

APPEAL NO. 122617
FEBRUARY 4, 2013

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 November 5, 2012, in [City], with [hearing officer] presiding as hearing officer. With regard to the disputed issues before her, the hearing officer determined that: (1) [date of injury], is the date of injury pursuant to Section 408.007, the date the appellant (claimant) knew or should have known the disease may be related to the employment; (2) the claimant did sustain a compensable injury; (3) the respondent (self-insured) is not relieved from liability under Section 409.002 because the claimant timely notified her employer pursuant to Section 409.001; and (4) the claimant does have disability from June 7, 2012, and continuing through the date of the CCH (the claimed period of disability). The hearing officer added an extent-of-injury issue on her own motion at the conclusion of the CCH, stating the issue was not certified but was litigated. The hearing officer made a finding of fact on whether the alleged injury included an injury to the right shoulder and right wrist but failed to make any conclusion of law or decision regarding the added extent-of-injury issue.

The claimant appealed Finding of Fact No. 5 which states that "[the] [c]laimant did not sustain physical damage or harm to her right shoulder and right wrist while in the course and scope of her employment on [date of injury]," and requests the Appeals Panel to render a decision that the compensable injury extends to an injury of the right shoulder and right wrist. The self-insured responded, urging affirmance as to Finding of Fact No. 5.

The hearing officer's determinations that: (1) [date of injury], is the date of injury pursuant to Section 408.007, the date the claimant knew or should have known the disease may be related to the employment; (2) the claimant did sustain a compensable injury; (3) the self-insured is not relieved from liability under Section 409.002 because the claimant timely notified her employer pursuant to Section 409.001; and (4) the claimant does have disability from June 7, 2012, and continuing through the date of the CCH (the claimed period of disability) were not appealed and have become final pursuant to Section 410.169.

DECISION

Reversed and remanded.

The parties stipulated that the Texas Department of Insurance, Division of Workers' Compensation (Division)-selected designated doctor, [Dr. S] was asked to opine on whether or not an injury resulted from the claimed incident. The claimant testified that she worked as a cashier for the employer for 12 years, using her whole arm to lift and

scan items off a conveyor belt. As a cashier, the claimant testified that she worked 40 hours per week, 8 hours a day, 5 days a week, and that her work duties reaching, lifting and scanning, using her whole arm, as a cashier, were repetitive. On [date of injury], the claimant testified that she was working a shift from 3:00 p.m. until midnight. Around 10:00 p.m., the claimant stretched her right arm to lift and scan an item and felt a pop in her right elbow. The claimant was unable to identify the item. The following day, her right elbow was swollen and the pain radiated up to her right shoulder and down to her right hand. The claimant reported an injury to the employer and sought medical attention on February 27, 2012.

On February 27, 2012, [Dr. R] examined the claimant, and in a report dated that same day, stated that the claimant presented with “complaint for her right arm including shoulder, elbow, and wrist discomfort. The [claimant] states that she has been a cashier for 12 years at [the employer] and she does constant repetitive activity and she has noticed pain that has started from the shoulder and radiates all the way to the elbow and hand along with nocturnal paresthesia.” Dr. R diagnosed right elbow sprain, right shoulder sprain, and right wrist sprain and released the claimant to light-duty work.

In evidence is an Employee’s Claim for Compensation for a Work-Related Injury or Occupational Disease (DWC-41), dated March 9, 2012, in which the claimant states that the cause of injury or occupational disease, including how it is work related is “[p]ain: right hand, fingers, arm, elbow, and shoulder, very repetitive work.”

Because the entire claim was disputed by the self-insured, the claimant filed a Request for Designated Doctor Examination (DWC-32), identifying the reason as Box “G. Other Similar Issues.” The form states that “[t]he [c]laimant has been a cashier for [employer] since July of 2000. She needs an opinion as to whether her repetitive work caused or aggravated the injuries she has been diagnosed with by her doctors, including [r]ight shoulder sprain/strain, and [s]upraspinatus tendinopathy, [r]ight [e]lbow sprain/strain, with medial epicondylitis, and [r]ight [w]rist sprain/strain and [c]arpal [t]unnel [s]yndrome [(CTS)].”

Dr. S, the designated doctor, examined the claimant on September 4, 2012. In a narrative report dated that same day, Dr. S stated:

Based on specific dated injury of [date of injury], the [claimant’s] injury is a direct result from it. The repetitive motions contributed to potential of injury, however, the individual event of injury resulted in her pathology. Thus her work did cause or aggravate the conditions of right shoulder sprain/strain and supraspinatus tendinopathy, right elbow sprain/strain with medial epicondylitis, and right wrist sprain/strain. I do not see any mention of [CTS] in her chart today and her examination today is also not

entirely supportive of this diagnosis so I cannot in reasonable medical probability relate that diagnosis to her work.

Section 401.011(10) provides that “[c]ompensable injury” means an injury that arises out of and in the course and scope of employment for which compensation is payable under this subtitle. Section 401.011(26) provides that “[i]njury” means damage or harm to the physical structure of the body and a disease or infection naturally resulting from the damage or harm. The term includes an occupational disease. Section 401.011(34) provides in pertinent part that “[o]ccupational disease” means a disease arising out of and in the course of employment that causes damage or harm to the physical structure of the body, including a repetitive trauma injury.

