

## APPEAL NO. 991668

On July 20, 1999, a contested case hearing (CCH) was held. The CCH was held under the provisions of the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). The issues at the CCH were: (1) whether appellant (claimant) sustained a compensable injury in the form of an occupational disease on \_\_\_\_\_; (2) whether respondent (carrier) waived the right to contest compensability of the claimed injury by not contesting compensability within 60 days of being notified of the injury; and (3) whether claimant sustained disability and, if so, for what period. The hearing officer decided that: (1) claimant did not sustain a compensable injury including a compensable right carpal tunnel syndrome (CTS) injury, in the form of an occupational disease that arose out of and in the course and scope of employment with (employer) on \_\_\_\_\_; (2) that claimant did not have disability beginning on October 5, 1998, and continuing through the date of the CCH, or for any other time period because claimant did not have a compensable injury on \_\_\_\_\_; and (3) although carrier did not contest compensability of claimant's claimed injury within 60 days of being notified of the claimed injury, carrier did not waive the right to contest compensability of claimant's claimed injury because claimant did not sustain a compensable injury on \_\_\_\_\_. Claimant appeals the hearing officer's decision that he did not have disability because he did not have a compensable injury and that carrier did not waive the right to contest compensability of his claimed injury because he did not sustain a compensable injury. Carrier requests affirmance.

### DECISION

Reversed and remanded.

Claimant testified that she is right handed, that she began working for the employer in October 1997; that in January 1998 she began working as a full-time cashier in employer's cafeteria; that she mainly used her right hand to operate the cash register; that operating the cash register required repetitive motion affecting her fingers and wrist; that she also helped in preparing food and cleaning; that in August 1998 she began having pain on her right side in her fingers, hand, and shoulder; that she went to Dr. W, who took her off work for two weeks; that Dr. W told her that she had CTS; that she believes that it was on \_\_\_\_\_, that Dr. W diagnosed her with CTS; that Dr. W referred her to Dr. O, who told her she had CTS; that Dr. W referred her to Dr. F, who told her that she had lupus and polyarthritis; that she then started treating with Dr. C, D.C., who diagnosed her with CTS related to her employment and took her off work; that the Texas Workers' Compensation Commission (Commission) sent her to Dr. V, who told her that she has work-related CTS; that she stopped working on October 5, 1998; that she did not quit work; that she stopped working because she was unable to work and her doctors had her off work; and that she is claiming that she suffered an injury to her right wrist in the form of CTS.

LT, employer's president, testified that he first knew that claimant was claiming a work injury on October 7, 1998; that he was informed by the Texas Workforce Commission (TWC) that claimant had quit her job, and that claimant did not continuously operate the

cash register. He also testified concerning the average number of cashier transactions that are made in an hour.

Dr. W noted on September 1, 1998, that claimant presented with several weeks of left shoulder pain, pain in the arm, and tingling and numbness in the hand; that there was no known injury; and that she was not doing anything that could cause CTS symptoms in the left hand. Dr. W diagnosed claimant with tendinitis and bursitis. A left shoulder x-ray was normal. Dr. F noted on September 4, 1998, that claimant has at least a two-year history of joint pain, which first started at the left shoulder and then spread to the right knee, back, and legs. Among other things, Dr. F noted that claimant's right wrist was swollen. Dr. F diagnosed claimant as having systemic lupus. Claimant was seen by a registered nurse on September 10, 1998, for increased right hand pain and was diagnosed by the nurse as having right CTS, systemic lupus erythematosus with polyarthritis, and discoid lupus, and Dr. F indicated his agreement with that evaluation.

On September 14, 1998, Dr. M diagnosed claimant as having right CTS. Dr. W noted on September 21, 1998, that claimant had right shoulder pain extending down her arm and diagnosed her as having right shoulder "pain bursitis versus tendinitis versus lupus." Dr. W wrote on September 30, 1998, that claimant has lupus, polyarthritis, and CTS and that he was taking claimant off work for two weeks. In a note dated September 30, 1998, Dr. W stated that claimant has arthritis, tendinitis in the right shoulder, and right wrist CTS, and requested that she be allowed two weeks off work to rest her right shoulder and wrist. In a note dated October 5, 1998, Dr. W noted that claimant has CTS and that she is unable to work a cash register.

