

APPEAL NO. 990546

This appeal is considered in accordance with the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On February 16, 1999, a contested case hearing was held. The issue concerned whether the appellant, who is the claimant, sustained a compensable injury and had disability as a result.

The hearing officer found that the claimant did not sustain an injury in the course and scope of his employment on _____, and therefore did not have compensable disability, although she found he was unable to obtain and retain employment equivalent to his preinjury wage.

The claimant appeals. He argues that he was in fact injured at work and has proven his case. He disputes the accuracy of some of the recitation of facts, and argues that he has compensable disability. The respondent (carrier) responds by citing facts in favor of the decision.

DECISION

Affirmed.

The claimant drove a front-end loader for (employer). He stated that he had requested health insurance through his company around the first of October 1998, that he had understood that his employer was supposed to pay for it but had canceled it about three weeks later.

The claimant said he had chest pressure, a cough, fatigue, and diarrhea on October 12th when he was treated by the (H Clinic), operated by a nurse practitioner, Ms. H. On _____, as he climbed into his front-end loader, claimant said he felt a tightness in his chest, difficulty breathing, and a sensation as though he were swelling. He said his back was "burning." Claimant said that when he drove his load, he operated the steering wheel with his left hand, and the gear shift with his right hand. Asked how often he drove the loader, he said sometimes he drove it most of the day, sometimes not.

Claimant said he went to see Mr. S, a supervisor, and told him he was having trouble breathing and needed to see a doctor. Claimant was taken to a clinic, and from there transported by ambulance to the hospital. Claimant maintained that he was never told what was wrong with him or what testing was being done to detect what was wrong with him. However, on reflection, claimant recalled being told a lung test was to be done, as well as testing to make sure his veins were not blocked. He was evaluated for seven to eight hours. He was discharged with a diagnosis of noncardiac chest pain.

Claimant was discharged, but went to the emergency room at his local hospital on November 28, 1998, where he was diagnosed with bronchitis, and given a shot. (This is reflected in the records of that hospital, which also record that claimant had a cough.)

Thereafter, the claimant went to H Clinic and was referred by Ms. H to Dr. S. Claimant contended he could not work because he had upper back pain, left-sided pain, tightness of the muscles, and a burning sensation. Claimant said he called his supervisor around December 2nd, and the supervisor told him he had been advised that claimant had a heart attack. The supervisor told him not to return to work until he was better.

Medical records from a treatment by H Clinic on December 7, 1998, show that claimant had mild tenderness to palpation in the thoracic area and good range of motion. His lungs were clear. This record indicated that evaluation of back pain would be done by referral to Dr. S. Dr. S answered a brief inquiry from the ombudsman on January 8, 1999, by stating that "[t]he differential diagnosis at this time could be consistent with some degree of thoracic and interscapular muscle strain/sprain. Other possibilities could include a thoracic disc syndrome."

The claimant's theory of recovery was not clear. There was no testimony that any event or accident took place on _____. If claimant's purpose was to prove a repetitive trauma, he did not present evidence of repetitious activities. Section 401.011(36) defines repetitive trauma injury as "damage or harm to the physical structure of the body occurring as the result of repetitious, physically traumatic activities that occur over time and arise out of and in the course and scope of employment." To recover for an occupational disease of this type, one must not only prove that repetitious, physically traumatic activities occurred on the job, but also must prove that a causal link existed between these activities on the job and one's incapacity; that is, the disease must be inherent in that type of employment as compared with employment generally. Davis v. Employer's Insurance of Wausau, 694 S.W.2d 105 (Tex. App.-Houston [14th Dist.] 1985, writ ref'd n.r.e.).

The hearing officer evidently found the preponderance of the evidence more consistent with an ordinary disease of life as opposed to a work-related injury either accidental or repetitive in nature. We will not set aside this determination, which is sufficiently supported by the record. The definition of "disability" which is necessary to entitlement to temporary income benefits is in Section 401.011(16):

"Disability" means the inability because of a compensable injury to obtain and retain employment at wages equivalent to the pre-injury wage.

Without a determination that claimant has sustained a compensable injury, there can be no disability.

Regarding the statement made by the hearing officer that claimant went to a "clinic" on November 28th (as opposed to the hospital), we do not believe that amounts to a significant error affecting the outcome of the decision.

For these reasons, we affirm the hearing officer's decision and order.

Susan M. Kelley
Appeals Judge

CONCUR:

Gary L. Kilgore
Appeals Judge

Judy L. Stephens
Appeals Judge