

APPEAL NO. 012529
FILED NOVEMBER 29, 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 September 26, 2001. The hearing officer resolved the disputed issues by deciding that the respondent (claimant) sustained a compensable repetitive trauma injury and that the claimant had disability from January 1, 2001, through August 10, 2001. The appellant (carrier) appealed and the claimant responded.

DECISION

The hearing officer's decision is affirmed.

COMPENSABLE REPETITIVE TRAUMA INJURY

The hearing officer did not err in determining that the claimant sustained a compensable repetitive trauma injury. The claimant had the burden to prove that he was injured in the course and scope of his employment. Johnson v. Employers Reinsurance Company, 351 S.W.2d 936 (Tex. Civ. App.-Texarkana 1961, no writ). Section 401.011(36) defines a "repetitive trauma injury" 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." The claimant testified that for a three-week period from _____, to _____, he tightened and loosened screws on a welding machine with both hands approximately 400 times a day, seven days a week. He referred to his injury date as _____. On December 21, 2000, the claimant was diagnosed as having probable bilateral carpal tunnel syndrome (CTS). An EMG study done in February 2001 confirmed that the claimant has bilateral CTS. A referral doctor opined in July 2001 that the repetitious nature of the claimant's work was a causative factor in the development of the claimant's bilateral CTS. The claimant had a left carpal tunnel release done in May 2001 and a right carpal tunnel release done in July 2001.

There is evidence that the claimant had some complaints about his hands before beginning to work for the employer. 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 reasonably be 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.), in which the court held that the aggravation of a preexisting condition is a compensable injury for purposes of the 1989 Act.

In the instant case, the hearing officer found that during the three-week period immediately preceding _____, the claimant performed repetitious, physically traumatic activities with both hands in the workplace, and that the claimant's work activities caused his CTS or aggravated his preexisting CTS. The hearing officer concluded that the claimant sustained a compensable repetitive trauma injury. The hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). Where there are conflicts in the evidence, the hearing officer resolves those conflicts and determines what facts have been established. We conclude that the hearing officer's decision is supported by sufficient evidence and that it is 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).

DISABILITY

The hearing officer did not err in determining that the claimant had disability from January 1, 2001, through August 10, 2001. 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." There is evidence that the claimant was terminated from employment for failing to show up at work for several days in late December 2000. In Texas Workers' Compensation Commission Appeal No. 010706, decided May 1, 2001, the Appeals Panel noted that our decisions have held that termination for cause does not necessarily preclude disability, but may be considered by the hearing officer in determining why a claimant is unable to earn the preinjury wage, and that disability can continue after termination if a cause of the inability to earn the preinjury wage after termination was the compensable injury. In the instant case, in determining the period of disability, the hearing officer could consider the claimant's testimony concerning his inability to perform his job duties because of his injury and the medical reports restricting the claimant's use of his hands and taking the claimant off work for his CTS surgeries. The hearing officer's decision on the disability issue is supported by sufficient evidence and is not so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. Cain, *supra*.

The hearing officer's decision and order are affirmed.

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

**JOSEPH KELLEY-GRAY, PRESIDENT
6907 CAPITOL OF TEXAS HIGHWAY, NORTH
AUSTIN, TEXAS 78755.**

Robert W. Potts
Appeals Judge

CONCUR:

Sue M. Kelley
Appeals Judge

Michael B. McShane
Appeals Judge