Dr. O saw claimant on October 9, 1998, for right hand complaints claimant said she had had for about three months. Dr. W wrote that physical examination showed positive signs for CTS in the right hand, diagnosed claimant as having CTS of the right hand, recommended an EMG and nerve conduction study (NCS) and that claimant continue to wear a splint, and released claimant to return to work.

Claimant began treating with Dr. C, a chiropractor, in October 1998 and he took her off work for a work-related CTS injury of \_\_\_\_\_. Dr. W's narrative reports reflect that claimant complained of right wrist pain and numbness and of some CTS symptoms in the left wrist; that claimant claimed a work-related bilateral CTS injury of \_\_\_\_\_; that an EMG had not been obtained; that Tinel's and Phalen's signs were positive on the right hand side; that her right wrist showed strength deficits as a result of her injury; and that claimant undertook therapy and treatment from Dr. C. Dr. C wrote that, within reasonable medical probability, the following conditions are directly related to claimant's work injury of \_\_\_\_\_: CTS (median nerve); DeQuervain's tenosynovitis, bursitis of wrist and carpus, brachial neuritis or radiculitis, myalgia and myositis, and muscular deconditioning. In December 1998, Dr. C noted that claimant was complaining of right hand, right wrist, and right shoulder pain; that Tinel's and Phalen's signs were positive on the right side; and that claimant had had some improvement but needed further treatment and should remain off work. In January 1999, Dr. C noted claimant continued to complain of right wrist and

shoulder pain and that she had had some improvement but needed further treatment and should remain off work. Dr. C's patient notes reflect that claimant has complained of pain in her right wrist, right hand, fingers of her right hand, right arm, and right shoulder, as well as pain in her left upper extremity and occasionally in her legs, hips, and neck. Dr. C's patient notes also refer to back pain disability scores, although claimant said she did not complain about back pain.

The benefit review officer (BRO) ordered claimant to attend an examination by Dr. V for the purpose of determining whether she has CTS and to provide an opinion concerning the cause of her hand/wrist problems. Dr. V examined claimant on March 11, 1999, and noted that claimant described having had a work-related injury on \_\_\_\_\_, resulting in bilateral wrist pain, more on the right than on the left; that Dr. F had diagnosed claimant as having lupus and polyarthritis; that claimant clinically appears to have CTS perhaps bilaterally, but more so on the right than on the left; and that an EMG/NCS is needed. Prior to undergoing the EMG/NCS, the BRO wrote to Dr. V and asked whether in his opinion claimant's CTS is related to her employment. Dr. V conducted the EMG/NCS of the right median and ulnar nerves on April 12, 1999, and wrote that those studies were within normal limits, that there is no evidence of CTS in the right wrist, that there is no evidence of other entrapment syndrome affecting the right upper extremity, that there is no evidence of cervical radiculopathy affecting the right upper extremity, that claimant may have musculoskeletal "overuse syndrome" or symptoms related to repetitive activities of her hand and wrist, and concluded that claimant "has suffered musculoskeletal trauma to her right hand as a result of repetitive activities of her work." Dr. V wrote that claimant had reached maximum medical improvement with no impairment.

The BRO wrote to Dr. V, stating part of the definition of an occupational disease and asked whether in his opinion overuse syndrome is a repetitive trauma injury. Dr. V responded on May 10, 1999, that "I have been unable to find any evidence of physical injury to [claimant] as a result of her alleged injury on \_\_\_\_\_ or any evidence of musculoskeletal trauma as a result of repetitive activities at work." Dr. V also stated that "[b]ased on the fact that I am unable to find anything on physical, neurological, or neurophysical examination suggesting damage or harm to the physical structure of the body arising out of and in the course and scope of employment, [claimant] does not appear to have a compensable work related injury as defined by the Texas Labor Code." Dr. V added that "[o]n a prior evaluation and [EMG/NCS] dated 4-12-99, it was assumed that [claimant] had suffered musculoskeletal trauma to her right hand as a result of repetitive activities of her work, but in point and fact, in review of all of the studies and her examination, I am unable to find specific evidence of such work related injury."

