APPEAL NOS. 000162 AND 000163

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A consolidated contested case hearing was held on December 30, 1999. The hearing officer issued separate decisions and orders and the appellant (claimant) has filed separate appeals, on both the claimant's (date of injury for Appeal No. 000163), and alleged (date of injury for Appeal No. 000162), injuries (Texas Workers' Compensation Commission Appeal Nos. 000163 and 000162, respectively). In regard to the (date of injury for Appeal No. 000163), injury, the sole issue was whether the claimant's compensable cervical strain injury of (date of injury for Appeal No. 000163), extends to and includes bilateral carpal tunnel syndrome (BCTS), herniated discs at the C5-6 and C6-7 levels of her cervical spine, and a dental injury. The hearing officer determined that the claimant's compensable cervical strain injury of (date of injury for Appeal No. 000163), does not extend to nor include BCTS, herniated discs at the C5-6 and C6-7 levels of the claimant's cervical spine, nor a dental injury. The claimant appeals the decision of the hearing officer, urging that her (date of injury for Appeal No. 000163), injury includes BCTS and cervical disc herniations, and that these conditions were accepted by the respondent, Texas Workers' Compensation Insurance fund (Carrier 1) in June 1996. Carrier 1 replies that the hearing officer's decision is supported by the evidence and should be affirmed. The determination that the claimant's compensable injury of (date of injury for Appeal No. 000163), does not include a dental injury has not been appealed and has become final. Section 410.169.

In regard to the alleged injury of (date of injury for Appeal No. 000162), the issues were whether the claimant sustained a compensable injury in the form of an occupational disease; the date of injury; whether the claimant reported an injury to the employer on or before the 30th day after the injury, and, if not, did good cause exist for failing to report the injury timely; and whether the claimant had disability. The hearing officer determined that the claimant did not sustain a compensable injury in the form of an occupational disease; that if the claimant had sustained a compensable occupational disease, the date of injury would have been (alleged date of injury); that the claimant did not report an injury to the employer on or before the 30th day after (alleged date of injury), but good cause existed for failing to report an injury; and because the claimant did not have a compensable injury, the claimant did not have disability. The claimant appeals, urging that she sustained a compensable injury in the form of an occupational disease; that her date of injury is (date of injury for Appeal No. 000162); that she timely reported the injury to the employer; and that she had disability beginning (date of injury for Appeal No. 000162). The respondent, (Carrier 2), replies that the hearing officer's decision is supported by the evidence and should be affirmed.

DECISION

Affirmed in both cases.

The claimant was employed as a senior collector for the employer, a credit union. On (date of injury for Appeal No. 000163), the claimant fell and sustained a compensable injury, a cervical strain. The claimant received active medical treatment from Dr. P until June 1996, and reached maximum medical improvement on November 11, 1994, with a 14% impairment rating. The claimant testified that she continued working after the (date of injury for Appeal No. 000163), injury until 1996, when she was taken off work for eight weeks following severe pain in her neck and shoulder, and was diagnosed with thoracic outlet syndrome and compression of the medial nerve, or BCTS. No cervical MRI was performed. The claimant testified that after being off work for eight weeks her cervical problems resolved, and between June 1996 and December 1998 she only saw Dr. P for "maintenance" to all areas of her spine, which she paid for herself.

The claimant testified that she worked for the employer seven years and her job duties as a senior collector required her to make phone calls all day through the computer and a headset, view a computer monitor, and make computer entries. The claimant testified that in August 1998, she was moved from credit card collections to regular accounts which ran on a faster computer system, enabling greater work productivity. The claimant testified that in November 1998 she was required to work overtime one day a week (a 12-hour shift), she began to have neck and arm pain, she related the pain to her work, she told her employer and Dr. P that she thought the pain was due to the overtime she was working, and she adjusted her keyboard and chair so that her computer monitor was almost at eye level. The claimant testified that in December 1998, she had an increased workload, was asked to forego any breaks, and the office was extremely cold because it had no heating system. The claimant said that her neck, hands and arms began to hurt severely and on December 4, 1999, Dr. P told her that her symptoms were work related and issued a work restriction indicating no overtime which her supervisor accommodated. According to the claimant, her pain increased to the point that she had pain down her arms and hands, pain in her neck and jaws, she was hurting from "ear to ear," and Dr. P took her off work on (date of injury for Appeal No. 000162). The claimant said that both she and Dr. P assumed the pain was stemming from the (date of injury for Appeal No. 000163), injury.

