

APPEAL NO. 012813  
FILED JANUARY 3, 2002

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 October 29, 2001, in Dallas, Texas, with [hearing officer] presiding as hearing officer. He held that the appellant (claimant) did not have disability (for the time period under review) due to her compensable injury of [Date of Injury]. The claimant has appealed. The respondent (carrier) urges affirmance.

DECISION

Reversed and remanded.

The claimant was injured while employed as a janitor. The stipulated date was [Date of Injury], although a number of the medical records in evidence show a date of injury of [Date of Injury]. Although the parties did not stipulate as to the nature of the injury that occurred, the claimant's testimony, a prior hearings decision, and the medical evidence indicate right wrist tendinitis or sprain. After initially being released by a prior treating doctor, the claimant changed doctors and underwent extensive chiropractic treatment for this injury. A February 12, 2001, MRI of the right wrist showed tenosynovitis and fluid through the carpal region of the wrist. Functional capacity evaluations (FCE) from February 23 and May 3, 2001, kept the claimant at a sedentary to light-duty work level, noting that her previous job had been classified as light.

Medical records indicate that as of February 2, 2001, the claimant was found to have bilateral ulnar nerve problems indicated by EMG testing, as well as right wrist nerve irritation. Cervical radiculopathy and neuropathy were ruled out. On September 26, 2001, a doctor for the carrier examined the claimant and found poor effort on an FCE, as well as difficult and inconsistent range of motion testing. Strength testing was inconsistent as well. Nevertheless, this doctor released the claimant to light duty with lifting restrictions of 20 pounds (occasional) and 10 pounds (frequent). He noted that the claimant had reached maximum medical improvement and had a four percent impairment rating (IR).

The carrier's theory of defense in this case was that any inability to work was brought about by the claimant's termination for cause. That argument was also raised in a previous CCH, held April 25, 2001, but rejected because the hearing officer held that the claimant had disability from her injury after her termination but only through January 3, 2001, when given a release to full duty by her prior treating doctor.

However, medical evidence since that CCH, including the report of the carrier doctor's examination, set and perpetuated restrictions as to the right hand. The claimant was treated in May with injections to her right wrist for pain relief; the treating doctor for this procedure found positive Tinel's and Phalen's signs. Although the hearing officer made a general finding that the claimant was unable to obtain and retain employment due to "something other" than the compensable injury, the carrier did not argue that the "sole cause" of the claimant's disability was due to a physical condition other than the compensable injury. Indeed, it does not appear that the claimant has been restricted by any doctor, including the carrier doctor, for any condition other than her right wrist.

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." A claimant's testimony alone is sufficient to establish that an injury has caused disability. Gee v. Liberty Mutual Fire Insurance Company, 765 S.W.2d 394 (Tex. 1989). A carrier that wishes to assert that a preexisting condition is the sole cause of an incapacity has the burden of proving this. Texas Employers Insurance Association v. Page, 553 S.W.2d 98, 100 (Tex. 1977); Texas Workers' Compensation Commission Appeal No. 92068, decided April 6, 1992. The status of disability (or lack of disability) is not necessarily continuous, but may be intermittent. Texas Workers' Compensation Commission Appeal No. 962342, decided January 6, 1997.

We are concerned with the part of the hearing officer's discussion that indicates that when only pain is keeping the claimant from working, there is no disability because "pain is not an injury." He also notes that the claimant has diabetes, although the relevance of this observation to the issue is not further described and there are no records indicating that the claimant was off work due to her diabetes.

Finally, the hearing officer made a finding of fact that the claimant's inability to obtain and retain employment is due to "something other than a compensable injury." Where the evidence indicates that indeed "something other" than a stipulated injury and medical restrictions emanating therefrom is the sole cause of the inability to work, then this cause should be articulated so that the evidence can be reviewed.

In this case, the occurrence of a compensable injury (damage, harm) was stipulated and medical evidence supports a right wrist injury. Common experience supports the inference that injuries cause pain. While in certain limited cases, the Appeals Panel has observed that pain alone is not necessarily an injury, this has

occurred when there is no other objective or clinical indication of physical harm or damage to the claimant. That is not the case here. The Appeals Panel has never held that pain resulting from a compensable injury cannot form the basis for disability. In this case, injury and not merely pain is established by the stipulation as well as the IR (which can only be awarded for anatomical or functional abnormality or loss resulting from an "injury"). Although the hearing officer stated that he could not find a recommendation for surgery in the claimant's medical records, a referral for surgical evaluation is indicated in the chiropractor's records. Because we believe the wrong standards have been used for analyzing the evidence, and because the hearing officer has not found what the "something other" than the injury may be (which information is important in this case to reviewing the evidence vis à vis the findings), we reverse and remand for further consideration of the disability issue in terms of the definition set forth in Section 401.011(16).

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 **INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA** and the name and address of its registered agent for service of process is

**THE CORPORATION SERVICE COMPANY  
800 BRAZOS STREET, SUITE 750, COMMODORE I  
AUSTIN, TEXAS 78701.**

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Susan M Kelley  
Appeals Judge

CONCUR:

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Elaine M Chaney  
Appeals Judge

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Michael B McShane  
Appeals Judge