APPEAL NO. 012812
FILED DECEMBER 19, 2001

This case returns following our remand in Texas Workers' Compensation Commission Appeal No. 012149, decided October 16, 2001, where we remanded the case because the required carrier information contained a post office box, where personal service of process cannot be effectuated. The correct information was placed in the record and forwarded to the appellant (claimant). Per our request, the respondent (carrier) also clarified that Valiant Insurance Company is a Zurich North America company. No hearing on remand was held, and the hearing officer's decision and order were reissued. 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 15, 2001. The hearing officer determined that the claimant did not sustain a compensable, specific incident injury on _____. The claimant has appealed on sufficiency of the evidence grounds and points out that he was not advised of the consequences of choosing to allege a specific injury as opposed to a repetitive trauma injury. The carrier replied, urging affirmance.

DECISION

Affirmed.

At the outset of this CCH, the hearing officer specifically discussed the question of whether the claimant was pursuing a claimed specific incident injury or an injury due to repetitive trauma. The claimant assured the hearing officer that his claim was based upon a specific incident which occurred on _____. In a section of the decision entitled **PROCEDURAL MATTERS**, the hearing officer discusses the history of the case, and the claimant's change of position from alleging a repetitive trauma injury at the benefit review conference (BRC) to alleging a specific injury at the CCH. She concludes the section with this sentence: "With these assertions, the issue of whether the Claimant allegedly sustained an occupational disease was not litigated."

The hearing officer provided a lengthy discussion of the evidence in this case. She summarized the discussion as follows:

> The evidence presented certainly supports that the Claimant sustained an injury; however, not a specific injury but an occupational disease. The Claimant elected to proceed on the theory that he sustained a specific injury as set out, *supra*; I cannot find that his bilateral carpal tunnel syndrome and bilateral cubital tunnel syndrome is compensable in this claim.

The claimant asserts on appeal that since the hearing officer found his injury was work related, the hearing officer should have found it compensable, whether it was a specific injury or a repetitive trauma injury. That, however, is not the way that the dispute resolution process works. We have previously held that the 1989 Act created an "issue-driven" system of adjudication that generally restricts a hearing officer to resolve the issue before the hearing officer and not to exceed the scope of that issue. *See* Texas Workers' Compensation Commission Appeal No. 990164, decided March 15, 1999; Texas Workers' Compensation Commission Appeal No. 990229, decided March 19, 1999. Section 410.151(b) of the 1989 Act provides that an issue not raised at the BRC may not be considered at the CCH unless the parties consent to the additional issue or the hearing officer finds good cause for adding the issue. In this case, the parties specifically agreed that the issue was whether there was a compensable injury based upon a specific injury. There was no consent to add an issue relating to whether there was a compensable injury based upon repetitive trauma, and it is apparent that it was not added based upon a good cause determination of the hearing officer. This contention by the claimant is without merit.

As the issue was framed in this case, the claimant had the burden to prove, by a preponderance of the evidence, that he sustained a specific incident, compensable injury on _____. This issue presented the hearing officer with a question of fact to resolve. The hearing officer is the sole judge of the weight and credibility of the evidence (Section 410.165(a)) and it is for the hearing officer to resolve such conflicts and inconsistencies in the evidence as were present in this case (Garza v. Commercial Insurance Co. of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ)). As an appellate-reviewing body, we will not disturb the challenged factual findings of a hearing officer unless they are so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust and we do not find them so in this case. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951).

The claimant points out two areas where he disagrees with statements made by the hearing officer; neither matter is of any significance to the resolution of the case and will not be discussed further.

The decision and order of the hearing officer are affirmed.

The true corporate name of the insurance carrier is **ZURICH NORTH AMERICA** and the name and address of its registered agent for service of process is

GARY SUDOL
ZURICH NORTH AMERICA
9330 LBJ FREEWAY, SUITE 1200
DALLAS, TEXAS 75243.

