

APPEAL NOS. 011090
AND 011091
FILED JULY 02, 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 was held on April 30, 2001. The hearing officer consolidated two docket numbers into a single hearing: the claim involving claimant's injury to her left upper extremity (the _____ injury) and the claim involving the claimant's injury to her right upper extremity (the _____ injury). With respect to the issues before him, the hearing officer determined that the respondent (claimant) sustained a compensable injury in the form of an occupational disease to the left and right upper extremities; that the date of injury for the left upper extremity injury is _____; that the date of injury for the right upper extremity injury is _____; that the claimant did not have disability as a result of the _____, injury, but had disability from July 20, 2000 to April 30, 2001 as a result of the _____, injury; that the appellant (carrier) is not relieved from liability because the claimant did not timely report her injuries to her employer; that the carrier waived its right to contest compensability of the _____, left upper extremity injury because it did not contest the injury in accordance with Section 409.021; and that it did not waive its right to contest compensability of the _____, right upper extremity injury. In its appeal, the carrier asserts error in the hearing officer's determinations that the claimant sustained compensable bilateral upper extremity injuries; that the date of injury of the right upper extremity injury is _____; that the claimant timely reported her injuries to her employer; that she had disability as a result of the _____, injury, from July 20, 2000, through the date of the hearing; and that it waived the right to contest compensability of the _____, left upper extremity injury. In her response to the carrier's appeal, the claimant urges affirmance. The claimant did not appeal the determinations that she did not have disability as a result of her _____, compensable injury and that the carrier did not waive its right to contest compensability of the _____, injury.

DECISION

Affirmed in part, reversed and rendered in part.

The hearing officer did not err in determining that the claimant sustained compensable occupational disease injuries to both upper extremities. An occupational disease includes a repetitive trauma injury. Section 401.011(34). A repetitive trauma injury is defined as 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). The hearing officer is the judge of the weight and credibility of the evidence, resolves conflicts and inconsistencies in the evidence, and decides what facts the evidence has established. Texas Workers' Compensation Commission Appeal No. 950084, decided February 28, 1995. The claimant's testimony and the medical evidence provide sufficient evidentiary support for the hearing officer's injury determinations and our review of the record does not demonstrate

that those determinations are so against the great weight of the evidence as to be clearly wrong or manifestly unjust. As such, no sound basis exists for us to reverse the hearing officer's determinations that the claimant sustained compensable bilateral upper extremity injuries on appeal. Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986); Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

The hearing officer found that the date of injury of the right upper extremity injury under Section 408.007, the date the claimant knew or should have known that her problems with right upper extremity may have been work-related, is _____. The date of injury of an occupational disease is generally a question of fact for the hearing officer to resolve. It was the hearing officer's prerogative to credit the claimant's testimony and to determine that the date of injury of the right upper extremity injury is _____. That determination is not so against the great weight of the evidence as to compel its reversal on appeal.

The issues of whether the claimant timely reported her injuries and whether she had disability as a result of the _____, compensable injury presented the hearing officer with questions of fact. The hearing officer resolved the conflicts and inconsistencies in the evidence relating to notice and disability in favor of the claimant. His determinations in that regard are not so against the great weight of the evidence as to be clearly wrong or manifestly unjust. Thus, they will not be disturbed on appeal.

Lastly, we consider the hearing officer's determination that the carrier waived its right to dispute compensability of the _____, injury because it did not contest the injury in accordance with Section 409.021. On July 25, 2000, the carrier initially received written notice of an alleged injury when the employer submitted an Employer's First Report of Injury or Illness (TWCC-1), alleging an injury date of _____, and involving "multiple upper extremities/ hands/ wrists/ arms." The carrier disputed the compensability of the alleged injury by timely filing a Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) on August 2, 2000. Subsequently, the claims involving the left and right upper extremities were divided into two separate claims and the claimant filed an Employee's Notice of Injury or Occupational Disease and Claim for Compensation (TWCC-41) on September 21, 2000, alleging an injury/occupational disease affecting only the "left hand and wrist," and alleging an injury date of _____. The carrier filed no additional dispute in response to this notice of injury.

In this instance, the initial claimed injury was to the upper extremities, hands, wrists, and arms and, although the claim was ultimately divided to address the right and left extremity separately and a different injury date was alleged with regard to the left hand and wrist after the division of the claims, the nature of the injuries themselves did not change. As such, it is apparent that the TWCC-21 filed by the carrier was intended to serve as a contest of the compensability of the claimed bilateral upper extremity injuries, which includes a contest of compensability of the left upper extremity injury. To require the carrier to dispute an injury, which it has previously disputed, simply because the initial claim has been divided into two claims and the claimant alleges a different date of injury for one

of the claimed injuries, would represent an elevation of form over substance. Texas Workers' Compensation Commission Appeal No. 981432, decided August 12, 1998. Thus, we reverse the hearing officer's determination that the carrier waived its right to contest compensability of the claimant's alleged _____, injury and render a new decision that, under the facts of this case, the carrier did not waive its right to contest compensability of the _____, injury. We note, however, that despite our reversal of the waiver issue, the carrier remains liable for benefits for the _____, injury, given our affirmance of the hearing officer's determination that that injury is compensable.

The hearing officer's determination that the carrier waived its right to contest compensability of the _____, injury is reversed and a new decision rendered that the carrier did not waive its right to contest that injury. In all other respects, the hearing officer's decision and order are affirmed.

Elaine M. Chaney
Appeals Judge

CONCUR:

Gary L. Kilgore
Appeals Judge

Robert W. Potts
Appeals Judge