APPEAL NOS. 030255 AND 030254
FILED MARCH 25, 2003

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 was held on December 13, 2002, with the record closing on January 8, 2002. With regard to (Docket No. 1), the hearing officer determined that (1) respondent 1 (claimant) sustained a compensable injury on (date of injury for Docket No. 1); (2) the claimant timely notified her employer of an injury in accordance with Section 409.001; and (3) the claimant had disability for several nonconsecutive days from December 13, 2001, through (alleged date of injury), and for the period of April 22, 2002, continuing through the date of the hearing. With regard to (Docket No. 2), the hearing officer determined that (1) the claimant sustained a compensable injury; (2) the date of injury (DOI) is (date of injury for Docket No. 1), prior to the initiation of respondent 2's (carrier 2) workers' compensation insurance coverage; and (3) carrier 2 did not waive its right to contest compensability, in that it timely initiated benefits. The appellant (carrier 1) appeals the determinations in each docket. The claimant did not file a response. Carrier 2 contends that carrier 1 does not have standing to file an appeal in Docket No. 2 and, in the alternative, urges affirmance.

DECISION

Affirmed, in part, as reformed and reversed and remanded in part.

We first address carrier 2's assertion that carrier 1 does not have standing to file an appeal in Docket No. 2. We note that Docket Nos. 1 and 2 were joined at the hearing below, without objection from the parties. Additionally, the central underlying issue in these dockets was whether carrier 1 or carrier 2 was liable for the claimant's injuries. Accordingly, carrier 1 has a justiciable interest in the outcome of Docket No. 2 and has standing to appeal the hearing officer's decision in that docket.

COMPENSABLE INJURY ISSUES

The evidence shows that the claimant worked as a seamstress for the employer, sewing pillowtops onto mattresses. The claimant sewed approximately 100 mattresses per day. The work was described as heavy labor. In December 2001, the claimant pulled a mattress pillowtop and felt a sharp, needle-like pain in her top left shoulder and neck area. The claimant testified that the pain had a sudden onset and was not "building up" before the date of injury. The claimant reported the injury to her supervisor and requested to see a doctor. The supervisor trivialized the claimant's complaint, instructing the claimant to continue working and rest the shoulder over Christmas vacation. When the claimant returned to work in January 2002, the pain in her left shoulder and neck returned. The claimant continued to complain of her injury to her supervisor but was ignored. Over the next several weeks, the pain increased and the claimant's shoulder/neck area became swollen. Finally, on (alleged date of injury), the

claimant reported her injury to another supervisor, who sent her to the company doctor. The claimant was subsequently diagnosed with injuries to her neck, left shoulder, and thoracic area.

During the course of these events, on February 22, 2002, the employer changed its workers' compensation carrier from carrier 1 to carrier 2. Carrier 1 contended that the claimant sustained a repetitive trauma injury with the last injurious incident occurring under carrier 2's coverage period, thereby relieving carrier 1 of liability. In the alternative, carrier 1 asserted that the claimant sustained an aggravation of her injuries on (alleged date of injury), relieving carrier 1 of liability for this claim. The hearing officer found that the claimant sustained a compensable injury on (date of injury for Docket No. 1). The hearing officer further determined, as reflected in the statement of the evidence, that the claimant did not sustain an injury on (alleged date of injury).

Carrier 1 requests reversal of the hearing officer's decisions as ambiguous with regard to whether the claimant sustained a repetitive trauma or specific injury. Carrier 1 cites language in the statement of the evidence which states: "Whether the Claimant got her symptoms and injury over a period of time in 2001, or whether she hurt herself when she pulled on a mattress with her left arm in December 2001, the inescapable fact is that she sustained her injury in December 2001, and reported it that day to her supervisor." Notwithstanding this language, we read the hearing officer's decisions as a whole to state that the claimant sustained a specific injury, not a repetitive trauma injury, on (date of injury for Docket No. 1). In view of the evidence presented, we cannot conclude that such determination is so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

Next, carrier 1 asserts that the hearing officer erred in failing to address whether the claimant sustained an aggravation injury on (alleged date of injury).[1] While the issue of aggravation was not certified from the benefit review conference, the issue was actually litigated by the parties. As indicated above, the hearing officer determined, as provided in the statement of evidence, that the claimant did not sustain a new injury on (alleged date of injury). This determination is implicit in the hearing officer's findings of fact and conclusions of law and is not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain, *supra*.[2]

Finally, carrier 1 requests reversal of the injury determination because the hearing officer's findings in Docket Nos. 1 and 2 are internally inconsistent. In Docket No. 1, the hearing officer found that the claimant sustained an injury to "her neck, left

[1] Carrier 1's aggravation argument appears intended to encompass the concepts of last injurious exposure for a repetitive trauma injury and a specific aggravation injury. Given our affirmance of the hearing officer's specific injury determination, we do not address the carrier's aggravation argument as it relates to concept of last injurious exposure.