On March 1, 1999, the claimant saw Dr. A, a neurologist, who had previously treated her in June 1996, and he scheduled diagnostic tests. The claimant said that on the night of March 2, 1999, she broke a dental bridge and her dentist told her that it was a result of muscle spasms and swelling in her neck which caused her to grind her teeth. The claimant testified that on March 4, 1999, Dr. P called her and said that he had received a phone call from Carrier 1 stating that because of the length of time between treatment in 1996 and 1999, the claimant needed to file a new claim. According to the claimant, she spoke with her supervisor on March 5, 1999, and human resources on March 18, 1999, and reported a new injury, although she thought her symptoms were related to the (date of injury for Appeal No. 000163), injury. A cervical MRI performed in April 1999, revealed herniated discs at the C5-6 and C6-7 levels.

The claimant asserts that she sustained a new injury, an aggravation of her (date of injury for Appeal No. 000163), injury which was caused by an increased workload, a workstation which was not ergonomically correct, and progressive bifocals in which she had to tilt her neck up to see the computer screen. According to the claimant, Dr. P has stated that her herniated discs were caused by repetitively moving her head and neck up and down to see through the bottom of her glasses, causing her discs to herniate slowly. Carrier 1 asserts that there is no medical evidence indicating that the claimant's herniated discs or BCTS is related to the (date of injury for Appeal No. 000163), injury, and no such diagnoses were made until after (date of injury for Appeal No. 000162). Carrier 2's position is that the claimant is suffering from an ordinary disease of life, not a new neck injury.

In June 1996, Dr. A diagnosed the claimant with a cervical musculoligamentous injury with no evidence of cervical radiculopathy with persistent thoracic outlet symptomatology and compression of the median nerves at the wrists. In July 1999, Dr. A diagnosed the claimant with a cervical musculoligamentous injury with C6 greater than C7 radiculopathy with HNP (herniated nucleus pulposus) at the C5-6 and C6-7 levels, compression of the median nerves at the wrists, and cervical vertigo and imbalance from myofascial spasm. Dr. A opines that the claimant sustained a new injury based on "SEP" and EMG findings which are "totally different from the 1993 date of injury." According to Dr. P, the claimant sustained a new injury due to the ergonomics of her workstation and her environment. Dr. P states:

> The long repetitive hours with an inappropriate monitor placement, keyboard height, inadequate chair placement, lack of a tracking ball, too cold of environment and long hours in front of the computer without breaks, all contributed to this repetitive stress injury.

Carrier 1 had the claimant examined by Dr. G, who commented on whether the claimant sustained a new injury or had a continuation of her old injury. Dr. G states:

> There is no way to medically rule out the possibility that she would have developed this as part of the normal continuation of the aging process in someone who has a pre-existing condition. There is no previous cervical MRI scan done before 1999 to indicate what the disc spaces at C5-6 and 6-7 looked like before her new symptoms began in 1998. Her complaints and findings of Carpal Tunnel Syndrome [CTS] are not related to the injury of 8-1-93. Her prior surgery in the right volar wrist area is also unrelated to that injury. In summary, I think [the claimant] sustained an aggravation of the pre-existing condition and has not sustained an acute new injury for the reasons stated above.

The claimant had the burden of proof regarding the extent of the (date of injury for Appeal No. 000163), injury. Johnson v. Employers Reinsurance Corporation, 351 S.W.2d 936 (Tex. Civ. App.-Texarkana 1961, no writ). The hearing officer is the sole judge of the

weight and credibility to be given to the evidence and it is the hearing officer's responsibility to resolve the inconsistencies and contradictions in the evidence. Section 410.165(a); Garza v. Commercial Insurance Co. of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). This is equally true of medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ); *see also* Texas Workers' Compensation Commission Appeal No. 941077, decided September 26, 1994.

