

APPEAL NO. 990823

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On March 30, 1999, a contested case hearing (CCH) was held. The disputed issues reported from the benefit review conference (BRC) were:

1. Did the claimed injury occur while the Claimant [appellant] was in a state of intoxication, as defined in the Tex. Labor Code ann. §401.013, from the induction of a controlled substance, thereby relieving the Carrier [respondent] of liability for compensation?
2. Did the Claimant sustain a compensable injury, in the form of an occupational disease, on \_\_\_\_\_?
3. Did the Claimant sustain a compensable injury to her neck, right and left shoulders, right elbow and both wrists in addition to her left forearm on \_\_\_\_\_?
4. Did the Claimant have disability resulting from the injury sustained on \_\_\_\_\_?
5. Was the Carrier's contest of compensability based on newly discovered evidence that could not reasonably have been discovered at an earlier date, thus allowing the Carrier to reopen the issue of compensability?

With regard to those issues, the hearing officer determined that the claimed injuries occurred while claimant was intoxicated with propoxyphene (also known as darvocet), a controlled substance, that claimant did not sustain a compensable injury on \_\_\_\_\_ (all dates are 1998 unless otherwise noted), (prior date of injury), "or at any other relevant time," that claimant has not sustained a compensable injury "to any part of her body . . . at any other relevant time," that claimant has not had disability from an injury sustained on \_\_\_\_\_, (prior date of injury) or "at any other relevant time" and that carrier's contest of compensability was based on newly discovered evidence (namely claimant's amended Employee's Notice of Injury or Occupational Disease & Claim for Compensation (TWCC-41) dated December 7th, which changed both the theory of liability and the date of injury) thus allowing carrier to reopen the issue of compensability.

Claimant appeals the adverse findings, essentially arguing that the evidence supports that she sustained a repetitive trauma injury on (prior date of injury), that the benefit review officer incorrectly listed the disputed issues (*i.e.*, the date of injury), that medical evidence supports injuries to various other listed body parts, that she has had disability, that she reported a repetitive trauma injury to a leadman on (prior date of injury), that she was not intoxicated but had mistakenly taken her husband's darvocet prescription by mistake, and that carrier had not timely contested the claimed repetitive trauma injury.

Claimant requests that we reverse the hearing officer's decision and render a decision in her favor. Carrier responds to the points raised by claimant and urges affirmance.

## DECISION

Affirmed.

Claimant testified that she sustained a repetitive trauma injury to her right and left forearms, right and left wrists, neck and arms on (prior date of injury) performing her duties "plating" cones. The size and weight of the cones and claimant's duties were discussed in some detail. There is some evidence that claimant complained of "pain in both arms" and wrists to a coworker and to Mr. MM, a union steward, around that time. However, it is undisputed that claimant continued working her regular job without complaints to management until \_\_\_\_\_. On that date, she again complained of an injury to Mr. MM, who took claimant to her supervisor, Mr. BT, and they all went to Mr. MS, employer's safety engineer. Mr. BT and Mr. MS both testified that claimant reported a specific injury while plating a part on her machine that day (\_\_\_\_\_) when she felt a "pull" in her left arm. Claimant's TWCC-41 dated \_\_\_\_\_ describes the injury as "plating a part on my machine" and names as body parts injured right and left arms, elbows, wrists, hands, neck, low back and left shoulder. An accident report claimant completed that date recites an injury to the "right and left arm" while "in the plating lab at my machine" on \_\_\_\_\_. Claimant sought medical care from Dr. E, on \_\_\_\_\_.

In an Initial Medical Report (TWCC-61) of an August 11th visit, Dr. E recites "her injury was caused by plating a part on her machine" and noted complaints of "burning sharp pains and numbness in her neck." Dr. E took claimant off work effective \_\_\_\_\_. Progress notes beginning August 11th through September 17th note neck, left shoulder, left and right wrist and low back pain. Other progress notes do not elaborate on the type of injury that caused these complaints and are substantially similar. A report dated September 8th gives a diagnosis of "Internal Derangement Elbow," bilateral carpal tunnel syndrome (CTS), cervical myofascitis and lumbar myofascitis. A report of November 10th largely repeats the complaints contained in the progress notes. A report of November 19th has a handwritten notation of "tenderness & moderate left elbow pain." Carrier, in Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) forms dated August 20th, September 8th and December 31st, denies liability for "injury to the cervical, right forearm, right and left wrists and right and left shoulders." The September 8th TWCC-21 also denies liability because claimant was intoxicated as well as the injury not being in the course and scope of employment. In a report dated December 1st, Dr. E recites a history of repetitive duties on July 24th and concludes, "In my clinical expertise with all medical probabilities, [claimant's] injury is directly related to her constant use of both upper extremities all day long." Carrier denied a repetitive trauma injury on or about (prior date of injury) in its December 31st TWCC-21.