The hearing officer, in the Background Information section of her decision stated:

Although [the] [c]laimant maintains that her injury also includes an injury to her right shoulder and the right wrist, the mechanism of injury is inconsistent with an injury to those additional body parts. The medical records refer to the claimed injury as a repetitive trauma injury. Although the [c]laimant describes her job functions as a cashier, and she may perform the same type of movements because of the nature of her being a cashier, the mechanism of injury being claimed by the [c]laimant is a specific event and not a repetitive trauma injury. The medical evidence describes the [c]laimant’s job duties as ‘repetitive’ and attempt to causally relate the right shoulder and right wrist to the ‘repetitive’ nature of her job. However, this is an inaccurate mechanism of injury. This is evident in the designated doctor’s report. The designated doctor notes the specific event, but also mentions that the [c]laimant’s job duties were ‘repetitive.’ The designated doctor acknowledged that the right elbow [injury] was caused by the specific event and noted that the other conditions may have resulted from the repetitive nature of [the] [c]laimant’s job duties. However [the] [c]laimant is not claiming a repetitive trauma injury and the evidence establishes a specific injury occurring on [date of injury].

Our review of the record indicates that the claimant litigated at the CCH the theory that a diagnosed injury to the right shoulder and right wrist are due to repetitive motion trauma. Furthermore, the hearing officer determined that the claimant sustained a compensable injury to her right elbow on [date of injury]. As previously discussed, a compensable injury includes a repetitive trauma injury.

In evidence is a benefit review conference (BRC) report dated July 3, 2012, which lists the certified issue as “[d]id the [c]laimant sustain a compensable injury?” The claimant’s position as stated in the BRC report is “[t]he [c]laimant did sustain an

injury in the course and scope of her employment on [[date of injury]]. The [c]laimant developed pain to her right shoulder and elbow as a result of the constant reaching, pulling and lifting she performs as a cashier. The medical evidence causally relates the [c]laimant's right upper extremity conditions to the [c]laimant's repetitive work activity." Under the date of injury issue, the claimant's position is "[t]he [c]laimant's date of injury is [[date of injury]]. This is the date the [c]laimant knew [or] should have known that her right upper extremity condition was due to her work activity."

In Appeals Panel Decision (APD) 010376, decided March 28, 2001, the hearing officer resolved the sole issue at the CCH by determining that the claimant's compensable injury extended to include bilateral CTS. In that case, the carrier contended that the claimant could not argue that he suffered both a discrete, traumatic lifting injury and a repetitive trauma injury on the same day, particularly if the claimant did not raise the repetitive trauma injury claim as an occupational disease. The Appeals Panel affirmed the hearing officer's decision, stating "[t]he fact that the claimant claimed a discrete trauma injury does not preclude him from arguing that his injury on [the date of injury], extended to and included bilateral CTS, commonly claimed as an occupational disease."

In APD 120850, decided June 28, 2012, the hearing officer resolved the sole disputed issue at the CCH by determining that the compensable injury of January 7, 2010, extends to cervical disc protrusions but did not extend to CTS and bilateral ulnar motor neuropathy based an analysis of specific versus repetitive trauma injury being litigated. The Appeals Panel reversed the hearing officer's decision and remanded the extent-of-injury issue to the hearing officer for a proper analysis of the evidence as to whether the claimed conditions were causally linked to the work injury, whether a specific injury or a repetitive trauma injury with a date of injury of January 7, 2010. *Also see* APD 030245, decided March 12, 2003, in which the Appeals Panel held "[w]ith respect to whether the claimant sustained a repetitive trauma type injury or a specific type injury, we note that the strict rules of pleading do not apply and alternative theories may be advanced if they are not contradictory or mutually exclusive."

In the case before us, the hearing officer erred in her Finding of Fact No. 5 that the compensable injury of [date of injury], did not extend to an injury to the right shoulder and right wrist based on an analysis of specific versus repetitive trauma injury. The hearing officer determined from the evidence that the claimant sustained a compensable injury to her right elbow on [date of injury], based on a specific event. By definition, a compensable injury includes a repetitive trauma injury. Also, there was medical evidence that causally linked the claimant's injury to her right shoulder and right wrist due to repetitive motions and her work injury, ie., the reports of Dr. R and Dr. S. There must be a proper analysis of all of the evidence as to the sufficiency of the

medical evidence to causally link the claimed injury to the right shoulder and right wrist to the work injury, whether specific or repetitive trauma injury with a date of injury of [date of injury], sustained by the claimant. This analysis was not done by the hearing officer in making her finding on the added issue of extent of injury.

Further, the decision is incomplete because there is no conclusion of law or decision on the extent-of-injury issue added by the hearing officer. Accordingly, we reverse that portion of the hearing officer's decision as incomplete as to the extent-of-injury issue and remand the extent-of-injury issue to the hearing officer for further action consistent with this decision.

REMAND INSTRUCTIONS

On remand, in accordance with this decision, the hearing officer is to consider and make a finding of fact, conclusion of law, and a decision on whether the compensable injury of [date of injury], extends to an injury to the right shoulder and right wrist.

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, **[a certified self-insured]** and the name and address of its registered agent for service of process is

**[CORPORATION]
[ADDRESS]
[CITY], TEXAS [ZIP].**

Cynthia A. Brown
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Margaret L. Turner
Appeals Judge