

APPEAL NO. 990271

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 11, 1999. The issue reported as unresolved at the benefit review conference was did the respondent (claimant) have disability resulting from the \_\_\_\_\_, injury. The hearing officer made the following findings of fact and conclusion of law:

**FINDINGS OF FACT**

2. On \_\_\_\_\_, Claimant sustained a compensable injury with pain across the shoulder and into the neck.

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6. On July 23, 1997, Claimant was taken off work completely by [Dr. F].
7. On August 20, 1997, Claimant was returned to work by [Dr. F] and went back to work, although not for Employer, on September 1, 1997.
8. Claimant continued to experience pain in his right shoulder from July 23, 1997 through July 22, 1998 when [Dr. F] again took claimant completely off work.
9. [Dr. F's] removal of Claimant from the work place was due in part to the continued pain from the compensable injury and in part from the recurrence of symptoms caused by the regrowth of bone in the right shoulder.
10. The regrowth of bone in the right shoulder and ossicle under the surface of Claimant's acromion were not caused by or aggravated by Claimant's compensable injury of \_\_\_\_\_.
11. Although Claimant received treatment for the regrowth of bone and ossicle, it did not fully alleviate the pain which had been present since the compensable injury of \_\_\_\_\_.
12. After the surgery for the right shoulder on September 3, 1998, four bulging discs in Claimant's cervical spine were discovered after Claimant was referred to [Dr. T] in October, 1998.
13. As a result of the pain, which is likely to be the result of the bulging cervical discs, Claimant has been unable to obtain and retain employment at wages equivalent to his preinjury wage beginning on

July 22, 1998 and continuing through the date of the hearing in this matter.

14. Claimant's symptoms and the mechanics of the injury are consistent with the bulging cervical discs found by [Dr. T].
15. Claimant's inability to obtain and retain employment at wages equivalent to his preinjury wage from July 23, 1998 through the date of the hearing in this matter is a result of his compensable injury of \_\_\_\_\_.

### **CONCLUSION OF LAW**

3. Claimant had disability resulting from the \_\_\_\_\_ injury beginning on July 23, 1997 and continuing through August 20, 1997 and again beginning on July 22, 1998 and continuing through the date of the hearing in this matter.

The appellant (carrier) requested review. It urged that it had no notice of a claimed injury to the claimant's neck and disability resulting from an injury prior to the CCH, that it had no opportunity to dispute or defend injury to the claimant's neck and disability because of the injury to the neck, and that the hearing officer erred in determining that the claimant sustained a compensable injury to his neck on \_\_\_\_\_, and had disability as the result of that neck injury. The carrier requested that the Appeals Panel reverse the determinations of the hearing officer that the claimant sustained an injury to his neck on \_\_\_\_\_, and had disability because of that neck injury and render a decision that the claimant did not injure his neck on \_\_\_\_\_, and did not have disability as a result of the \_\_\_\_\_, injury. In the alternative, the carrier requested that the determinations related to the neck be reversed and that the case be remanded for further consideration and development of the evidence. A response from the claimant has not been received.

### **DECISION**

We reverse and remand.

At the CCH, the claimant testified that when he lifted a welding machine on \_\_\_\_\_, he had "a bad burning sensation that just went all the way up my shoulder, up through my neck and then it just kept hurting and stuff." The claimant said that after the surgery in September 1998 he still had a lot of discomfort in his neck, shoulder, and arm; that he was referred to Dr. T; that she had an MRI performed; and that Dr. T told him he had bulges in four discs in his neck. Neither the report of the MRI nor a report from Dr. T is in the record. In opening and closing statements made at the CCH, the claimant contended that he had the surgery on his shoulder on September 3, 1998, as the result of the compensable injury he sustained on \_\_\_\_\_, and that he had disability because of the surgery on his shoulder. The questions of whether the compensable injury sustained on \_\_\_\_\_, included an injury

to the neck and whether the claimant was unable to obtain and retain employment because of an injury to the neck were not fully litigated at the CCH. The Appeals Panel has stated that the strict compliance with rules applicable to pleadings need not be followed in the dispute resolution system in the Texas Workers' Compensation Commission (Commission). In Texas Workers' Compensation Commission Appeal No. 93577, decided August 18, 1993, the Appeals Panel stated that one of the reasons behind having issues stated and known is to give affected parties notice of what they must meet or defend against and that if a party is not given any opportunity to offer evidence, refute, or otherwise provide an answer on an issue, corrective action may be necessary. In the case before us, the claimant contended that the surgery performed on September 3, 1998, resulted from the \_\_\_\_\_, injury and the carrier contended that it did not. Whether the claimant was unable to obtain and retain wages equivalent to the preinjury because of an injury to the neck sustained on \_\_\_\_\_, was not litigated.

Some of the findings of fact were not appealed and became final under the provisions of Section 410.169. The evidence is sufficient to support some other findings of fact. We reverse Findings of Fact Nos. 12, 13, 14, and 15 and the part of Conclusion of Law No. 3 that the claimant had disability beginning on July 22, 1998, and continuing through the date of the CCH because the parties did not litigate the questions answered in those findings of fact and these findings of fact are the basis for the reversed part of Conclusion of Law No. 3. We remand for the parties to be afforded the opportunity to present evidence on and make argument related to whether the claimant sustained a compensable injury to his neck on \_\_\_\_\_, and whether he had disability as the result of an injury to his neck sustained on that day.

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 Commission's Division of Hearings, pursuant to Section 410.202. See Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

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Tommy W. Lueders  
Appeals Judge

CONCUR:

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Joe Sebesta  
Appeals Judge

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Philip F. O'Neill  
Appeals Judge