LT wrote on October 7, 1998, among other things, that claimant's supervisor had advised him on that day that claimant wanted to file a workers' compensation claim because her wrist hurt; that he, LT, called claimant on that day; and that claimant told him that she had hurt herself on or about \_\_\_\_\_, operating the cash register. The Employer's First Report of Injury or Illness (TWCC-1) dated October 7, 1998, notes the body part injured as right wrist. In a Payment of Compensation or Notice of

Refused/Disputed Claim (TWCC-21) dated October 14, 1998, the carrier noted a date of injury of \_\_\_\_\_; noted the nature of injury as "right wrist"; noted that its first written notice of injury was received on October 7, 1998; and denied the claimant's claim based on no injury in the course and scope of employment and no evidence of a work-related injury and/or work-related disability. The TWCC-21 is file stamped as having been received by the Commission on January 7, 1999.

A document reflects that the employer may have extended the claimant a job offer on October 9, 1998. TWC documents reflect that claimant was denied unemployment benefits.

The hearing officer made the following pertinent findings of fact and conclusions of law:

### **FINDINGS OF FACT**

2. Claimant did not suffer damage or harm to the physical structure of Claimant's body including a right [CTS] injury that occurred as a result of repetitious physical traumatic activities that occurred over time and arose out of and while engaged in or about the furtherance of the affairs or business of employer on \_\_\_\_\_.
3. Claimant's probative medical evidence did not establish a causal relationship between Claimant's employment with Employer on \_\_\_\_\_, and Claimant's alleged injury including an alleged right [CTS] injury.
4. Claimant's alleged inability to obtain and retain employment at wages equivalent to the wages Claimant was receiving prior to \_\_\_\_\_, beginning on October 5, 1998, and continuing to the present date of this hearing on July 20, 1999, or for any other time period, was not due to an injury including a right [CTS] injury Claimant alleged she suffered while working for employer on \_\_\_\_\_.
5. Carrier was notified of Claimant's alleged injury on October 7, 1998.
6. Carrier first denied the compensability of Claimant's injury by completing and filing a [TWCC-21] dated October 14, 1998, with the [Commission] on January 7, 1999, which date of January 7, 1999, was more than 60 days after Carrier was notified on October 7, 1998, of Claimant's alleged injury.

## CONCLUSIONS OF LAW

3. Claimant did not sustain a compensable injury including a compensable right [CTS] injury, in the form of an occupational disease that arose out of and in the course and scope of employment with Employer on \_\_\_\_\_.
4. Claimant did not have disability beginning on October 5, 1998, and continuing through the present date of this hearing on July 20, 1999, or for any other time period because Claimant did not have a compensable injury on \_\_\_\_\_.
5. Although Carrier did not contest compensability of Claimant's claimed injury within 60 days of being notified of the claimed injury, Carrier did not waive the right to contest compensability of Claimant's claimed injury because Claimant did not sustain a compensable injury on \_\_\_\_\_.

