

APPEAL NO. 990826

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 February 1, 1999, with the record closing on March 8, 1999. The issues at the CCH were whether the respondent (claimant) suffered an injury in the course and scope of her employment on _____, and whether the claimant had disability. The hearing officer determined that the claimant suffered an injury in the course and scope of her employment on _____, in the form of a repetitive trauma injury to the cervical spine and right shoulder, and that the claimant's disability started September 23, 1998, and was continuing as of the date of the CCH. The appellant (self-insured) appeals the findings of facts and conclusions of law on sufficiency of the evidence grounds. The claimant urges that the decision of the hearing officer should be affirmed.

DECISION

Affirmed.

The claimant testified that she sustained a repetitive trauma injury as a result of her job as a school bus driver over a period of four years and two months. The claimant testified that the movement in her bus seat and the opening and closing of the bus doors caused a neck, right shoulder, and right arm injury. The claimant testified that the bus had an air seat which would only adjust all the way up or down, not in between. The claimant testified that the seat caused her to bounce, because she is light weight. The claimant testified that she drove five bus routes per day, approximately 116 miles on paved roads, some which were on bumpy, country roads. According to the claimant, she made 63 stops per day which required her to open and close the bus door over 100 times per day. The claimant stated that opening and closing the bus door was difficult, it sometimes took both hands, and was especially difficult when the wind was blowing.

The claimant admitted she had a preexisting condition, fibromyalgia, which she was being treated for by Dr. K. The claimant testified that she first sought medical treatment with Dr. K for the repetitive trauma injury on September 23, 1998, when her shoulder and arm pain increased. The claimant sought medical treatment with Dr. VW on October 5, 1998. Dr. VW diagnosed the claimant as having a posterolateral protrusion of the C6-7 disc and bulging at C5-6. In a letter dated December 14, 1998, Dr. VW states:

Her neck pain and right shoulder pain correlate to her disc herniation, and is superimposed on her usual pain syndrome that had not previously prevented her from working. Her disc pathology is NOT a consequence of her fibromyalgia. There is no evidence in the literature that fibromyalgia produces any structural changes in the discs that would lead to disc bulging and disc herniation. Her current situation is due to NEW injury to the discs related to her employment as a school bus driver.

Dr. K, in a letter dated January 12, 1999, states that the claimant has cervical disc disease which is causing radicular symptoms, that fibromyalgia syndrome does not cause any structural changes in the spine, and that the claimant's abnormalities in her cervical spine may or may not be related to her employment as a school bus driver.

The claimant testified that the pain since September 23, 1998, is different than her fibromyalgia pain. According to the claimant, she now suffers from sharp pain, tingling down her right arm, and her shoulder and neck movement is limited. The claimant asserts Dr. VW has taken her off work as a result of her repetitive trauma injury, and she has been unable to work from September 23, 1998, through the date of the CCH.

The self-insured argues that the claimant was not injured on _____, as a result of any compensable event. The record is clear that the claimant was asserting a repetitive trauma injury, not a specific injury, on _____, and the date of injury was not an issue at the CCH. We have previously pointed out problems that arise in claims in which a repetitive trauma injury is claimed and the issue is stated as whether the claimant sustained an injury on a specific date. We again encourage the use of the phrase "date of injury" rather than "injury sustained on" in claims involving repetitive trauma.

The self-insured asserts the claimant's condition of fibromyalgia is the sole producing cause of any disability and pain symptoms. The self-insured had the claimant examined by a doctor, Dr. N. Dr. N opined that the claimant did not sustain an injury on the job; that the claimant's pain is due to fibromyalgia, a chronic pain syndrome which is an ailment of life; and that the claimant has disc bulges or protrusions, not herniations.

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 The term does not include an ordinary disease of life to which the general public is exposed outside of employment, unless that disease is an incident to a compensable injury or occupational disease." 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.).

The claimant had the burden to prove she sustained a repetitive trauma injury and had disability. The self-insured had the burden of proof on a sole cause defense. Texas

Workers' Compensation Commission Appeal No. 94212, decided April 4, 1994. Whether the sole cause of the claimant's alleged injury was her fibromyalgia was a question of fact for the hearing officer to decide. The 1989 Act provides that the hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). The hearing officer determined that the claimant's work activities caused a repetitive trauma injury and disability. These determinations are sufficiently supported by the claimant's testimony and the medical opinion of Dr. VW. To the extent there were conflicting medical reports regarding causation, this was an issue for the hearing officer to resolve. A finding of disability may be based upon the testimony of the claimant alone, and the hearing officer accepted the claimant's testimony. As an appeals body, we will not substitute our judgment for that of the hearing officer when the determination is not so against the overwhelming weight of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Texas Workers' Compensation Commission Appeal No. 950456, decided May 9, 1995. We find there was sufficient evidence to support the determination of the hearing officer that the claimant suffered an injury in the course and scope of employment on _____, in the form of a repetitive trauma injury, and had disability from September 23, 1998, through the date of the CCH.

The decision and order of the hearing officer are affirmed.

Dorian E. Ramirez
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Elaine M. Chaney
Appeals Judge