

APPEAL NO. 011262
FILED JULY 9, 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 held on May 7, 2001. The disputed issue reported from the benefit review conference (BRC) was whether the compensable injury of _____, included an injury to the cervical and/or thoracic spine. The hearing officer determined that the compensable injury of _____, did not include an injury to the cervical and/or thoracic spine. The appellant (claimant) appeals the hearing officer's determination on sufficiency grounds and asserts that the hearing officer erred in not allowing her to present evidence in support of her position that her injury was the result of repetitive trauma, rather than a specific event. The respondent (self-insured) urges affirmance.

DECISION

Reversed and remanded.

The hearing officer erred by refusing to allow the claimant to present evidence in support of her position that her injury may have occurred as a result of repetitive trauma. The claimant asserts that the hearing officer erred in not allowing her to present evidence in support of her position that her injury was the result of repetitive trauma, rather than a specific event. At the outset of the hearing, the claimant began to testify as to the repetitive nature of her employment as a school bus driver. Specifically, the claimant testified that she made 60 to 80 stops per day, which required her to repeatedly shift gears and manually open the bus doors.

The self-insured objected to this line of testimony, asserting that the issue before the hearing officer was whether the claimant sustained a specific injury to her cervical/thoracic spine on _____, and that it was not prepared to defend against a repetitive trauma injury claim. The hearing officer agreed, finding that it was fundamentally unfair for the self-insured to defend against a repetitive trauma injury when it had believed that the claimant's alleged injury was the result of a specific event. The hearing officer, therefore, limited the claimant's testimony to the specific events of _____.

In Texas Workers' Compensation Commission Appeal No. 951848, decided December 18, 1995, the issue out of the BRC was whether the claimant sustained a compensable repetitive trauma injury. The claimant in that case requested that the hearing officer change this issue to whether the claimant sustained a compensable injury, thereby leaving open to the claimant the ability to present his case, based not on a repetitive trauma injury, but on the aggravation of a prior-existing ordinary disease of life. The Appeals Panel questioned the refusal of the hearing officer to allow the rewording of the issue as sought by the claimant. In doing so, the Appeals Panel stressed that CCHs are not governed by the strict rules of pleading; that we will affirm a decision of a hearing officer on any legal theory reasonably supported by the evidence, whether or not relied on

by the parties; that alternative theories of compensability may be urged, provided they are not contradictory; and that surprise to a party brought about by rewording an issue is to be avoided. In Texas Workers' Compensation Commission Appeal No. 970851, decided July 2, 1997, we observed that some leeway, consistent with the express provisions of the 1989 Act and implementing rules, is to be given to the parties to resolve substantive issues as expeditiously as possible provided that due process principles of fundamental fairness are observed in the joining of issues at each stage of the adjudicatory process.

A review of the BRC report in this case shows that the claimant's position was clearly stated in terms of whether her "repetitive use of the [gear] shift affected her cervical at the C4-C5 level, thus causing disc protrusions." The issue as stated is not clearly limited only to a specific injury. Under these circumstances, the hearing officer should have permitted the claimant to present evidence on the repetitive nature of her alleged spinal injury, where a repetitive trauma theory was plainly part of her position at the BRC. See Texas Workers' Compensation Commission Appeal No. 972656, decided February 4, 1998. The fact that a party may have declined to prepare for all matters covered at the BRC cannot be a basis for refusing the opposing party the opportunity to develop evidence. (We would further observe that we cannot agree that it is necessarily within "common knowledge" that spinal disc bulges are a common phenomenon.)

The decision and order of the hearing officer are accordingly reversed, and the matter remanded, to allow the claimant to present evidence excluded by the hearing officer as relating to repetitive trauma. Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate 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 Texas Workers' Compensation Commission's Division of Hearings, pursuant to Section 410.202. See Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

Susan M. Kelley
Appeals Judge

CONCUR:

Judy L. S. Barnes
Appeals Judge

Philip F. O'Neill
Appeals Judge