Claimant was seen by Dr. T on December 7th. In a report of that date, Dr. T notes a complaint of left elbow pain made "worse by lifting or picking things up or cooking." Dr. T recites a history of repetitive trauma, notes a history of left elbow surgery in 1994 and diagnoses "Epicondylitis, left elbow." Claimant filed a second TWCC-41, dated December 7th, alleging a "repetitive use of left & right arms." (As noted previously, carrier disputed a repetitive trauma injury in its TWCC-21 dated December 31st.)

Dr. K, a carrier required medical examination doctor, in a Report of Medical Evaluation and narrative dated November 2nd, certified claimant had reached maximum medical improvement on October 28th with a zero percent IR. Dr. K diagnosed "Left elbow strain, status post fracture dislocation left elbow treated surgically 1993" and mild left CTS. Dr. K remarked on causation:

Regarding causal relationship: It is my opinion that the injury the examinee indicates occurred on \_\_\_\_\_, when she felt something pop in her elbow after lifting some parts for electroplating, is causally unrelated to the problems the examinee has had in her low back. With regard to her cervical spine, it is conceivable that an injury to the upper extremity can either coincidentally cause strain in the neck, or result in a neck strain as a result of abnormal or unusual use of the extremity due to impairment. However, based on the history I have taken today, and the physical examination of the examinee I performed, I do not believe the problems the examinee has in her neck (or her low back) are causally related to the problems she has had in her left elbow and forearms, or to the injury sustained on \_\_\_\_\_.

The hearing officer gave a fairly detailed Statement of the Evidence and in his findings found claimant's testimony "not persuasive" because of inconsistencies "regarding her dates of injury, manner of injury and extent of injury." He found the medical evidence from Dr. T and Dr. E unpersuasive because they failed to consider "other possible causes such as Claimant's previous left elbow injury . . . ."

Regarding the intoxication issue, claimant was administered a drug screening urinalysis on \_\_\_\_\_, which tested positive at a level of 925 nanograms per milliliter (ng/ml) for darvocet. Claimant had not been prescribed darvocet. Claimant testified that on August 9th she had mistakenly taken four or five darvocet pills (apparently on more than one occasion) which had been prescribed for her husband. Claimant testified that she had the normal use of her physical and mental faculties and was not intoxicated on \_\_\_\_\_. (In her appeal, claimant says she only took one pill by accident and the others were given to her by her husband.) Mr. MM testified that claimant did not appear intoxicated on \_\_\_\_\_, and Mr. BT testified that he did not notice anything unusual about claimant that day. Mr. MS testified that he believed claimant was intoxicated

and that she appeared agitated when he spoke with claimant on \_\_\_\_\_. Dr. S, in a report dated September 3rd, stated:

The confirmatory test level is 200ng/ml and [claimant's] level was at 925 ng/ml; which means at the time that the specimen was collected the patient was under the influence of propoxyphene, with such effects as: drowsiness, slowed reaction time, and fatigue.

Dr. E, in a report dated February 11, 1999, stated that on \_\_\_\_\_ he had spoken with claimant and "At no time during this visit did [claimant] display any visual or verbal cues to allow me to think in any way that she was intoxicated."