Michael B. McShane
Appeals Judge

CONCURRING OPINION:

I write this concurring opinion to point out the following matters:

1. The hearing officer indicates in her decision that the carrier argued that the claimant asserted a repetitive trauma injury at the benefit review conference (BRC), but then changed his mind when the benefit review officer (BRO) explained the difference between a repetitive trauma injury and a specific injury. The BRC report reflects that the injury issue was "Did the Claimant sustain a compensable injury on _____?". The BRC report reflects that the claimant's position at the BRC was that he sustained an injury to his hands while moving a door weighing over 100 pounds on _____. That position reflects a claim for a specific, accidental injury, on _____. The only mention in the BRC report about a repetitive trauma injury is in the statement of the carrier's position, where the BRO noted that the carrier's position was that the claimant did not sustain a compensable injury, that the claimant made a claim for a specific injury, and that a repetitive trauma injury has never been claimed. The BRO recommended that the claimant did not sustain a compensable injury on _____.

2. An Employee's Notice of Injury or Occupational Disease & Claim for Compensation (TWCC-41) is not in evidence (nor is there one in the appeals file). Thus, whatever the claimant claimed on that form, if he filed one, is unknown.

3. The medical reports reflect that the claimant told his doctors that the symptoms in his arms began on _____, when he was lifting a door.

4. The injury issue agreed to by the parties at the contested case hearing was whether the claimant "sustained a compensable injury on _____"; and the claimant replied in the affirmative when asked by the hearing officer if his position was that he injured his hands while moving a door on _____.

5. The claimant replied in the affirmative when asked by the hearing officer whether he understood the difference between a repetitive trauma injury and a specific injury.

6. The claimant replied in the affirmative when the hearing officer said that it seemed to her that the claimant was stating that he had a specific injury rather than a repetitive trauma injury.

7. Without any objection or clarification from the claimant, the ombudsman assisting the claimant stated in opening statement that the claimant was claiming a "specific trauma on _____ when he lifted a door. . . ."

8. The claimant testified that his injury to his wrists and elbows occurred when he was moving the door at work.

9. When asked on cross-examination whether he was claiming a repetitive trauma injury from repetitive motions of his wrists at work, the claimant said "no."

10. Without any objection or clarification from the claimant, the ombudsman assisting the claimant argued in closing argument that the claimant sustained a specific injury on _____.

11. The carrier argued in closing argument that the claimant had not made a claim for a repetitive trauma injury and had chosen to make a claim for a specific injury because, if the claimant had claimed a repetitive trauma injury, the carrier would have raised a notice-of-injury defense, indicating that the date of injury for a repetitive trauma claim would have been "a long time ago," and that that was explained to the claimant at the BRC.

12. There was no request to add an issue regarding a repetitive trauma claim, so there was no such request for the hearing officer to deny.

13. The hearing officer correctly states in her decision that "the issue of whether the Claimant allegedly sustained an occupational disease was not litigated," but nevertheless makes a finding that the evidence shows that "the Claimant developed bilateral upper extremity nerve neuropathies from repetitively performing construction work for the Employer."

14. The facts of this case are distinguishable from our decision in Texas Workers' Compensation Commission Appeal No. 992343, decided December 6, 1999, because in that case, although the issue was framed in terms of a repetitive trauma injury, the parties did not litigate the case on that basis, but instead litigated it as a specific trauma injury, thus we affirmed the hearing officer's decision that the employee sustained a compensable, specific trauma injury. In addition, the work activities upon which the claim was based occurred in a six-hour period on one day, and the carrier did not point to any specific prejudice or that it was deprived of the right to present a defense to liability. Our decision in Texas Workers' Compensation Commission Appeal No. 992851, decided January 27, 2000, where the injury issue was framed in terms of an occupational disease, but the hearing officer found a specific injury because the work activities that led to the injury occurred on one specified day, and the Appeals Panel affirmed, is distinguishable on the same basis as Appeal No. 992343, *supra*. Texas Workers' Compensation Commission Appeal No. 000483, decided April 14, 2000, wherein the Appeals Panel affirmed a hearing officer's decision that the employee sustained a repetitive trauma injury, is distinguishable from the facts of the instant case because, although the carrier contended that the claimant was always claiming a discrete injury, the claimant actually claimed a repetitive trauma injury, and the carrier did not allege prejudice in having to defend under both theories.

Robert W. Potts
Appeals Judge

Elaine M. Chaney
Appeals Judge