APPEAL NO. 012471
FILED NOVEMBER 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 August 16, 2001. The appellant (claimant) appeals the hearing officer's determinations that the respondent (carrier) did not waive the right to contest the compensability of the claimed injury by not contesting the compensability within 60 days of receiving notice of the injury, that the claimant's compensable injury does not extend to and include bilateral carpal tunnel syndrome (CTS), clinical depression, cervical spine spondylolysis, lumbar spine spondylosis, and lumbar degenerative disc disease; that the claimant reached maximum medical improvement (MMI) on April 25, 2000, and that her impairment rating (IR) was 0%. On the latter finding, the hearing officer had set aside the report of the designated doctor and instead adopted the carrier doctor's report. The carrier responds, urging the factual sufficiency of the evidence. The determinations that the claimant sustained a compensable injury on _____; that the carrier's contest of compensability was not based on newly discovered evidence; and that the claimant's average weekly wage was $742.69 has not been appealed and has become final.

DECISION

The hearing officer's decision is reversed and the matter remanded for reconsideration of the evidence in light of this decision and applicable law.

Prior to the injury at issue at the CCH, the claimant sustained a compensable injury on _____, that affected her low back; objective testing found lumbar herniations at two levels. Although she reached MMI in 1994, she received an eight percent IR for her low back as the result of a May 7, 1998, examination. The report of the examining doctor makes no mention of a subsequent injury, but the claimant also sustained an injury on _____. The injury under review in the CCH occurred on _____, when the claimant fell forward in the course and scope of her employment and landed on her hands and knees in the parking lot. She testified that she skidded on the asphalt and her hands were bleeding and her pants were torn, and that right after this fall, her hands, knees, neck, and back hurt.

We feel it is relevant to the medical issues herein that the claimant was noted to be 5' 1" tall and to weigh 212 pounds in May 1998. It is also relevant to note that the prior compensable injuries also occurred while the claimant was employed by the same employer.

The only conditions that were disputed at the CCH as a result of this fall were bilateral CTS, clinical depression, cervical spondylolysis, lumbar spondylosis, and L5-S1 degenerative disease. The carrier announced at the beginning of the CCH that it had accepted "a bilateral knee injury" and was disputing any other condition. The claimant had two knee surgeries in 2000. No dispute was brought forward concerning any shoulder

injury or any wrist injury that was not CTS.

On April 22, 1998, the claimant filed an Employee's Notice of Injury or Occupational Disease & Claim for Compensation (TWCC-41) contending that she fell in the parking lot and injured "multiple body parts." The claimant indicated that the carrier paid for her medical treatment, including therapy for her back and neck, but then stopped paying for treatment in November 2000 after her doctor recommended surgery for her hands. The only Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) in evidence was filed by the carrier on November 8, 2000. This also describes the injury as multiple body parts, but disputes only the relationship of an injury to the bilateral wrists to the _____, fall. The TWCC-21 recites that first written notice of injury was received by the carrier on November 2, 1999; however, the record clearly indicates active adjustment of the claim well prior to this date, because the carrier had the claimant examined by its own doctor on March 8, 1999. (At this time, well prior to the undisputed date of MMI, the carrier doctor certified that the claimant was at MMI with a zero percent IR.)

The claimant moved at the beginning of the CCH, unsuccessfully, to preclude discussion of any previous injuries on the basis of relevance, and it may fairly be stated that she was initially circumspect or did not fully recall details when questioned about medical evidence showing that she had preexisting neck and back problems. When she finally agreed that she had neck and back pain prior to the _____ fall, she said that the quality of the pain was much different after that fall. She was treated for neck and back pain a month before her _____ injury. She likewise did not recall being assessed for CTS in November 1992.

There was some evidence that after the claimant's 1992 injury, she was prescribed antidepressant medication. Although the claimant denied having depression prior to her _____ injury, she agreed she had been treated before for anxiety related to specific events affecting family members. She testified that she felt some terror at being videotaped by the carrier.

The claimant briefly testified that she used a cane after her surgeries. A March 1, 1999, medical report noted that at that time the claimant was using a cane. Her treating doctor in February 2001 wrote that some of her wrist pain was attributed to pressing on her cane and using a wheelchair. He said that the claimant used the cane due to a weak spine as well as for ambulation.