Section 406.032(1)(A) provides that a carrier is not liable for compensation if the employee was in a state of intoxication at the time of the injury. For purposes of this case, intoxication is defined as not having the normal use of mental or physical faculties from the voluntary introduction of a controlled substance into the body. See Section 401.013(a)(2)(B). Section 401.013(b)(1) provides for an exception for drugs "taken under and in accordance with a prescription written for the employee by the employee's doctor." It is undisputed claimant did not have a prescription for darvocet. An employee starts with the presumption of sobriety. Once a carrier introduces evidence of intoxication, the burden shifts to the employee to prove that he or she was not intoxicated at the time of the injury. In this case, the positive urinalysis with quantitative measurements and Dr. S's report is sufficient to shift the burden to the claimant to prove that she was not intoxicated. Although there was conflicting lay and medical evidence, the hearing officer found (Finding of Fact No. 10) that it seemed "improbable that claimant would accidentally take the darvocet four or five times." Whether a claimant is intoxicated at the time of an injury is a question of fact for the hearing officer to decide. Texas Workers' Compensation Commission Appeal No. 950266, decided March 31, 1995. The hearing officer's decision is supported by the evidence.

On the issues of whether claimant sustained a compensable occupational disease (repetitive trauma) to various part of the body on \_\_\_\_\_, an occupational disease is "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 . . . ." Section 401.011(34). A repetitive trauma injury is "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." Section 401.011(36). An employee must prove, by a preponderance of the evidence, the compensability of an occupational disease. Texas Workers' Compensation Commission Appeal No. 960582, decided May 2, 1996, citing Schaefer v. Texas Employers' Insurance Association, 612 S.W.2d 199 (Tex. 1980). "[O]ne must not only prove that recurring, physically traumatic activities occurred on the job, but must also prove that a causal link exists between these activities on the job and one's incapacity; that is, the disease must be

inherent in that type of employment as compared to employment generally." Texas Workers' Compensation Commission Appeal No. 950868, decided July 13, 1995, citing Davis v. Employers Insurance of Wausau, 694 S.W.2d 105 (Tex. App.-Houston [14th Dist] 1985, writ ref'd n.r.e.). As previously noted, the hearing officer was not persuaded by claimant's testimony or the reports of Dr. E and Dr. T. Section 410.165(a) provides that the hearing officer, as finder of fact, is the sole judge of the relevance and materiality of the evidence as well as the weight and credibility that is to be given the evidence. It was for the hearing officer, as trier of fact, to resolve the inconsistencies and conflicts in the evidence. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). This is equally true regarding medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). The trier of fact may believe all, part, or none of the testimony of any witness. Aetna Insurance Company v. English, 204 S.W.2d 850 (Tex. Civ. App.-Fort Worth 1947, no writ). We find the hearing officer's decision on compensability supported by the evidence.

In view of the fact that we are affirming the hearing officer's decision that claimant did not sustain a compensable injury, claimant cannot, by definition in Section 401.011(16), have disability.

On the last issue of timely contest of compensability, in evidence are TWCC-21s disputing a compensable injury and the extent of injury. Subsequently, when the claimant filed a second TWCC-41 on December 7th, alleging a repetitive trauma injury with a date of injury of (prior date of injury), carrier timely filed a TWCC-21 on December 31st disputing the repetitive trauma injury. Claimant argues that the hearing officer was mistaken because, although copies of the TWCC-21s were exchanged with her, that does not prove they were filed with the Texas Workers' Compensation Commission (Commission) and that the copies in evidence do not have a "TWCC stamp date when the Commission received these documents." This argument was not specifically raised at the CCH, and the forms filed with the Commission may well be in the Commission claims file. The copies in evidence are file copies in carrier's files and copies that claimant admits she received. The hearing officer makes a specific finding that the TWCC-21s were filed with the Commission on the dates indicated and that carrier timely and properly contested compensability of the alleged injuries. We see no evidence to the contrary.

Claimant, in her appeal, disputes several factual statements made by the hearing officer, such as with which hand she shifts gears, what was said at a BRC, and the wearing of an air cast. Any such misstatement would not constitute reversible error on the issues before the hearing officer.

Upon review of the record submitted, we find no reversible error and we will not disturb the hearing officer's determinations unless they are so against the great weight and preponderance of the evidence as to be clearly wrong or unjust. In re King's Estate, 150

Tex. 662, 244 S.W.2d 660 (1951). We do not so find and, consequently, the decision and order of the hearing officer are affirmed.

Thomas A. Knapp  
Appeals Judge

CONCUR:

Robert W. Potts  
Appeals Judge

Joe Sebesta  
Appeals Judge