

APPEAL NO. 011061
FILED JUNE 20, 2001

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 commenced on December 15, 2000. Because the respondent (claimant) was incarcerated and unable to attend, the CCH was continued until April 27, 2001, when it was concluded.

With regard to the issues before him the hearing officer determined that the claimant sustained a compensable repetitive trauma injury "to his bilateral wrists and hands" and that the claimant had disability from February 22, 2000, "and continuing through the date of this hearing." In Finding of Fact No. 3 and Conclusion of Law No. 3 the hearing officer indicates that disability ended on April 27, 2000; however, that is an obvious typographical error and the date should be April 27, 2001. We so reform those determinations to read 2001.

The appellant (carrier) appealed asserting that: (1) the claimant's back was not involved in this case; (2) the claimant did not sustain a compensable bilateral repetitive injury (carpal tunnel syndrome (CTS)); and (3) the claimant did not have disability for the period found by the hearing officer. The appeal file did not contain a response from the claimant.

DECISION

Affirmed in part and reversed and rendered in part.

The claimant was employed as a "circuit builder" building cable circuits. The claimant testified that he had been employed about one month and started out training as an "assembler," then a "cutter," and finally building circuits by bending, taping and numbering wires in a cable. The claimant testified that the wiring had to be done pursuant to a diagram without mistakes and within a time limit. The claimant said he was doing 242 cables a shift (a shift apparently being from 4:30 p.m. to 4:30 a.m.) with a goal of 260 cables a shift in order to qualify for a promotion and a raise. The claimant testified that on _____, his hands and wrists began to hurt and swell. The following day the claimant did not work and when he returned to work his hands again began to swell and hurt.

The claimant also complained of back pain but said that it began before his hands began to hurt. The hearing officer, in his Statement of the Evidence, commented:

Claimant also makes a questionable allegation of a back injury which appears to pre-date the hand and wrist problems. No determination will be made herein as to whether the claim having an injury date of _____, extends to the back.

Although the claimant's position at the benefit review conference was that he "was doing repetitive work and injured his hands and back," the hearing officer's comment regarding the alleged back injury has not been challenged and will not be addressed further.

Regarding the claimed bilateral CTS injury, although the objective evidence of an MRI was read as normal, and an EMG was not done, at least two doctors did diagnose CTS. Even the carrier, in its appeal, states that the "reports are equivocal as to the existence of [CTS]." It is for the hearing officer, as the sole judge of the weight and credibility of the evidence, to resolve conflicts in the evidence and 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). We find the hearing officer's decision on this point supported by the evidence and we affirm the decision on the injury issue.

Regarding the disability issue, the claimant contended that he had disability beginning February 22, 2000. In addition to the claimant's testimony a report of a doctor visit on February 24, 2000, takes the claimant off work at that time. Off-work slips take the claimant off work in June, and again from July to August 4, 2000. It is undisputed that the claimant was arrested and incarcerated on October 17, 2000, and remained incarcerated until January 30, 2001. The claimant asserted that he was wrongly arrested and was just an "innocent bystander" at the time of his arrest for a drug offense. The hearing officer comments in the Statement of the Evidence:

From October 17, 2000, through January 30, 2001, claimant was incarcerated. Claimant's situation is one in which he did not remove himself from the workplace. Claimant is credible that he was an "innocent bystander" at the time of his arrest and incarceration. Claimant has not been convicted of an offense; and it appears highly unlikely that any conviction for any offense will result.

Disability is defined in Section 401.011(16) as "the inability because of a compensable injury to obtain and retain employment" (emphasis added) at the preinjury wage. The claimant's inability to obtain and retain employment from October 17, 2000, through January 30, 2001, was not because of his injury but rather because he was incarcerated. In Texas Workers' Compensation Commission Appeal No. 002599, decided December 13, 2000, we noted that disability is an economic concept and that if an injured employee becomes incarcerated (wrongfully or not) the actual loss of wages is attributable to such incarceration, which is the reason for the inability to obtain and retain employment rather than the compensable injury. Texas Workers' Compensation Commission Appeal No. 92428, decided October 2, 1992; Texas Workers' Compensation Commission Appeal No. 92674, decided January 29, 1993. In Appeal No. 92674 we held, in part:

TIBs are to replace lost wages due to a compensable injury. In this case, actual loss of wages became directly attributable to the claimant's incarceration since he cannot earn wages while incarcerated. In our opinion,

incarceration, and not the compensable injury, has become the reason for the claimant's inability to obtain and retain employment at wages equivalent to the preinjury wage.

The Appeals Panel has consistently followed this interpretation of disability relative to incarceration. Regardless of whether the claimant involuntarily removed himself from the workplace, was an "innocent bystander," or was wrongfully incarcerated, the fact remains that his inability to obtain and retain employment was due to the incarceration and not the compensable injury. We reverse the hearing officer's decision on the disability issue and render a new decision that the claimant had disability from February 22, 2000, to October 16, 2000, and from January 31, 2001, to the date of the CCH, April 27, 2001.

The hearing officer's decision and order on the injury issue is affirmed and the hearing officer's decision on the disability issue is reversed and a new decision regarding disability, as noted, is rendered.

Thomas A. Knapp
Appeals Judge

CONCUR:

Elaine M. Chaney
Appeals Judge

Michael B. McShane
Appeals Judge