The claimant's treating doctor rendered a 41% IR on April 25, 2000. Because a designated doctor examined the claimant in July 2000, it may be inferred that the 41% IR was disputed. The designated doctor rendered a 43% IR. The IR was assessed for an apparently then-undisputed MMI date of April 25, 2000, and included IRs for the cervical area, the lumbar area, the right and left wrists, and the left knee (which was seven percent whole person IR). The designated doctor noted that the claimant at this point only had left knee surgery although right knee surgery was regarded as a possibility. The designated

doctor's report was received by the Texas Workers Compensation Commission (Commission) on July 10, 2000, and was sent by the Commission to the carrier on July 13, 2000. In closing argument, the carrier stated that it accepted the 7% that the designated doctor assessed for the knee injury but disputed the rest of his IR.

THE WILLIAMSON CASE AND WAIVER

The Appeals Panel has stated that the case of Continental Casualty Co. v. Williamson, 971 S.W.2d 108 (Tex. App.-Tyler 1998, no. pet. h.) does not apply where there is some injury or condition supported by the evidence. Texas Workers' Compensation Commission Appeal No. 981847, decided September 25, 1998. We will not apply it where there is plain evidence of injury (i.e. damage or harm to the body) even if the hearing officer ultimately finds that the injury did not arise out of the course and scope of employment; to apply Williamson in this fashion would create a circular means of circumventing the requirements of Sections 409.021(c) and 409.022. *See* Texas Workers' Compensation Commission Appeal No. 990432, decided April 16, 1999; Texas Workers' Compensation Commission Appeal No. 992365, decided December 6, 1999. An assertion that injuries are preexisting is exactly the type of defense that should be raised in a TWCC-21.

In this case, the hearing officer held that the Williamson case would apply to absolve the carrier of the need to dispute the neck and back injuries because she found there was "no" injury to these regions. As Appeals No. 990432 and 992365, *supra*, hold, this is reversible error, and we reverse and remand for reconsideration of the waiver issue as to the back and neck injuries that the hearing officer agreed were asserted as part of the _____, fall and not as "extended" injuries. We point out that the conclusion of law reached by the hearing officer that there was no newly discovered evidence upon which to reopen the issue of compensability has not been timely appealed and is binding on the remand.

ANALYSIS OF THE ADDITIONAL INJURIES BY THE HEARING OFFICER

We would first note that it was error for the hearing officer to limit the scope of the knee injuries to a "contusion." The hearing officer recited in her discussion that she viewed the meniscus tears to the knees as an extent-of-injury issue. Presupposing this were true, it was not one that the parties asked the hearing officer to resolve, and, in fact, the carrier conceded the knee injuries and the IR assigned thereto by the designated doctor. In no way did the carrier at the CCH indicate that it believed that such injury was limited to a contusion.

In the same finding of fact, the hearing officer found that the claimant sustained a soft tissue shoulder injury, and a lumbar strain. However, there was no dispute over any shoulder injury and the lumbar conditions under review were specifically enumerated and a strain was not among the disputed conditions.

We strike the finding of fact whereby the hearing officer set forth the nature of the _____, injury and specifically reverse any finding that the knee injury was limited to a contusion; on remand of this case, should the hearing officer find it necessary for purposes of determining the issues before her to set out the body parts injured on _____, such finding must state that the claimant sustained an undisputed bilateral knee injury.

As to the expressly disputed conditions, the hearing officer held that the cervical and lumbar spondylosis and the L5-S1 degenerative disease were "congenital conditions not caused by the incident of _____." We cannot agree that this specific finding is supported by the record. The treating doctor stated that it was claimant's "central canal stenosis" that was congenital. However, presupposing that a degenerative disc disease could ever be said to have arisen at birth (i.e. "congenital"), the hearing officer noted that the treating doctor opined that the fall likely caused an exacerbation of the lumbar and cervical conditions. By finding a lumbar strain, the hearing officer appears to agree that this region of the claimant's body was affected by the fall. Lacking in the decision, however, is any specific consideration of whether any preexisting conditions were aggravated by the _____, fall. The accident need not have "caused" the disputed cervical and lumbar conditions for them to be compensable. We reverse and remand for further consideration of the evidence on the injuries in issue that remain to be decided after determination of whether the carrier has waived the right to dispute any of these injuries.

DEPRESSION

We agree that the claimant's condition of depression was asserted as an extended injury and thus did not need to be controverted in accordance with Section 409.021. *See* Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 124.3(c) (Rule 124.3(c)).