Claimant appeals Conclusions of Law Nos 4 and 5. Claimant contends that carrier waived the right to contest compensability by not contesting compensability within 60 days of notice of injury and that claimant suffered disability from October 5, 1998, and continuing to the present. The claimant points out that the hearing officer grounded his determination that carrier did not waive its right to contest compensability on his finding that claimant did not sustain a "compensable injury" and that that conclusion begs the question. Claimant points out that nowhere in his decision does the hearing officer determine that claimant did not suffer "an injury." Claimant states that no evidence would support such a determination. While not directly challenging Finding of Fact No. 2 and Conclusion of Law No. 3, he points out that, while those determinations are in agreement with Dr. V's finding of no compensable injury, they do not reflect a determination of no injury. Claimant contends that since carrier did not contest his injury within 60 days of its notice of injury, his injury is compensable as a matter of law. Claimant contends that Conclusion of Law No. 5 is in error because it is based on the finding of no compensable injury, and since carrier waived its right to contest compensability, the injury became compensable as a matter of law. Carrier responds that the hearing officer's decision should be affirmed and claims that, since claimant did not challenge Finding of Fact No. 2, "the finding that Claimant did not sustain an injury has become final." Carrier misreads Finding of Fact No. 2. That finding does not find that claimant has no injury, instead, it is in essence a finding that claimant did not sustain a repetitive trauma injury in the course and scope of her employment. Carrier contends that the hearing officer correctly concluded that although it did not contest compensability of claimant's claimed injury within 60 days of notice of the injury, it did not waive the right to contest compensability of claimant's claimed injury because claimant did not sustain a compensable injury on \_\_\_\_\_. We disagree.

Section 409.021(c) provides in part that if an insurance carrier does not contest the compensability of an injury on or before the 60th day after the date on which the insurance

carrier is notified of the injury, the insurance carrier waives its right to contest compensability. See *also* Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 124.6(c). Section 401.011(26) defines injury and Section 401.011(10) defines compensable injury. In Continental Casualty Company v. Williamson, 971 S.W.2d 108 (Tex. App.-Tyler 1998, no pet.), the court noted that an injury and a compensable injury are two different things and held that "if a hearing officer determines that there is no injury, and that finding is not against the great weight and preponderance of the evidence, the carrier's failure to contest compensability cannot create an injury as a matter of law."

In Texas Workers' Compensation Commission Appeal No. 990135, decided March 10, 1999, a hearing officer found that a claimant did not injure her low back at work and that the carrier failed to timely contest compensability of the low back injury, and thus it became compensable as a matter of law. The carrier appealed the waiver decision. In affirming the hearing officer's decision, the Appeals Panel stated that:

In its response to the claimant's appeal the carrier argues that the injury is not compensable as a matter of law, citing [Williamson, *supra*]. The carrier's reliance on Williamson is misplaced. We have previously recognized that Williamson is limited to situations where there is a determination that the claimant did not have an injury, that is no damage or harm to the physical structure of the body, as opposed to cases where, as here, there is an injury, a lumbar sprain/strain and a disc bulge at L3-4 per an MRI, which was determined by the hearing officer not to be causally related to the claimant's employment Texas Workers' Compensation Commission Appeal No. 982446, decided December 2, 1998; Texas Workers' Compensation Commission Appeal No. 982161, decided October 26, 1998; and Texas Workers' Compensation Commission Appeal No. 981847, decided September 25, 1998. Thus, in affirming the hearing officer's determination that the carrier did not timely contest compensability of the claimant's back injury, we likewise affirm his determination that the claimant's back injury has become compensable as a matter of law.

In the instant case, the hearing officer's determination that carrier did not waive its right to contest compensability is premised on a determination of no compensable injury. Carrier was given written notice of a claimed work-related right wrist injury and failed to timely contest compensability of the claimed right wrist injury. If claimant had an injury as defined by Section 401.011(26) to her right wrist, then the right wrist injury would be compensable as a matter law even if it was not sustained in the course and scope of employment because carrier would have waived its right to contest compensability, that is, whether the injury occurred in the course and scope of employment. If claimant had a right wrist injury that became compensable as a matter of law due to carrier's waiver, then a disability determination would need to be made. The hearing officer did not make a determination of whether claimant had an injury; his determination is that claimant did not have a compensable injury including CTS on \_\_\_\_\_.

We reverse the hearing officer's decision and order and remand the case to the hearing officer to make further findings of fact and conclusions of law in regard to the waiver and disability issues, and in particular whether claimant had an injury, as defined by Section 401.011(26), to her right wrist.

Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitates 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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Robert W. Potts  
Appeals Judge

CONCUR:

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Susan M. Kelley  
Appeals Judge

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Thomas A. Knapp  
Appeals Judge