APPEAL NO. 121472
FILED OCTOBER 1, 2012

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 June 15, 2012, in [City], Texas, with [hearing officer] presiding as hearing officer. With regard to the four disputed issues before him, the hearing officer determined that: (1) the date of the compensable injury is [date of injury]; (2) the respondent (claimant) "sustained a compensable repetitive trauma injury including at least her right [DeQuervain's] tenosynovitis and bilateral medial epicondylitis injurious conditions;" (3) the claimant had disability beginning June 10, 2011, and continuing through the date of the CCH; and (4) the appellant (carrier) is not relieved from liability under Sections 409.002 and 409.001 because the claimant timely notified her employer.

The carrier appealed the hearing officer's determination on compensability, timely notice to employer, and disability. Further, the carrier contended that the extent of injury was not in dispute and the hearing officer had erred in identifying the nature of the repetitive trauma injury. The carrier also contended that the claimant failed to timely report her injury and that the claimant does not have disability. The claimant, in an untimely response, urged affirmance.

The hearing officer's determination that the date of the compensable injury is [date of injury], has not been appealed and has become final pursuant to Section 410.169.

DECISION

Affirmed in part, reversed and rendered in part, and reversed and remanded in part.

TIMELINESS OF THE CLAIMANT'S RESPONSE

Pursuant to Section 410.202(b) the claimant's written response must be filed no later than the 15th day after the appeal is served on the claimant. The deemed date of receipt of the carrier's appeal was July 25, 2012, and therefore the claimant's response had to be filed or mailed no later than Wednesday, August 15, 2012. The claimant's response is dated August 16, 2012, was sent to the Texas Department of Insurance, Division of Workers' Compensation (Division) via facsimile transmission on Thursday, August 16, 2012, and was received by the Division on that same day. The response, not having been mailed or filed by August 15, 2012, is untimely and will not be considered.

NEWLY DISCOVERED EVIDENCE

The carrier, in its appeal, included a decision and order involving the same claimant, the same date of injury, the same mechanism of injury at work, the same carrier, and was heard before the same hearing officer on a different docket number on June 15, 2012. Documents submitted for the first time on appeal are generally not considered unless they constitute newly discovered evidence. *See generally*, Appeals Panel Decision (APD) 091375, decided December 2, 2009; Black v. Wills, 758 S.W.2d 809 (Tex. App.-Dallas 1988, no writ). In determining whether new evidence submitted with an appeal or response requires remand for further consideration, the Appeals Panel considers whether the evidence came to the knowledge of the party after the hearing, whether it is cumulative of other evidence of record, whether it was not offered at the hearing due to a lack of diligence, and whether it is so material that it would probably result in a different decision. *See* APD 051405, decided August 9, 2005. Because the decision and order attached to the carrier's appeal decided the compensability of a condition (bilateral medial epicondylitis) rising out of the same mechanism of injury at issue in the case before us, it is so material that it would probably result in a different decision in this case. Under the circumstances of this case we hold that the decision and order of the June 15, 2012, CCH in [Docket No. 1] constitutes newly discovered evidence which came to the knowledge of the parties after the CCH in this case and we will consider it.

TIMELY NOTICE TO THE EMPLOYER

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

COMPENSABLE REPETITIVE TRAUMA INJURY

The evidence establishes that the claimant was a "package handler" for an express delivery service. The claimant's work required her to lift and put packages in containers (specified as "cans"). The claimant demonstrated, and the hearing officer recited, how she would throw the boxes, picked off the conveyor belt, into the cans. The claimant alleges an injury to her elbows and wrists performing those maneuvers. In [Docket No. 1], a CCH held on the morning of June 15, 2002 (the morning CCH) the parties litigated an elbow injury, namely bilateral medial epicondylitis. In a separate CCH held on the afternoon of June 15, 2012 (the afternoon CCH) in [Docket No. 2], the parties litigated wrist injuries namely DeQuervain's tenosynovitis.

