

APPEAL NO. 031203
FILED JULY 7, 2003

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 April 4, 2003. The hearing officer resolved the disputed issues by deciding that the respondent/cross-appellant (claimant) sustained a compensable repetitive trauma injury with a date of injury of _____; that the claimant did not have disability as a result of the claimed injury of _____; and that the appellant/cross-respondent (self-insured) waived the right to dispute compensability of the claimed injury by not timely contesting the injury in accordance with Section 409.021. The self-insured appealed the hearing officer's waiver and injury determinations based on sufficiency of the evidence grounds. The claimant cross-appealed the hearing officer's findings that her work duties were not so repetitive in nature as to cause an injury. The claimant responded to the self-insured's request for review and urged affirmance of the hearing officer's determinations. The appeal file does not contain a response from the self-insured.

DECISION

Affirmed.

The resolution of the waiver issue is determinative of the other issue disputed here. The self-insured argues that the hearing officer erred in determining that it had waived the right to contest compensability of the claimant's injury because the alleged occupational disease, repetitive trauma injury, was previously adjudicated. It is undisputed that the claimant had previously filed a workers' compensation claim for an alleged occupational disease with a date of injury of (alleged date of injury), and that a previous hearing officer determined, and the Appeals Panel affirmed, that the claimant did not sustain a compensable repetitive trauma injury; that the date of the claimed injury was (alleged date of injury); that the self-insured is relieved of liability under Section 409.002, because the claimant failed to timely notify her employer of her claimed injury under Section 409.001; and that the claimant did not have disability.

The self-insured asserts that the claimant changed her alleged date of injury from (alleged date of injury), to _____, to support a repetitive trauma injury claim. The self-insured cites Texas Workers' Compensation Commission Appeal Nos. 011090 and 011091, both decided July 2, 2001, in support of its contention that it need not have filed another Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) or taken any other action. In that case, the Appeals Panel cited Texas Workers' Compensation Commission Appeal No. 981432, decided August 12, 1998, and stated that "to require the carrier to dispute an injury, which it has previously disputed, simply because the initial claim has been divided into two claims and the claimant alleges a different date of injury for one of the claimed injuries, would represent an elevation of form over substance."

A Decision and Order dated December 11, 2001, regarding the prior occupational disease injury of (alleged date of injury), reflects that the claimant asserted that she had neck and shoulder problems that resulted from a repetitive trauma. In that case, the hearing officer determined that the “claimant’s neck and shoulder conditions were not the result of repetitious, physically traumatic activities that occurred over time and arose out of and in the course in scope of her employment.” The case before us is distinguishable because the claimant alleged an occupational disease injury in the form of bilateral epicondylitis and left sided cubital tunnel syndrome (CuTS), of _____, that resulted from a repetitive trauma. The evidence reflects that the claimant is not alleging a repetitive trauma injury to her neck and shoulders, but rather she is claiming a repetitive trauma injury to her arms. The hearing officer could determine from the evidence that the claimant had filed a new and separate claim for the bilateral epicondylitis and CuTS, and that the self-insured had not timely denied liability for this claim on any grounds.

The self-insured asserts it did not fairly receive notice that the claimant’s injury was work-related. The Employee’s Notice of Injury or Occupational Disease and Claim for Compensation (TWCC-41), dated _____, states that it is a notice of occupational disease that occurred because of “constant typing,” that the alleged date of injury is _____, and that the nature of the injury is a “repetitive stress injury.” We conclude that the hearing officer could find from the evidence that the TWCC-41 fairly informed the self-insured that the claimant had alleged a repetitive trauma injury with a date of injury of _____. The evidence sufficiently supports the hearing officer’s determination that the self-insured received first written notice of the claimed injury on _____.

The self-insured asserts that the claimant alleged a claim based on pain, rather than a work-related injury. The evidence reflects that the self-insured received first written notice of the claimed occupational disease injury on _____, and filed its TWCC-21 contesting compensability with the Texas Workers' Compensation Commission on July 24, 2002. The TWCC-21 lists the claimant’s nature of injury as “bilateral upper extremity,” and that the carrier’s first written notice of the injury was received on _____. The hearing officer could conclude from the TWCC-21 and TWCC-41 that the carrier was fairly informed that the claimant was claiming a repetitive trauma injury of _____, and not claiming pain alone.

We have reviewed the complained-of determinations. We conclude that the hearing officer did not err applying Continental Casualty Company v. Downs, 81 S.W.3d 803 (Tex. 2002) in this case and in determining that the self-insured waived its right to contest compensability of the claimed occupational disease injury pursuant to Section 409.021 by failing to file its contest within seven days of the date it received its first written notice of the claimed injury.

Due to our affirmance of the hearing officer’s waiver determination, we likewise affirm her determination that the claimant sustained a compensable occupational disease injury because the injury became compensable as a matter of law. The

claimant filed an appeal of the hearing officer's determination that her work duties were not so repetitive in nature as to cause an injury. However, the hearing officer noted and determined the claimant sustained harm or damage to the physical structure of the body in the form of "bilateral lateral epicondylitis [sic]" and "left sided [CuTS]." Since, we have affirmed the determination that the injury became compensable as a matter of law, the claimant is not aggrieved by that determination. Accordingly, we will not further address the issue because even if we were to find that the hearing officer erred in making the challenged determination, that determination would not affect the outcome of the case. See Texas Workers' Compensation Commission Appeal No. 011170, decided July 9, 2001.

The self-insured argued that the hearing officer erred in not admitting all of the documentation to Carrier's Exhibit No. 4, which prevented the self-insured from presenting relevant information in its case. The hearing officer's evidentiary rulings are reviewed using an abuse-of-discretion standard. Texas Workers' Compensation Commission Appeal No. 92165, decided June 5, 1992. To obtain a reversal of a judgment based upon the hearing officer's abuse of discretion in admitting or excluding evidence, an appellant must first show that the admission was in fact an abuse of discretion, and, also, that the error was reasonably calculated to cause and probably did cause the rendition of an improper judgment. See Hernandez v. Hernandez, 611 S.W.2d 732 (Tex. Civ. App.-San Antonio 1981, no writ). We perceive no abuse of discretion in the hearing officer excluding some of the documentation contained in the Carrier's Exhibit No. 4, and further note that it is not evident how the exclusion of the exhibit was reasonably calculated to cause and probably did cause the rendition of an improper judgment.

The hearing officer's decision and order are affirmed.

The true corporate name of the insurance self-insured is **STATE OFFICE OF RISK MANAGEMENT (a self-insured governmental entity)** and the name and address of its registered agent for service of process is

For service in person the address is:

**RON JOSSELET, EXECUTIVE DIRECTOR
STATE OFFICE OF RISK MANAGEMENT
300 W. 15TH STREET
WILLIAM P. CLEMENTS, JR. STATE OFFICE BUILDING, 6TH FLOOR
AUSTIN, TEXAS 78701.**

For service by mail the address is:

**RON JOSSELET, EXECUTIVE DIRECTOR
STATE OFFICE OF RISK MANAGEMENT
P.O. BOX 13777
AUSTIN, TEXAS 78711-3777.**

Veronica Lopez-Ruberto
Appeals Judge

CONCUR:

Chris Cowan
Appeals Judge

Robert W. Potts
Appeals Judge