

APPEAL NO. 010373

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on January 8, 2001. The record was closed on January 12, 2001. In response to the five issues before him, the hearing officer determined that: 1) the appellant (claimant) had not sustained a compensable occupational disease injury to her back; 2) the date of the claimant's alleged injury is _____ (all dates are 2000 unless otherwise noted); 3) the claimant had not timely reported her injury to the employer; 4) the respondent (self-insured) had not waived the right to contest compensability; and 5) the claimant did not have disability.

The claimant has appealed on all the issues, raising both factual sufficiency and legal arguments. The self-insured responds, urging affirmance.

DECISION

Affirmed in part and reversed and rendered in part.

The claimant had been employed as a customer representative for the self-insured for about 21 years. The claimant's duties were to take incoming calls using a headset and respond to the calls using a computer. The claimant worked eight hours a day (plus overtime when assigned), five days a week. She received two 15-minute breaks a shift. (There was no testimony about lunch breaks.)

OCCUPATIONAL DISEASE INJURY

The claimant contends that she suffered a repetitive trauma injury to her low back by sitting at her workstation in an "unnatural position," with her body bent forward at a 30E angle. The claimant's treating doctor, Dr. B, a chiropractor, testified that the claimant's work position caused a straightening of the "lumbar lordotic curvature," and that the claimant had "chronic lumbar strain and abnormal longation of the thoracic and lumbar musculature." The hearing officer commented that the claimant had failed to prove that her "sitting was an activity unique to her employment that would affect her in some degree more than [sic] the general population, or put her more at risk of such an injury than the general public in employment in general." In a number of cases we have held that the element of causation in repetitive trauma cases was:

To recover for an injury of this type, one must not only prove that repetitious traumatic activities occurred on the job, but must also show that a causal link existed between the traumatic activity and the incapacity; that is, the disease must be inherent in the type of employment as compared with employment generally. [Citation omitted.] Texas Employers' Insurance Association v. Ramirez, 770 S.W.2d 896, 899 (Tex. App.-Corpus Christi 1989, writ denied);

Davis, supra [Davis v. Employers Insurance of Wausau, 694 S.W.2d 105 (Tex. App.-Houston [14th Dist.] 1985, writ ref'd n.r.e.)].

See Texas Workers' Compensation Commission Appeal No. 001629, decided August 28, 2000, and Texas Workers' Compensation Commission Appeal No. 950816, decided July 5, 1995. We hold that the hearing officer did not apply an incorrect standard and affirm the hearing officer's decision on this issue.

DATE OF INJURY

Section 408.007 states that the date of injury for an occupational disease (which includes a repetitive trauma injury) is “the date on which the employee knew or should have known that the disease may be related to the employment.” This will not, in every case, mean the date on which concrete diagnosis is rendered. While a definitive diagnosis from a doctor is not required, neither is the employee held to the standard of a doctor's knowledge of causation. See Texas Workers' Compensation Commission Appeal No. 002841, decided January 18, 2001. In this case, the claimant had low back pain for a period of two years or so and, on or about July 1, had found a chair which she could use a rolled-up pillow to put in the chair to give her some relief from her low back pain. The hearing officer found that on or about July 1, an ordinarily prudent person would have known that her low back pain may be related to her employment. We hold that the hearing officer's decision on this issue is supported by the evidence and we affirm the decision on this issue.

TIMELY NOTICE TO THE EMPLOYER

We decide this issue independently from the date of injury issue, noting that contrary to the self-insured's assertion that there is no “authority for the proposition that a Carrier should be limited to the disputes listed on the TWCC 21 [Payment of Compensation or Notice of Refused/Disputed Claim] . . .” the Appeals Panel has held that the language in Sections 409.021(d) and 409.022 “makes clear that the carrier is limited to the grounds stated in its initial dispute and may only thereafter raise defenses that are based upon newly discovered evidence.” Appeal No. 002841, *supra*. The self-insured, in its TWCC-21, only contests compensability on the basis that the claimant's condition is an ordinary disease of life and that her sitting was “not a physically traumatic, repetitive activity: as defined in Section 401.011(36).” The self-insured did not contest compensability on the basis of lack of timely notice to the employer. In so far as the self-insured argues that the holding in Continental Casualty Company v. Williamson, 971 S.W.2d 108 (Tex. App.-Tyler 1998, no pet. h.) applies, we have held that Williamson does not apply to situations where there is evidence of an injury and the issue is whether the injury is related to the employment. Texas Workers' Compensation Commission Appeal No. 981847, decided September 25, 1998, and Texas Workers' Compensation Commission Appeal No. 992864, decided February 4, 2000. In the case before us, the claimant does have some sort of lumbar spine injury and the hearing officer only finds, in essence, that it is an ordinary disease of life and the claimant was at no greater risk in her

employment than employment in general. Accordingly, we reverse the hearing officer's decision that the self-insured had not waived the right to contest compensability based on lack of timely notice to the employer and render a new decision that the self-insured waived its right to contest compensability on the basis of the claimant's failure to timely give notice to her employer. Our reversal on this issue, however, does not result in making the claim compensable because we have affirmed the decision of no compensable injury.

WAIVER OF CONTEST OF COMPENSABILITY BASED ON
DOWNNS V. CONTINENTAL CASUALTY COMPANY,
32 S.W.3d 260 (Tex. App.-San Antonio 2000, pet. filed)

The claimant contends that Downns, which requires a carrier to either pay benefits or give notice of its refusal to pay, is applicable. (The self-insured argues that there were no benefits to be paid in the first seven days after notice of the injury.) Both parties cite TWCC Advisory 2000-7, August 28, 2000, which provides that the Texas Workers' Compensation Commission (Commission) does not consider Downns precedent "until it becomes final upon completion of the judicial process." The claimant contends that since a motion for rehearing has been denied, the judicial process has become final. The self-insured responds that the case has been appealed to the Texas Supreme Court. TWCC Advisory 2001-02, February 20, 2001, reiterated the Commission's position in TWCC Advisory 2000-7 that the judicial process is not complete. The hearing officer did not err in applying the Commission's position on this issue.

DISABILITY

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

We affirm the hearing officer's decision and order on the occupational disease; the date of injury; waiver pursuant to Downns, *supra*, and disability issues. We reverse so much of the hearing officer's decision of the untimely notice to the employer issue as it relates to the self-insured's failure to timely dispute compensability based on lack of timely notice

on its TWCC-21 and render a new decision that the self-insured had not contested timely notice to the employer in its TWCC-21 and is precluded from doing so now. Our reversal of this issue does not result in making this claim compensable.

Thomas A. Knapp
Appeals Judge

CONCUR:

Judy L. S. Barnes
Appeals Judge

Elaine M. Chaney
Appeals Judge