

APPEAL NO. 011641
FILED SEPTEMBER 6, 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 June 21, 2001. The hearing officer resolved the disputed issues by determining that the respondent/cross-appellant (claimant) did not sustain a compensable injury on _____; that because the claimant did not sustain a compensable injury, the claimant did not have disability; and that the appellant/cross-respondent (carrier) did not waive the right to contest compensability of the claimed injury by not contesting the injury in accordance with Section 409.021. The carrier filed a conditional appeal on the rationale used by the hearing officer in finding that it did not waive its right to contest compensability. The claimant cross-appealed the hearing officer's determinations that she did not sustain a compensable injury and that the carrier did not waive the right to contest compensability of the claim. The hearing officer's determination as to disability was not appealed. There was no response by the claimant or the carrier to other party's appeal.

DECISION

Reversed and remanded.

The claimant sustained a compensable injury to her left shoulder and left upper chest on _____. The claimant received very little treatment for this injury, and testified that she continued to have sporadic pain in her left shoulder, which she treated with over-the-counter medication. The claimant reported an injury to her cervical and lumbar spine to her employer in July 2000. The claimant denied any prior cervical or lumbar problems.

The hearing officer determined that the claimant's _____, injury is a continuation of the injury she sustained on _____, and not a new injury (aggravation). An injury is "damage or harm to the physical structure of the body and a disease or infection naturally resulting from the damage or harm." Section 401.011(26). A compensable injury is "an injury that arises out of and in the course and scope of employment" Section 401.011(10). In Cooper v. St. Paul Fire & Marine Insurance Company, 985 S.W.2d 614 (Tex. App.-Amarillo 1999, no pet.), the court held that "to the extent that the aggravation of a prior injury caused damage or harm to the physical structure of the employee, it can be reasonably said that the resulting condition fell within the literal and plain meaning of 'injury' as defined by the 71st Legislature," and that "the legislature intended the meaning of 'injury' to include the aggravation of preexisting conditions or injuries." See *also* Peterson v. Continental Casualty Company, 997 S.W.2d 893 (Tex. App.-Houston [1st Dist.] 1999, no pet. h.), in which the court held that the aggravation of a preexisting condition is a compensable injury for purposes of the 1989 Act. In Texas Workers' Compensation Commission Appeal No. 94428, decided May 26, 1994, the Appeals Panel noted that to prove an aggravation of a preexisting condition there must be some enhancement, acceleration, or worsening of the underlying condition from the injury and not just a mere recurrence of symptoms inherent in the etiology of the preexisting condition.

We will reverse a factual determination of a hearing officer only if that determination is so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Company, 715 S.W.2d 629, 635 (Tex. 1986). Upon review of the record in this case, it appears that the hearing officer misapplied the law in coming to his conclusion that the claimant did not sustain a new compensable injury (aggravation). In his Statement of the Evidence, the hearing officer concludes that “. . . [t]he symptoms on _____, were identical or nearly identical to those of which she complained of as being due to her _____, compensable injury to her neck and left shoulder.” Our review of the record indicates that the claimant’s _____, compensable injury was for her left shoulder and left upper chest. She received very little treatment for this injury, continued working for almost two years, and no mention was made of the cervical or lumbar area. Additionally, the claimant was placed at maximum medical improvement for that injury on December 30, 1998, with a zero percent impairment rating. The claimed injury of _____, is for the claimant’s cervical and low back areas, two entirely different body parts. While the shoulder and cervical spine are close to each other, and may at times be confused, the medical evidence does not support a finding that the lumbar spine was included in, part of, or related to the _____, compensable injury. The claimant has been seeking treatment for her claimed injuries of _____, and she has been unable to obtain or retain employment at wages equivalent to her preinjury wage beginning on August 6, 2000, and continuing through June 21, 2001, due to her injuries. We reverse the hearing officer’s determination that the claimant did not sustain a compensable injury on _____, and remand the issue back to him for reconsideration of that issue in a manner consistent with this Decision. The hearing officer may hold a rehearing to obtain additional medical evidence to assist him in his determination.

The hearing officer’s determination that the carrier did not waive the right to contest compensability of the claimed injury by not contesting the injury in accordance with Section 409.021 is reversed and remanded back to the hearing officer for additional findings of fact. The hearing officer determined that there can be no waiver of compensability where there is no injury. That statement is true; however, the claimant does have an injury, as evidenced by her testimony and the medical records in evidence. Under the holding of Continental Casualty Company v. Williamson, 971 S.W.2d 108 (Tex. App.-Tyler 1998, no pet. h.), the failure to timely dispute does not create an injury where there was none. Therefore, if there is no injury the carrier does not waive its right to contest compensability. Since the record clearly indicates that the claimant has an injury, the carrier had an obligation to file a timely dispute under Section 409.021. As the hearing officer made no findings of the timeliness of the carrier’s dispute, this case is reversed and remanded on the issue of the carrier’s timely dispute of compensability of the claimed injury. The hearing officer is directed to make all of the necessary findings of fact to resolve this issue, which include the date on which the carrier was notified of the claimed injury, the date it contested the claim, and whether or not the contest was within 60 days of the date of notice. A rehearing may be held to develop all of the evidence necessary to make the ordered findings of fact.

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 (amended June 17, 2001). See Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

The true corporate name of the insurance carrier is **RELIANCE NATIONAL INDEMNITY COMPANY** and the name and address of its registered agent for service of process is

**TIMOTHY J. McGUIRE
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IRVING, TEXAS 75038.**

Michael B. McShane
Appeals Judge

CONCUR:

Gary L. Kilgore
Appeals Judge

Robert W. Potts
Appeals Judge