

APPEAL NO. 071571
FILED OCTOBER 12, 2007

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 July 13, 2007. The hearing officer resolved the disputed issues by deciding that: (1) the appellant (claimant) did not sustain a compensable repetitive trauma injury; (2) the date of injury is _____; (3) the respondent (carrier) is relieved of liability for benefits because the claimant failed without good cause to give her employer timely notice of her injury; and (4) the claimant did not have disability. The claimant appealed the hearing officer's repetitive trauma injury, date of injury, timely notice, and disability determinations. The carrier responded, urging affirmance.

DECISION

Reversed and remanded.

FACTUAL SUMMARY

The claimant testified that she was employed as a custodian and that she sustained a repetitive trauma injury because of her repetitive work duties. The claimant testified that on _____, she went to see a doctor in Mexico, Dr. LA, for a physical and cholesterol check. In evidence is Dr. LA's medical report dated _____, which states that: the claimant complained about "sensation of something bothering in her hands, like to go to sleep;" that "something bothering in her wrists and also sensation of pain in the right one;" and that she had an "appointment with BH and SMAC to see if the cholesterol triglycerides had to do with the circulation." (Transcript pages 16-18).¹ The claimant testified that Dr. LA opined that her wrist pain was due to poor circulation associated with high cholesterol. The claimant testified that she continued to work for the next three years with occasional pain to her wrists for 10-15 minutes at a time. The claimant testified that she purchased a wrist brace in April 2007, and that she wore it to work on (claimant's alleged date of injury). The claimant testified that a nurse in her work area noticed that she was wearing a brace on (claimant's alleged date of injury), and urged her to seek medical treatment. A medical report dated (claimant's alleged date of injury), shows that the claimant was diagnosed with tenosynovitis and carpal tunnel syndrome. The claimant testified that she reported her injury to her employer on May 7, 2007. The claimant was examined by Dr. LO on June 4, 2007, and he diagnosed the claimant with bilateral carpal tunnel syndrome, right pronator tunnel syndrome, and tenosynovitis. The claimant alleged that her date of injury is (claimant's alleged date of injury), that she sustained a compensable repetitive trauma injury, that she timely reported her injury to her employer on May 7, 2007, and that she had disability from June 4 through June 24, 2007.

¹ Dr. LA's report, dated _____, was in Spanish and it was not accompanied by an English translation. Dr. LA's report was admitted as claimant's and carrier's exhibits. The interpreter read into the record in English Dr. LA's report. Neither party objected to the interpretation of Dr. LA's report.

DATE OF INJURY, REPETITIVE TRAUMA INJURY, TIMELY NOTICE, AND DISABILITY

The date of injury for an occupational disease, which includes a repetitive trauma injury, is the date the claimant knew or should have known the disease may be related to the claimant's employment. See Section 408.007. The Appeals Panel has held that the date of injury for an occupational disease is not necessarily the date of the first symptom. See Appeals Panel Decision (APD) 981397, decided August 6, 1998, citing Commercial Insurance Company of Newark, New Jersey v. Smith, 596 S.W.2d 661 (Tex. Civ. App.-Fort Worth 1980 writ ref'd n.r.e.).

In three unappealed findings the hearing officer determined that: (1) the claimant's activities in the course and scope of employment as a custodian were sufficiently repetitive and traumatic to cause a repetitive trauma injury to her upper extremities; (2) the claimant first notified her employer of her repetitive trauma injury on May 7, 2007; and (3) as a result of her injury, the claimant was unable to obtain and retain employment at wages equivalent to her preinjury average weekly wage beginning June 4 through June 24, 2007, and at no other time before or after this period.

The hearing officer states in the decision that the critical issue in this case is the date of injury. The hearing officer references in his discussion Dr. LA's medical report and states that the "evidence established that the Claimant knew or should have known her pain was work related at the doctor's visit on _____, at which she raised the issue even though she was there apparently for a cholesterol check." The claimant testified that she relied on Dr. LA's opinion that the problem with her wrists was due to poor circulation associated with high cholesterol. Dr. LA's report dated _____, is the first medical report reflecting the claimant's symptom of wrist pain. The claimant testified that Dr. LA prescribed anti-inflammation medication and that she did not seek any other medical treatment until (claimant's alleged date of injury). Neither the claimant's testimony nor Dr. LA's report dated _____, indicate that the claimant knew or should have known that her wrist pain may be related to her work on _____. We conclude that the hearing officer's determination that the date of injury is _____, is so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. Accordingly, we reverse the hearing officer's date of injury determination and we remand the case for a date of injury determination consistent with the evidence in this case.

Given that we have reversed and remanded the hearing officer's date of injury determination, we likewise reverse the hearing officer's determination that the claimant did not sustain a compensable repetitive trauma injury, that the carrier is relieved of liability for benefits because the claimant failed without good cause to give her employer timely notice of her injury, and that the claimant did not have disability. We remand the repetitive trauma injury, timely notice, and disability issues to the hearing officer to make a determination consistent with the evidence in this case.

We note that the hearing officer states in his discussion that in "April 2004" the claimant purchased the brace, that she was seen wearing the brace on "(claimant's alleged date of injury)," that the claimant claimed "trivialization of the injury up to the day it was reported," and that "[t]his contention is unpersuasive, especially in light of her action in mid-April 2004 to buy a brace. By then, any trivialization ended." The claimant testified that she purchased a brace in "April 2007" and that she wore the brace on "(claimant's alleged date of injury)." Review of the record indicates that there is no evidence in the record to support that the claimant purchased a brace in "April 2004" or that she wore the brace on "(claimant's alleged date of injury)." On remand, the hearing officer is to consider the evidence in the CCH record.

SUMMARY

We reverse the hearing officer's determination the date of injury is _____, that the claimant did not sustain a compensable repetitive trauma injury, that the carrier is relieved of liability for benefits because the claimant failed without good cause to give her employer timely notice of her injury, and that the claimant did not have disability. We remand the date of injury, repetitive trauma injury, timely notice, and disability issues to the hearing officer to make determinations consistent with the evidence in this case.

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 Department of Insurance, Division of Workers' Compensation, pursuant to Section 410.202 which was amended June 17, 2001, to exclude Saturdays and Sundays and holidays listed in Section 662.003 of the Texas Government Code in the computation of the 15-day appeal and response periods. See APD 92642, decided January 20, 1993.

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

**ROBIN M. MOUNTAIN
6600 CAMPUS CIRCLE DRIVE EAST, SUITE 300
IRVING, TEXAS 75063.**

Veronica L. Ruberto
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Margaret L. Turner
Appeals Judge