[2] We note that even if carrier 1 had prevailed on the issue of aggravation, it would remain liable for the original compensable injury, absent a showing of sole intervening cause. Texas Workers' Compensation Commission Appeal No. 91038, decided November 14, 1991.

shoulder and thoracic areas," while in Docket No. 2, the hearing officer found that the claimant sustained injuries only to "her neck and left shoulder area." We note that the issue before the hearing officer was whether the claimant sustained a compensable injury, and the hearing officer's findings of fact, albeit inconsistent, are sufficient to answer that question. Additionally, in the statement of the evidence in each docket, the hearing officer indicated that the claimant's injuries included the "neck, shoulder and thoracic area." Given this statement and the corresponding nature of the complained-of findings of fact, we believe the hearing officer intended to find, in each docket, that the claimant sustained injuries to her neck, left shoulder, and thoracic area. In the absence of an extent-of-injury issue, however, the hearing officer's findings should not be read as determining the extent of the compensable injury. *See* Texas Workers' Compensation Commission Appeal No. 020127, decided March 4, 2002. For these reasons, we reform the complained-of findings of fact to state that the compensable injury includes, but is not necessarily limited to, the neck, left shoulder and thoracic area.

DATE OF INJURY

The hearing officer did not err in determining that the date of injury is (date of injury for Docket No. 1). There was conflicting evidence presented regarding whether the claimant sustained the compensable injury on December 10, 2001, or (date of injury for Docket No. 1). Carrier 1 contends that the hearing officer committed reversible error in Docket No. 1, in finding that the DOI was some date other than that provided in the certified issue of compensability. We observe that the hearing officer found the DOI to be (date of injury for Docket No. 1), consistent with the certified issue in Docket No. 1. Notwithstanding, we have held that the DOI is "essential" to resolving the compensability of an injury and a hearing officer may find a DOI other than the date provided in the certified issue. *See* Texas Workers' Compensation Commission Appeal No. 012988, decided January 10, 2002. Accordingly, we perceive no reversible error.

NOTICE

The hearing officer did not err in determining that the claimant timely notified her employer of an injury in accordance with Section 409.001. The determination involved a question of fact for the hearing officer to resolve. The hearing officer is the sole judge of the weight and credibility of the evidence (Section 410.165(a)) and, as the trier of fact, resolves the conflicts and inconsistencies in the evidence including the medical evidence (Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ)). The hearing officer found that the claimant notified her supervisor of a work-related injury on the DOI. In view of the evidence presented, we cannot conclude that the hearing officer's determination is so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain, *supra*.

WAIVER

The hearing officer did not err in determining that carrier 2 did not waive its right to contest compensability of the claimant's injury. We have held that workers' compensation insurance coverage is a threshold requirement for establishing the liability of a carrier. Texas Workers' Compensation Commission Appeal No. 022268-s, decided October 30, 2002, citing Houston General Insurance Co. v. Association Casualty Insurance Co., 977 S.W.2d 634 (Tex. App.-Tyler 1998, no pet. h.). Given our affirmance of the hearing officer's determination that the claimant did not sustain any injury during the period of carrier 2's coverage, we likewise affirm that carrier 2 did not waive its right to contest compensability in this case.

DISABILITY

The hearing officer erred in part in determining that the claimant had disability for several non-consecutive days from December 13, 2001, through (alleged date of injury), and for the period of April 22, 2002, continuing through the date of the hearing. Whether the claimant had an inability to obtain and retain employment at her preinjury wage was a question of fact for the hearing officer to resolve. The hearing officer is the sole judge of the weight and credibility of the evidence (Section 410.165(a)) and, as the trier of fact, resolves the conflicts and inconsistencies in the evidence including the medical evidence (Campos, *supra*). In view of the evidence presented, we cannot conclude that the hearing officer's disability determination is so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain, *supra*. However, with regard to the "several non-consecutive days" of disability from December 13, 2001, through (alleged date of injury), the hearing officer erred in not finding specific dates of disability. *See* Texas Workers' Compensation Commission Appeal No. 002840, decided January 17, 2001; Texas Workers' Compensation Commission Appeal No. 951237, decided September 11, 1995. Accordingly, we reverse the hearing officer's disability determination with regard to the "several non-consecutive days" of disability from December 13, 2001, through (alleged date of injury), and remand for further findings of fact and conclusions of law specifying the dates of disability.

The decision and order of the hearing officer are affirmed, in part, as reformed and reversed and remanded, in part, with regard to the specific dates of disability from December 13, 2001, through (alleged date of 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 Texas Workers' Compensation Commission's Division of Hearings, 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

Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

The true corporate name of the insurance carrier in Docket No. 1 is **TRUCK INSURANCE EXCHANGE** and the name and address of its registered agent for service of process is

FRED WERKENTHIN
C/O JACKSON WALKER, L.L.P.
100 CONGRESS AVENUE, SUITE 1100
AUSTIN, TEXAS 78701.

The true corporate name of the insurance carrier in Docket No. 2 is **TEXAS BUILDERS INSURANCE COMPANY** and the name and address of its registered agent for service of process is

ROBERT SIDDONS
11612, ROOM 2244, BUILDING 1, SUITE 200
AUSTIN, TEXAS 78733.

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Edward Vilano
Appeals Judge

CONCUR:

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Thomas A. Knapp
Appeals Judge

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Robert W. Potts
Appeals Judge