Whether the claimant sustained cervical herniated discs and BCTS as a result of the (date of injury for Appeal No. 000163), injury was ultimately a question of fact for the hearing officer. His determination will not be reversed unless it is against the great weight and preponderance of the evidence. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986). The hearing officer found that the claimant's disc herniations and BCTS are not a direct and natural result of her neck injury of (date of injury for Appeal No. 000163). The hearing officer states that although CTS was revealed in 1996 neurological tests, there is no connection to her 1993 neck injury. The claimant has cervical herniations and EMG deficits which were not diagnosed until 1999, and no medical opinion relates the claimant's herniations or BCTS to the (date of injury for Appeal No. 000163), injury. Although the claimant argues on appeal that BCTS was accepted by the carrier, carrier waiver was not raised as an issue and we will not consider it for the first time on appeal. Having reviewed the record, we find the evidence sufficient to support the hearing officer's determination that the claimant's compensable cervical strain injury of (date of injury for Appeal No. 000163), does not extend to nor include BCTS, or herniated discs at the C5-6 and C6-7 levels of her cervical spine.

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). "[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 hearing officer determined that at some unknown time and place, the claimant sustained an injury, two herniated discs in the C5-6 and C6-7 levels of her cervical spine, which did not arise out of nor was it in the course and scope of her employment with the employer. The claimant had the burden to prove that she sustained a compensable

repetitive trauma injury. Whether she did so was a question of fact for the hearing officer to decide. Texas Workers' Compensation Commission Appeal No. 93449, decided July 21, 1993. Based on the evidence presented, the hearing officer concluded that the claimant did not meet her burden of proving she sustained a compensable occupational disease injury. It is up to the fact finder to determine what weight to give to the medical evidence. Even though the medical opinions of Dr. P and Dr. A state that the claimant sustained a new injury which was caused by the repetitive nature of her work, it was the hearing officer's duty to determine what weight to give the medical evidence and he could disbelieve any of it. Although in May 1999, Dr. A noted that the claimant had some changes in comparison with a previous "SEP" in 1996, indicating only a slowing of the right median nerve distally, the hearing officer concluded that the claimant's BCTS remained the same through April 26, 1999, without being affected by her work activity, other than in symptoms. The claimant did not present any medical evidence to support a causal connection between her broken dental bridge and her cervical injury. We find there was sufficient evidence to support the determination of the hearing officer that the claimant did not sustain a compensable injury in the form of an occupational disease.

The claimant appealed the hearing officer's determination that the date of injury is (alleged date of injury). The date of injury of an occupational disease is the date the claimant "knew or should have known that the disease may be related to the employment." Section 408.007. The claimant asserted (date of injury for Appeal No. 000162), as the date of injury. The hearing officer's determination that if the claimant had sustained a compensable occupational disease, the date of injury would have been (alleged date of injury), is supported by the claimant's testimony that on that date Dr. P informed her that her increased overtime and workload were likely the cause of her symptoms and Dr. P took her off working overtime. A different resolution of the issue would not change the outcome of this case, given our affirmance of the determination that the claimant did not sustain a compensable injury in the form of an occupational disease.

The claimant appealed the hearing officer's determination that the claimant did not timely report the injury on or before the 30th day after (alleged date of injury), but good cause existed, based on her position that the date of injury is (date of injury for Appeal No. 000162), and she reported the injury on March 5, 1999. As the hearing officer's decision on this issue is favorable to the claimant, the claimant was not aggrieved by the hearing officer's resolution of this issue and we will not consider the claimant's appeal of this issue.

With respect to the issue of disability, disability is defined as "the inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage." Section 401.011(16). Since we find the evidence to be sufficient to sustain the determination of the hearing officer that the claimant did not sustain a compensable injury in the form of an occupational disease, the claimant cannot have disability under the 1989 Act. Texas Workers' Compensation Commission Appeal No. 92640, decided January 14, 1993.

The decision and order of the hearing officer in both cases are affirmed.

Dorian E. Ramirez
Appeals Judge

CONCUR:

Elaine M. Chaney
Appeals Judge

Judy L. Stephens
Appeals Judge