The parties agreed on the record, and the hearing officer commented, that the parties proceeded in the instant case (the afternoon CCH) "on the basis that it was

limited to wrist injuries while [the claimant's] [Docket No. 3], the morning CCH] claim was limited to elbow injuries." The hearing officer, in the morning CCH, found that the claimant's repetitive lifting and tossing of boxes "caused her injurious conditions of bilateral medial epicondylitis." The hearing officer then determined that "[t]he carrier is relieved from liability for only this claim number [Docket No. 3] under [Section] 409.002 because of the claimant's failure to timely notify [the] employer pursuant to [S]ection 409.001." The effect of that determination is that the claimant did not sustain a compensable repetitive trauma injury under claim number [Docket No. 3]. The hearing officer's determination was that the bilateral medial epicondylitis was not compensable based on his determination that the carrier is relieved from liability because of the claimant's failure to give timely notice of her injury to the employer pursuant to Section 409.001. That decision has not been appealed and has become final pursuant to Section 410.169.

In the afternoon CCH, the hearing officer found that the claimant's "repetitive lifting and tossing of boxes at work caused at least her right [DeQuervain's] tenosynovitis and bilateral medial epicondylitis injurious conditions" and determined that the claimant "sustained a compensable repetitive trauma injury including at least her right [DeQuervain's] tenosynovitis and bilateral medial epicondylitis injurious conditions." The hearing officer ordered the carrier to pay benefits in accordance with his decision. The result of those cases is that in the morning CCH the carrier was relieved of liability to pay benefits for the elbow injury, the bilateral medial epicondylitis, while in the afternoon session the carrier was ordered to pay benefits for both the DeQuervain's tenosynovitis (wrist) and the bilateral medial epicondylitis (elbow). Therefore, it was legal error for the hearing officer to include bilateral medial epicondylitis as part of the [date of injury], compensable injury.

Accordingly, we reverse the hearing officer's determination that the claimant sustained a compensable repetitive trauma injury including at least her right DeQuervain's tenosynovitis and bilateral medial epicondylitis injurious conditions and render a new decision by striking the words "and bilateral medial epicondylitis" from Conclusion of Law No. 3 and the Decision portion of the hearing officer's decision and order.

DISABILITY

Disability is defined in Section 401.011(16) as the inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage.

In the Background Information portion of his decision and order the hearing officer commented that in making a decision on the disability dispute "the entire

compensable injury must be determined and considered." The hearing officer went on to comment:

> While the parties expected to limit the consideration of Issue 1, the compensable injury dispute, to only the claimant's wrist, this is not possible because to decide Issue # 3, the disability dispute, the entire compensable injury must be determined and considered. The evidence is clear that the claimant sustained repetitive trauma injuries at work that included at least bilateral medial epicondylitis and right DeQuervain's tenosynovitis.

We agree that to decide the disability dispute the hearing officer must consider the entire compensable injury. However, the hearing officer in the morning CCH had determined that the bilateral medial epicondylitis was not part of the compensable injury because the claimant failed to give timely notice to the employer. That determination has not been appealed and has become final. We reverse the hearing officer's decision that the claimant had disability beginning June 10, 2011, and continuing through the date of the CCH because the hearing officer clearly considered a non-compensable condition, the bilateral medial epicondylitis, in his determination of disability. We remand the case back to the hearing officer to determine the period of disability from the date of injury forward for the compensable injury only, namely the right DeQuervain's tenosynovitis. We note that the disability issue is not for a specified time period but covers a period of dispute from [date of injury], through the date of the CCH. On remand the hearing officer should make a finding of fact and conclusion of law for the entire period of disability in dispute or modify the disability issue to a specific period.

SUMMARY

We affirm the hearing officer's determination that the carrier is not relieved from liability under Section 409.002 because the claimant timely notified her employer pursuant to Section 409.001.

We reverse the hearing officer's determination that the claimant sustained a compensable repetitive injury including at least her right DeQuervain's tenosynovitis "and bilateral medial epicondylitis" injurious conditions and render a new decision by striking the words "and bilateral medial epicondylitis" from Conclusion of Law No. 3 and the Decision portion of the hearing officer's decision and order.

We reverse the hearing officer's determination that the claimant had disability initially beginning June 10, 2011, and continuing through the date of this hearing and remand the case to the hearing officer to determine the period of disability, if any, based only on the compensable injury.

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 Division, 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 060721, decided June 12, 2006.

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

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

Thomas A. Knapp
Appeals Judge

CONCUR:

Cynthia A. Brown
Appeals Judge

Margaret L. Turner
Appeals Judge