APPEAL NO. 020758
FILED APRIL 25, 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 March 4, 2002. The issues were:

1. Did the [appellant] Claimant sustain a compensable repetitive trauma injury?

2. What is the date of injury?

3. Is the [respondent] Carrier relieved from liability under Tex. Labor Code ann. Section 409.002 because of the Claimant's failure to timely notify his Employer pursuant to Section 409.001?

4. As a result of the decision and order of the Benefit [CCH] (docket no. 1) [the first CCH] and affirmation by the appeal panel in appeal no. 012812, [decided December 19, 2001,] does the [Texas Workers' Compensation] Commission have jurisdiction to determine compensability?

The hearing officer determined that the claimant had sustained a compensable repetitive trauma injury with a date of injury of _____; that the claimant had timely notified his employer of the claimed injury; and that the Commission had jurisdiction to determine compensability because the claimant had not previously had an opportunity to litigate a repetitive trauma injury.

The carrier appeals, contending that the doctrines of collateral estoppel ("issue preclusion") and res judicata ("claim preclusion") preclude the claimant's recovery in this case and that there is insufficient evidence of a repetitive trauma injury. The claimant responds, urging affirmance.

DECISION

Affirmed.

The claimant testified that his work with the employer involved the nearly constant use of certain tools installing walls, ceilings, and doors. In _____, the claimant began experiencing bilateral upper extremity nerve injuries, including bilateral carpal tunnel syndrome (BCTS) and bilateral cubital tunnel syndrome (BCuTS). In a prior CCH (the first CCH) the issue was whether the claimant sustained a compensable injury on _____.

The testimony in that case revolved around the moving of a heavy door when the claimant "felt significant burning pain in both upper extremities." The hearing officer in the first CCH commented:

> The Carrier argued that the Claimant had represented at the Benefit Review Conference [BRC] that his alleged injuries of [BCTS] and [BCuTS] were the result of repetitive trauma but had changed his mind regarding the cause of his upper extremity difficulties when the Benefit Review Officer explained the differences between a repetitive trauma injury and a specific injury. When asked, the Claimant stated that he believed that he had a specific injury rather than an occupational disease caused by repetitive activity. With these assertions, the issue of whether the Claimant allegedly sustained an occupational disease was not litigated.

The evidence generally seemed to indicate that the claimant was pressed into making a choice as to whether his injury was a specific injury or a repetitive trauma injury. Nowhere is there any indication that the claimant was advised that he could plead both in the alternative. As noted in Appeal No. 012812, *supra*, 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." The hearing officer in the first CCH then found:

> 3. The preponderance of the evidence presented shows or otherwise establishes that the Claimant developed bilateral upper extremity nerve neuropathies from repetitively performing construction work for the Employer.

She further found:

> 5. The Claimant's efforts in lifting and moving the heavy door while working for the Employer on _____, did not cause the Claimant to sustain [an injury of] the bilateral upper extremity nerve neuropathies from which he suffers.

The hearing officer commented that because the claimant "elected to proceed on the theory that he sustained a specific injury . . . , I cannot find that his [BCTS] and [BCuTS] is compensable in this claim."

The claimant appealed the first CCH decision to the Appeals Panel, which resulted in Appeal No. 012812, *supra*. Appeal No. 012812 discussed how the dispute resolution system is "issue driven" and held that the agreed-upon issue "was whether there was a compensable injury based upon a specific injury." A concurring opinion also points out:

> 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.
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> * * * *
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> 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 the Employer."

The claimant subsequently filed an Employee's Notice of Injury or Occupational Disease & Claim for Compensation (TWCC-41), dated September 4, 2001, alleging an occupational disease in the form of a "repetitive motion trauma" and that he first knew the occupational disease might be related to the employment on _____. As with the carrier's appeal, much of the CCH dealt with whether the claimant could relitigate his claim on a different theory or whether this was a new and different claim. The carrier argued that at the first CCH:

> Claimant was afforded the opportunity to pursue a theory of repetitive trauma, but he refused to do so. He could have insisted that the Hearing Officer consider alternate theories: he did not do so.

We note that the claimant was pro se, assisted by an ombudsman, and although he stated that he knew the difference between a specific incident injury and a repetitive trauma injury, that is not necessarily the case. We also note that, rather clearly, the claimant was never advised that he could plead alternative theories. In fact, his testimony would indicate that he was claiming a specific injury when he lifted the door on _____, and a repetitive injury on _____, when he used various tools and that "nobody ever told me that they–they wouldn't be litigated together, that they had to be litigated separately, or that I needed to file a separate claim."

The claimant's treating doctor, in a report dated August 8, 2001, states that there is "no question" that the claimant's injury is work related, that the claimant "does a lot of high[ly] repetitious and highly strenuous hand activities at work," and that the _____, door-lifting incident was "simply the straw that broke the camel's back." There is no medical evidence to the contrary.

There is sufficient evidence to support the hearing officer's decision. One of the distinctions that we draw between this case and cases cited by the carrier is that the

hearing officer in the first CCH decided the case on the specific injury theory, stating that the repetitive injury theory was not before her but also finding that the claimant had sustained a repetitive trauma injury. The carrier, at the first CCH, argued that had the claimant claimed a repetitive trauma injury it could have raised notice and date of injury defenses, which the carrier was free to do in this case.

We hold that the hearing officer did not err in finding that the claimant sustained a compensable repetitive trauma injury on _____; that the claimant gave timely notice to the employer; and that the Commission had jurisdiction to determine compensability. We conclude that the hearing officer's determinations are not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

Accordingly, the hearing officer's decision and order are affirmed.

The true corporate name of the insurance carrier is **VALIANT INSURANCE COMPANY, a division of Zurich North America,** and the name and address of its registered agent for service of process is

GARY SUDOL
ZURICH NORTH AMERICA
12222 MERIT DRIVE
DALLAS, TEXAS 75251.

Thomas A. Knapp
Appeals Judge

CONCUR:

Gary L. Kilgore
Appeals Judge

Robert W. Potts
Appeals Judge