However, the hearing officer has applied an incorrect legal standard in evaluating the compensability of the claimant's depression. The hearing officer stated that depression would not be "compensable" if it was not proven to be permanent. This is incorrect, and may represent a confusion with the parameters for assessing an IR for depression. Depression may be considered part of a compensable injury even if it is not permanent. The claimant still bears the burden of proving the causal link to her injury. *See* Texas Employers Insurance Association v. Wilson, 522 S.W. 2d 192 (Tex. 1975). Because this "requirement" of permanence appears to have been a major point on which the hearing officer determined that the claimant's depression was not compensable, we remand for further consideration of the evidence using the proper standard of causation.

CARPAL TUNNEL SYNDROME

Although it is a close question, we cannot disagree with the hearing officer's characterization of CTS as an extent-of injury question. We are troubled, however, by the hearing officer's assertion in her discussion that "[a]ccording to the medical evidence, carpal tunnel syndrome is a repetitive trauma injury and would not be caused by trauma,

such as the fall with the claimant catching herself." We find no generalized medical opinions in the record to this effect nor are we prepared to say, in light of the number of times the Commission has been asked to consider CTS of traumatic origin, that this would be true as a matter of common knowledge[1]. Because the hearing officer appears to have based her rejection of the CTS claim on the opinion that CTS can only be repetitive in origin, we reverse and remand for further reconsideration of the evidence. We note that the claimant bears the burden of proof and that such burden is not met by chronology alone.

ERROR IN SETTING ASIDE THE DESIGNATED DOCTOR'S REPORT

Although the carrier responds to the appeal by stating that the hearing officer was within "her discretion" by adopting its doctor's zero percent IR, the matter of which of a number of IRs to adopt is not a matter of "discretion." By statute, the designated doctor's report is entitled to presumptive weight unless the great weight of contrary medical evidence is against that report. Section 408.125(e). We have stated that where a hearing officer finds that the great weight of contrary medical evidence outweighs the presumptive weight otherwise accorded to the designated doctor's report, the findings of fact must detail how the report is so outweighed. Texas Workers' Compensation Commission Appeal No. 951125, decided August 28, 1995; Texas Workers' Compensation Commission Appeal No. 961269, decided August 14, 1996; Texas Workers' Compensation Commission Appeal No. 980995, decided June 22, 1998. The hearing officer has not done that in this case nor, for that matter, was any basis articulated for adopting the 0% IR of the carrier doctor over the 41% of the treating doctor.

To the extent a reason for rejecting the designated doctor's report can be ascertained from the discussion in the decision, that reason is against the great weight and preponderance of the evidence. The hearing officer states that the designated doctor rated only body parts not found by her to be compensable. However, a portion of the designated doctor's IR was given for the undisputed knee injuries, a fact conceded by the carrier at the CCH. (As stated above, the hearing officer's limitation of any such injury to "contusions" constitutes a ruling on matters not in issue and could not therefore be used as a basis to set aside the designated doctor's report). This basis for not according presumptive weight to the designated doctor's report cannot stand.

Also, as pointed out in the appeal, the adopted 0% IR of the carrier doctor was assessed well before the date of MMI. The hearing officer identifies only this report as "the great weight of contrary medical evidence" and no other report. We have reviewed this report and find it to be nothing more than another medical opinion even if it had been rendered after the date of MMI.

[1] See, for example, Texas Workers' Compensation Commission Appeal No. 950929, decided July 25, 1995; Texas Workers' Compensation Commission Appeal No. 990718, decided May 18, 1999; and Texas Workers' Compensation Commission Appeal No. 002072, decided October 12, 2000.

The extent to which the designated doctor's report in this case can form the basis for an IR, or the extent to which any other medical evidence greatly weighs against the report, is plainly dependent upon the outcome of the injury issues in accordance with this decision. We reverse the hearing officer's determination that the designated doctor's report was not entitled to presumptive weight and was against the great weight of the contrary medical evidence and remand for further consideration in accordance with this decision.

In summary, having found numerous errors of law and fact in the decision, we reverse and remand for a reconsideration of the issues in light of the points raised in this decision.

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 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. Saturdays, Sundays, and holidays listed in Section 662 of the Texas Government Code are not included in the commutation of time.

The true corporate name of the insurance carrier is **HIGHMARK CASUALTY INSURANCE COMPANY** and the name and address of its registered agent for service of process is

CORPORATION SERVICE COMPANY
800 BRAZOS, SUITE 750
AUSTIN, TEXAS 78701.

Susan M. Kelley
Appeals Judge

CONCUR:

Gary L. Kilgore
Appeals Judge

Robert W. Potts
Appeals Judge