

APPEAL NO. 041461
FILED AUGUST 10, 2004

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 May 20, 2004. The hearing officer determined that in (Docket No. 1), respondent 1 (claimant) sustained a compensable carpal tunnel syndrome (CTS) injury on (date of injury for Docket No. 1), to her right wrist but not her left wrist; that the claimant had disability resulting from her (date of injury for Docket No. 1), compensable injury from September 30, 2003, through November 6, 2003; and that the appellant (carrier 1) waived its right to contest compensability of the claimed right CTS injury by not timely contesting it. The hearing officer made a number of other determinations involving a (date of injury for Docket No. 2), injury involving respondent 2 (carrier 2). Those determinations have not been appealed and have become final pursuant to Section 410.169.

Carrier 1 appealed the determinations that the claimant sustained a compensable right CTS injury (the parties had stipulated that the claimant's compensable injury included her right wrist) from her (date of injury for Docket No. 1), injury; that carrier 1 had waived its right to contest compensability of the right CTS; and that the claimant had disability due to the (date of injury for Docket No. 1), injury. The file does not contain responses from either the claimant or carrier 2.

DECISION

Affirmed.

It is undisputed that the claimant had a long history of bilateral hand/wrist problems and CTS going back to 1996. The claimant reported a bilateral CTS injury to the employer (who had workers' compensation coverage with carrier 1 at that time) on (date of injury for Docket No. 1). The medical reports of that time frame refer to the CTS injury, the claimant's Employee's Notice of Injury or Occupational Disease and Claim for Compensation (TWCC-41) for the (date of injury for Docket No. 1), injury claims as the nature of the injury "carpal tunnel" and two Employer's First Report of injury or Illness (TWCC-1) dated July 16 and July 20, 2001, list the nature of the injury as CTS. Carrier 1 did not file a Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) until a benefit review conference in February 2004 where it disputed the CTS, but accepted that the compensable injury "is limited to right wrist tendonitis only." The hearing officer comments that carrier 1's position "is difficult to accept since 'tendonitis' was not listed on the TWCC-1, the TWCC-41, or in any of medical reports." Carrier 1 contends that its TWCC-21 of February 19, 2004, "was not a contest of compensability" but "a contest of the extent of the compensable injury." The hearing officer's determinations on the injury and carrier 1's waiver issue are supported by the evidence. The hearing officer did not err in determining that the compensable

injury of (date of injury for Docket No. 1), included right wrist CTS and that carrier 1 had waived the right to contest compensability of the right CTS.

The claimant had right wrist CTS release surgery due to the July 2001 compensable injury performed on September 30, 2003. The claimant asserts disability from September 30, 2003, through November 6, 2003. Carrier 1 first argues that since the surgery was for the CTS, which it was contesting, there was no disability for the compensable injury. Because we are affirming the hearing officer's determination on the compensability of the CTS we reject carrier 1's argument on that ground. Carrier 1 also contends that since the claimant "took vacation pay while she was off-work, and therefore she was able to obtain and retain employment at pre-injury wages and *does not* meet the definition of disability." (Emphasis in the original.) See Section 401.011(16) for the definition of disability. We note that the issue in this case is whether the claimant had disability (i.e. the inability to obtain and retain employment at the preinjury wage) not the entitlement to temporary income benefits (TIBs). The hearing officer correctly found that the claimant had a period of inability to obtain and retain employment at the preinjury wage. Whether the claimant is entitled to TIBs and whether the vacation/sick leave taken amounts to post-injury earnings pursuant to Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 129.2 (Rule 129.2) is another matter. We disagree with the hearing officer's reference to Texas Workers' Compensation Commission Appeal No. 960933, decided June 27, 1996, and Texas Workers' Compensation Commission Appeal No. 982986, decided February 4, 1999, as being dispositive of the issue of whether sick leave "constitutes disability" (i.e. entitlement to TIBs).

We have reviewed the complained-of determinations and conclude that the hearing officer's determinations are not so incorrect as a matter of law or are so against the great weight and preponderance of the evidence as to clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

We affirm the hearing officer's decision and order.

The true corporate name of insurance carrier 1 is **NORTH AMERICAN SPECIALTY INSURANCE COMPANY** and the name and address of its registered agent for service of process is

**CT CORPORATION SYSTEM
350 NORTH ST. PAUL STREET
DALLAS, TEXAS 75201.**

The true corporate name of insurance carrier 2 is **TEXAS MUTUAL INSURANCE COMPANY** and the name and address of its registered agent for service of process is

**MR. RUSSELL R. OLIVER, PRESIDENT
221 WEST 6TH STREET
AUSTIN, TEXAS 78701.**

Thomas A. Knapp
Appeals Judge

CONCUR:

Judy L. S. Barnes
Appeals Judge

Veronica L. Ruberto
Appeals Judge