

APPEAL NO. 091624
FILED DECEMBER 11, 2009

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A consolidated contested case hearing (CCH) was held on September 17, 2009. With regard to Docket No. (Docket No. 1), the disputed issues before the hearing officer were:

- (1) Does the compensable injury of _____, extend to include a left shoulder superior labral tear from anterior to posterior (SLAP) tear?
- (2) Did the respondent (claimant) have disability resulting from a compensable injury, and if so, for what periods?

The hearing officer determined that the compensable injury of _____, extends to include a left shoulder SLAP tear, and that the claimant had disability from February 16 through July 24, 2009, but not otherwise up through the date of the CCH.

With regard to (Docket No. 2), the disputed issues before the hearing officer were:

- (1) Did the claimant sustain a compensable repetitive trauma injury (RTI)?
- (2) Is the appellant (carrier) relieved from liability under Section 409.002 because of the claimant's failure to timely notify his employer pursuant to Section 409.001?
- (3) What is the date of injury pursuant to Section 408.007, the date the employee knew or should have known that the RTI may be related to the employment?
- (4) Did the claimant have disability resulting from a compensable injury, and if so, for what periods?

The hearing officer determined that: (1) the claimant did not sustain a compensable RTI; (2) that the carrier is not relieved from liability under Section 409.002 because of the claimant's failure to timely notify his employer pursuant to Section 409.001; (3) the date of the claimed RTI was _____; and (4) the claimant had disability resulting from a compensable acute injury beginning on February 16 through July 24, 2009, but not otherwise up through the date of the CCH.

The carrier appealed the hearing officer's extent of injury and disability determinations in Docket No. 1. Also, the carrier appealed the hearing officer's timely notice, date of injury and disability determinations in Docket No. 2. The hearing officer's

determination that the claimant did not sustain a compensable RTI in Docket No. 2 was not appealed and has become final pursuant to Section 410.169. The claimant responded, urging affirmance of the hearing officer's determinations in Docket Nos. 1 and 2.

DECISION

Affirmed in part and reversed and rendered in part.

The claimant testified that he sustained injuries to his low back and left shoulder on _____, when he slipped and fell and hit his back on the truck while unloading bags of laundry, using a swinging motion with his arm. It is undisputed that the claimant sustained a compensable back injury¹ on _____. The claimant testified that on January 16, 2009, he began to have left shoulder pain. In a medical report dated February 16, 2009, a referral doctor, (Dr. D), diagnosed "[l]eft shoulder biceps tendinitis versus possible SLAP tear" and referred the claimant for an MRI of the left shoulder. The claimant subsequently sought treatment for his left shoulder with (Dr. C), an orthopedic surgeon. In a medical report dated March 17, 2009, Dr. C stated that the MRI of the left shoulder showed a SLAP tear of the left shoulder and recommended surgery to repair the SLAP tear of the left shoulder. The claimant underwent two arthroscopic surgeries to his left shoulder on April 16, 2009, and May 14, 2009. In a medical report dated July 28, 2009, Dr. C states that the claimant's mechanism of injury of _____, is consistent with a SLAP tear of the left shoulder. The evidence reflects that the claimant's last day of work was on February 16, 2009, and that he was released to return to work without restrictions on July 24, 2009.

In Docket No. 1, the claimant argued that his compensable injury of _____, extends to a SLAP tear of the left shoulder. In Docket No. 2, the claimant argues in the alternative that he sustained a RTI in the form of a SLAP tear of the left shoulder, from repetitively lifting laundry bags.

DOCKET NO. 1 EXTENT OF INJURY AND DISABILITY

The hearing officer's determinations that the compensable injury of _____, extends to include a left shoulder SLAP tear, and that the claimant had disability from February 16 through July 24, 2009, but not otherwise up through the date of the CCH, are supported by sufficient evidence and are affirmed.

¹ In a medical report dated _____, (Dr. M) diagnosed the claimant with a "[l]umbar contusion with low back pain."

**DOCKET NO. 2
TIMELY NOTICE**

The hearing officer's determination that the carrier is not relieved from liability under Section 409.002 because of the claimant's failure to timely notify his employer pursuant to Section 409.001 is supported by sufficient evidence and is affirmed.

DATE OF INJURY

The date of injury for an occupational disease, which includes a RTI, 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 hearing officer found that the claimant reported a left shoulder injury to his employer on _____. This finding is supported by sufficient evidence. However, the hearing officer found that the date of claimed RTI is _____. The claimant argued at the CCH that he related _____, as the date he found out that his left shoulder injury could have been caused by repetitive lifting at work.

At the CCH, the claimant's production manager testified that on _____, the claimant reported that his left shoulder injury may be work-related. In the instant case, the evidence indicates that the claimant's date of injury for the claimed RTI is _____. The hearing officer's determination that the date of injury for the claimed RTI is _____, is so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust. Accordingly, we reverse the hearing officer's determination that the date of the claimed RTI is _____, and render a new decision that the date of the claimed RTI is _____.

DISABILITY

Because the claimant did not sustain a compensable RTI, the claimant cannot by definition in Section 401.011(16) have disability due to the claimed RTI. We reverse the hearing officer's determination in Docket No. 2 that due to the acute left shoulder injury, the claimant has had disability beginning on February 16 through July 24, 2009, but not otherwise up through the date of the CCH and we render a new decision that the claimant did not have disability resulting from the non-compensable RTI in Docket No. 2.

SUMMARY

With regard to Docket No. 1, we affirm the hearing officer's determinations that the compensable injury of _____, extends to include a left shoulder SLAP tear, and that the claimant had disability from February 16 through July 24, 2009, but not otherwise up through the date of the CCH.

With regard to Docket No. 2, we affirm the hearing officer's determination that the carrier is not relieved from liability under Section 409.002 because of the claimant's failure to timely notify his employer pursuant to Section 409.001.

We reverse the hearing officer's determination that the date of the claimed RTI is _____, and render a new decision that the date of the claimed RTI is _____.

We reverse the hearing officer's determination in Docket No. 2 that due to the acute left shoulder injury, the claimant has had disability beginning on February 16 through July 24, 2009, but not otherwise up through the date of the CCH and we render a new decision that the claimant did not have disability resulting from the non-compensable RTI in Docket No. 2.

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

**KIRK HOOD
1021 MAIN STREET, SUITE 1150
HOUSTON, TEXAS 77002.**

Veronica L. Ruberto
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Margaret L. Turner
Appeals Judge