

APPEAL NO. 990301

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on January 19, 1999. With respect to the issues before him, the hearing officer determined that the respondent (claimant) sustained a compensable hernia injury; that the date of injury is date 1; and that the claimant timely reported his injury to his employer. In its appeal, the appellant (carrier) challenges each of those determinations as not being supported by any evidence or, alternatively, as being against the great weight of the evidence. In his response, the claimant urges affirmance.

DECISION

Affirmed, as modified.

The claimant testified that he is employed in the parts department of an equipment company and has been so employed for about two years. He stated that his duties include shipping and receiving, filing orders, and completing repairs. He stated that he does not typically lift parts over 100 pounds; however, he maintained that he does have to lift and move items of as much as 100 pounds every day. He testified that on date 2, while drying off after taking a shower, he noticed a bulge or knot near his scrotum. He testified that initially he thought it might be an insect bite. However, when it had not gone away by October 6th, he reported the bulge to his supervisor and stated that he needed to go to the doctor. The employer sent the claimant to Dr. E. Dr. E diagnosed a left indirect inguinal hernia and recommended surgery. In handwritten notes, Dr. E states that "over the past two months [claimant] has noted a knot in the [left] inguinal area." The claimant testified that he told Dr. E he had noticed the knot a couple of days before the appointment and denied that he had had the knot for two months. On November 9, 1998, Dr. U performed surgery to repair the claimant's hernia. The claimant testified that he was off work for two weeks following the surgery, that he returned to light duty at full pay for a period thereafter, and that now he is back working full duty.

The claimant testified that the first indication he had that something was wrong was when he discovered the bulge on Friday, date 2. He stated that he did not do anything out of the ordinary on the preceding Thursday, noting that it was "just the usual busy day." He testified that he believed the hernia was work related because he does not do a lot of physical labor outside of work. He maintained that he believes he got the hernia from engaging in repetitive heavy lifting, which caused weakness and eventually a hernia. The claimant focused on the lifting he did on September 19, 1998. He explained that on that date, the employer received a shipment of 48 cylinder heads which weighed 106 pounds each. He stated that he had to lift each of the cylinders off the pallet, out of the box, flip them upside down, take the carbon build-up off the cylinders with a grinder, and check them for cracks. He acknowledged that he did not have any pain on September 19th in his abdomen or groin; however, he stated that he believed that his work activity on that day caused the hernia because it was the heaviest work he had done over a sustained period before he noticed the bulge on date 2. On cross-examination, the claimant testified that Dr. U told him that hernias do not always appear immediately and that it is not unusual for

someone to have a hernia for a period and not realize that they have it. He also testified that on one occasion a few days before he noticed the bulge, he felt a sharp pain in his abdomen when he was reaching to put an oil pump on a shelf at work. He explained that he did not report that incident as the cause of his hernia because the pain was "there and gone" and he did not think anything of it.

Ms. B testified that she is the human resources manager for the employer. She stated that she received a completed Employer's First Report of Injury or Illness (TWCC-1) on October 6, 1998, which did not include information about the date, time, or cause of the injury. She testified that she contacted the claimant to ask for details about the injury and he told her that he did not know how it had happened.

The carrier asserts error in the hearing officer's injury, date-of-injury, and notice determinations, noting that "[n]owhere in the record is there any evidence that the claimant suffered an injury in the course and scope of his employment on [date 1]." It further argued that that date "apparently was in a crystal ball consulted by the hearing officer as he divined his findings of fact and conclusions of law." The injury, date-of-injury, and notice issues presented questions of fact for the hearing officer to resolve and they can generally be established on the basis of the claimant's testimony alone, if it is believed by the hearing officer. A review of the hearing officer's decision demonstrates that he clearly believed the claimant in his assertions that he had sustained the hernia as a result of activities he performed at work. The hearing officer found that it was the reaching incident which the claimant stated occurred at work a couple of days before he discovered the bulge on date 2. The evidence in this case simply does not support a causal connection between that incident and the claimant's hernia. Likewise, the evidence does not support a finding of a date of injury on the specific date 1, date. At most, the claimant's testimony would support a finding that the injury occurred on or about date 1, if the evidence had supported a causal connection between the reaching incident and the hernia. While we acknowledge that we have required hearing officers to find a specific date of injury and it is likely that the hearing officer's injury finding in this case was made with that requirement in mind, where, as here, the testimony is uncertain as to when the event occurred the better practice is to find an "on or about" date of injury.

Our determination that the evidence does not support the hearing officer's determination that the claimant's hernia was caused by the reaching incident does not end the inquiry in this case. Under the guidance of Daylin, Inc. v. Juarez, 766 S. W.2d 347 (Tex. App. -El Paso 1989, writ denied), a determination can be affirmed on any theory reasonably supported by the record. In this instance, the evidence supports a determination that the claimant's hernia was caused by the repetitive lifting he performed at work over the period from September 19, 1998, until date 2, when the bulge first appeared. The evidence reflects that although the claimant believed that he engaged in more sustained heavy lifting on September 19, 1998, than he normally performed, he did lift and move items up to 100 pounds every day. He testified that he repetitively lifted items each day and that he worked six days a week for an average of 70 hours per week. That evidence provides sufficient support for the determination that the claimant sustained a hernia injury in the course and scope of his employment in the employer's parts department. Under Section 408.007, the date of injury for an occupational disease, which includes a repetitive trauma injury, is the date on which the claimant knew or should have

known that the disease may be related to the employment. In this instance, that date is date 2, the date the claimant discovered the bulge, a few days after he had felt the sharp pain in his abdomen at work, while putting an oil pump on a shelf over his head.

We affirm the hearing officer's determination that the claimant sustained a compensable hernia injury under the theory that the evidence supports a determination that the claimant's repetitive lifting at work caused the hernia. Because we believe that the evidence supports a determination that the claimant sustained a repetitive trauma injury, as opposed to an injury from a specific incident, the date of injury is the date that the claimant knew or should have known that the injury may be related to his employment. As noted above, that date is date 2, in this instance. As such, the hearing officer's findings and conclusions will be modified, as follows:

FINDING OF FACT

12. Claimant suffered an injury in the course and scope of his employment. The date of injury is [date 2].

CONCLUSION OF LAW

3. Claimant suffered an injury in the course and scope of his employment. The date of injury is [date 2].

Given our determination that the date of injury in this case is date 2, the claimant timely reported his injury to his employer. It is undisputed that the claimant reported his hernia to his employer on October 6, 1998, well within the 30-day period provided for giving timely notice of an injury to the employer. Section 409.001.

The hearing officer's decision and order are affirmed, as modified.

Elaine M. Chaney
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Susan M. Kelley
Appeals Judge