

APPEAL NO. 011680
FILED AUGUST 30, 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 July 2, 2001. The hearing officer resolved the disputed issues by deciding that the appellant (claimant) did not sustain a compensable repetitive trauma injury on or about _____; that the claimant failed, without good cause, to timely report his alleged injury; and that the claimant has not had disability as a result of the alleged repetitive trauma injury. The claimant appealed and the respondent, American Home Assurance Company (carrier one), responded.

DECISION

Affirmed in part and reversed and remanded in part.

CLAIMED REPETITIVE TRAUMA INJURY, NOTICE, AND DISABILITY

A repetitive trauma injury, which is an occupational disease under Section 401.011(34), is defined in Section 401.011(36). Section 401.011(16) defines "disability" as "the inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage." Section 409.001(a) provides that, if the injury is an occupational disease, an employee or a person acting on the employee's behalf shall notify the employer of the employee of an injury not later than the 30th day after the date on which the employee knew or should have known that the injury maybe related to the employment.

It is undisputed that the claimant sustained a compensable injury to his neck on April 1, 1996, as a result of an accidental injury while working for the employer on that date. The claimant said that after his injury, he worked modified duty for the employer in 1996 and 1997; that he was off work for three months in 1998 for physical therapy for that injury; and that he then returned to regular-duty work. On June 23, 2000, Dr. S recommended that the claimant undergo cervical spine surgery for ruptured discs at C5-6 and C6-7, and provided a date of injury of _____, on the surgery recommendation. Dr. S took the claimant off work on December 3, 2000, and the claimant has not returned to work since then. The claimant went through the spinal surgery second opinion process and one second opinion doctor concurred with the surgery recommendation. On December 7, 2000, a spinal surgery CCH was held and the hearing officer issued a decision in favor of the claimant on the cervical spinal surgery recommended by Dr. S, finding that such surgery was for the compensable injury of _____. The hearing officer's decision in favor of the claimant on the issue of spinal surgery was not appealed. The surgery recommended by Dr. S was performed on December 29, 2000.

On January 22, 2001, the claimant completed an Employee's Notice of Injury or Occupational Disease and Claim for Compensation (TWCC-41), claiming that as a result of performing repetitious job duties in his maintenance position with employer, he injured

his cervical discs at C5-6 and C6-7. The parties agreed at the CCH that the date of injury for the claimed occupational disease, the date the claimant knew or should have known that the disease may be related to the employment (see Section 408.007) was _____.

The claimant testified regarding the various types of maintenance activities he has performed for the employer over the past five years and presented a letter from Dr. S dated July 2, 2001, in which Dr. S lists the claimant's various work activities and opines that the claimant's repetitive arm and neck movements would explain why the claimant would have a second injury and a worsening of his ruptured discs.

The claimant testified that on June 27, 2000, he reported to his supervisor that he had sustained a repetitive trauma injury and that his doctor was recommending surgery. On January 23, 2001, the claimant completed and signed an Employer's First Report of Injury or Illness (TWCC-1) in which he noted that he reported his injury on 1.

The hearing officer found that the claimant's job duties with the employer did not cause him to engage in repetitious, traumatic activities resulting in damage or harm to the physical structure of his body; that although the claimant first realized on _____, that his job duties with the employer might have caused him to sustain a repetitive trauma injury, he did not advise anyone in a supervisory capacity with the employer of his alleged new injury within 30 days of _____; that the claimant did not act as a reasonably prudent person in failing to report his alleged new injury of _____, on or before July 23, 2000; and that since December 3, 2000, the claimant has been unable to obtain and retain employment at wages equivalent to the wage he earned prior to _____; however, the claimant's inability in that regard is the result of the claimant's compensable injury of _____, and is not the result of an alleged new compensable injury of _____. The hearing officer concluded that the claimant did not sustain a compensable repetitive trauma injury on or about _____; that the claimant failed, without good cause, to timely report his alleged repetitive trauma injury; and that the claimant has sustained no disability attributable to an alleged new compensable repetitive trauma injury of _____.

Conflicting evidence was presented on the disputed issues. The hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). As the finder of fact, the hearing officer resolves the conflicts in the evidence and determines what facts have been established from the evidence presented. We conclude that the hearing officer's determinations adverse to the claimant on the disputed issues of compensable repetitive trauma injury, timely notice to the employer, and disability are supported by sufficient evidence and are not 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 (Tex. 1986). Accordingly, those determinations are affirmed.

CARRIER'S NAME

No stipulation was asked for or made at the CCH regarding the employer's workers' compensation insurance carrier for the claimed repetitive trauma injury. The claimant appeals the hearing officer's Finding of Fact No. 2 that on _____, the employer subscribed to a policy of workers' compensation insurance issued by carrier one. The claimant asserts that either "WIC" (carrier two) or "ARCMI" (carrier three) is the carrier. The attorney who filed the response for carrier one states in the response that there was no issue of coverage, and that the hearing officer's finding that carrier one is the proper carrier is supported by sufficient evidence; however, at the CCH that attorney provided the hearing officer with an insurance carrier information form (Hearing Officer Exhibit No. 2) in which the carrier's true corporate name is stated to be The Insurance Company of the State of Pennsylvania (carrier four), and which states the name and address of carrier four's registered agent for service of process. The benefit review conference report listed carrier one as the carrier, but the Payment of Compensation or Notice of Refused Disputed Claim (TWCC-21) forms in evidence list carrier four as the carrier. The TWCC-21s list ARClaims Management, Inc., which is probably carrier three referred to by the claimant in his appeal, in the box for the address of the carrier's claims office. Carrier three may just be a third-party administrator for carrier four.

We find it necessary to reverse the hearing officer's Finding of Fact No. 2 regarding the name of the carrier for the claimant's claimed repetitive trauma injury and to remand the case to the hearing officer for further consideration and development of the evidence with regard to the correct carrier for the claimed repetitive trauma injury in light of the following: (1) there was no stipulation as to the carrier for the claimed repetitive trauma injury; (2) there is an apparent gross unexplained discrepancy between the names of carrier one (found by the hearing officer to be the carrier) and carrier four (represented to be the carrier in the carrier information form); (3) the claimant has appealed the hearing officer's finding regarding the name of the carrier; (4) carrier one asserts in its response that the hearing officer did not err in finding carrier one to be the carrier despite the fact that the carrier information form lists carrier four as the carrier; and (5) Section 410.204, as amended June 17, 2001, requires each final decision of the Appeals Panel to conclude with a paragraph stating the true corporate name of the insurance carrier and the name and address of its registered agent for service of process. If the hearing officer finds that the carrier is a carrier other than carrier four, for whom the name and address of the registered agent for service of process has already been provided, then another completed carrier information form must be provided for that carrier or an adequate explanation must be made on the record as to why the carrier information provided for carrier four pertains to the carrier found to be the correct carrier by the hearing officer.

The hearing officer's determinations that the claimant did not sustain a repetitive trauma injury; that the claimant failed, without good cause, to timely report his alleged repetitive trauma injury to the employer; and that the claimant has not had disability attributable to the alleged repetitive trauma injury of June 23, 2000, are affirmed. The hearing officer's Finding of Fact No. 2, with regard to the carrier's name, is reversed and

the case is remanded to the hearing officer for further consideration and development of the evidence with regard to the correct carrier for the claimant's claimed repetitive trauma injury.

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.

Robert W. Potts
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Gary L. Kilgore
Appeals Judge