sufficient evidence to support the hearing officer's determination on the compensable injury issue. We would caution the reader against citing this case for the proposition that driving a bus on a bumpy road will always, or usually, result in a repetitive trauma injury.

Accordingly, we affirm the hearing officer's decision and order on the issue of a compensable occupational (repetitive trauma) injury and reverse the hearing officer's determination on the dates of disability and render a new decision that claimant had disability from July 8 through July 16, 1997.

Thomas A. Knapp
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Gary L. Kilgore
Appeals Judge