APPEAL NO. 023060-s
FILED JANUARY 21, 2003

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A contested case hearing was held on October 21, 2002. The hearing was reconvened and the record closed on October 25, 2002. The hearing officer resolved the disputed issues by deciding that (1) the respondent (claimant) sustained a compensable repetitive trauma injury, right carpal tunnel syndrome (CTS); (2) the claimed repetitive injury did not occur while the claimant was in a state of intoxication; (3) the date of injury is _____; (4) the appellant (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; (5) the carrier did not contest compensability in accordance with Section 409.021 and that the carrier's contest is not based on newly discovered evidence that could not reasonably have been discovered at an earlier date; and (6) the claimant has had disability resulting from the compensable repetitive trauma injury from September 18, 2002, through the date of the hearing. The carrier asserts error in each of those determinations. In his response, the claimant urges affirmance.

DECISION

Affirmed, as reformed.

CARRIER WAIVER

The hearing officer's findings that the carrier first received written notice of the claimed repetitive trauma injury on September 19, 2000, and that by Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) filed with the Texas Workers' Compensation Commission (Commission) on September 21, 2000, the carrier disputed the claim, were not challenged. At issue is the sufficiency of the dispute. The carrier argues that its TWCC-21 was sufficient to meet the requirements of Section 409.021 since the Appeals Panel has held that no "magic words" are required, citing Texas Workers' Compensation Commission Appeal No. 93326, decided June 10, 1993. In its TWCC-21, the carrier stated: "The carrier disputes entitlement to medical or indemnity benefits as the employee has tested positive for an illegal substance. Per labor code: An insurance carrier is not liable for compensation if the injury occurred while in a state of intoxication." The carrier is required to specify the grounds for the refusal to pay benefits under Section 409.022. While specific words are not required for a full and complete statement of the grounds for refusal, a fair reading must indicate why the claim is being refused. Texas Workers' Compensation Commission Appeal No. 992679, decided January 12, 2000. In general, the carrier is limited to and bound by the grounds set forth in the TWCC-21 it files, unless the new defense is based on newly discovered evidence. Section 409.022(b); Texas Workers' Compensation Commission Appeal No. 960949, decided June 28, 1996. The hearing officer was therefore faced with analyzing whether the carrier was limited in offering other defenses to the claim.

Giving the statement on the TWCC-21 its plain meaning, it is apparent that the carrier's dispute of this claim was based solely on intoxication. There is simply nothing in the TWCC-21 from which it could reasonably be determined that the carrier was raising a course and scope defense or a timely notice defense. If the carrier had listed more than one reason for contesting or disputing the claim, the hearing officer could have considered each of those reasons in order to determine if any were sufficient to raise another defense. However, where, as here, a single reason for disputing the claim is advanced, the hearing officer could not consider any other defenses. Accordingly, we reform Conclusion of Law No. 6 to read as follows: The carrier's contest of compensability in accordance with Section 409.021 was not sufficient to raise a defense other than intoxication. Because we have affirmed the determination that the carrier waived its right to raise a course and scope defense and to raise a timely notice defense, we will not further discuss the injury and notice issues on appeal.

DATE OF INJURY

The hearing officer did not err in determining that the date of the repetitive trauma injury is _____. For a repetitive trauma injury (occupational disease), Section 408.007 defines the date of injury as "the date on which the employee knew or should have known that the disease may be related to the employment." The hearing officer specifically found that the claimant's right hand and wrist symptoms progressed and that on _____, the claimant was diagnosed with right CTS and informed that his condition may be related to his employment. Our review of the record does not demonstrate that the challenged determination is so against the great weight of the evidence as to be clearly wrong or manifestly unjust; therefore, no sound basis exists for us to reverse that determination on appeal. Pool v. Ford Motor Co., 715 S.W.2d 629 (Tex. 1986); Cain v. Bain, 709 S.W.2d 175 (Tex. 1986).

DISABILITY

The claimant had the burden to prove by a preponderance of the evidence that he had disability. Texas Workers' Compensation Commission Appeal No. 012361, decided November 19, 2001. Disability is defined as "the inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage." Section 401.011(16). The determination as to an employee's disability is a question of fact for the hearing officer. Texas Workers' Compensation Commission Appeal No. 92147, decided May 29, 1992. In this instance, the hearing officer determined that the claimant's disability began on September 18, 2002, when he began treating with Dr. M and was placed on restricted duty. She was acting within her province as the fact finder in so finding. Our review of the record does not demonstrate that the hearing officer's disability determination is so contrary to the overwhelming weight of the evidence to compel its reversal on appeal. Although another fact finder may well have drawn different inferences from the evidence concerning disability, which would have supported a different result, that does not provide a basis for us to reverse the disability determination on appeal. Salazar v. Hill, 551 S.W.2d 518 (Tex. Civ. App.-Corpus Christi 1977, writ ref'd n.r.e.).

INTOXICATION

Finally, we consider the carrier's contention that the hearing officer erred in determining that, due to the nature of the claimed injury, the positive urinalysis was not sufficient probative evidence of intoxication to rebut the presumption of sobriety. Section 401.011(36) defines a "repetitive trauma injury" as "damage or harm to the physical structure of the body occurring as the result of repetitious, physically traumatic activities that occur over time and arise out of and in the course and scope of employment." Section 406.032(1)(A) provides that an insurance company is not liable for compensation if "the injury **occurred** while the employee was in a state of intoxication." (Emphasis added.) At best, the carrier's evidence can be interpreted to show that the claimant may have been intoxicated on (a day after incident), the date of the drug test. However, because the claimant sustained a compensable repetitive trauma injury, by definition his injury occurred over time. Thus, the hearing officer did not err in determining that the carrier presented insufficient evidence to shift the burden, in that the evidence of intoxication did not demonstrate that the claimant was intoxicated when the injury occurred. That is, the carrier failed in its burden to present probative evidence of intoxication in this case, because it did not produce evidence from which it could be determined that the claimant was intoxicated over the period of time that he was engaged in the repetitious, physically traumatic activities that caused his injury. Rather, it produced evidence of potential intoxication on a single day. Under those circumstances, we cannot agree that the hearing officer erred in determining that the carrier failed to rebut the presumption of sobriety such that the burden shifted to the claimant to prove that he had the normal use of his mental or physical faculties.

As modified, the hearing officer's decision and order are affirmed.

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

CORPORATE SERVICES COMPANY
800 BRAZOS STREET
AUSTIN, TEXAS 78701.

_____
Elaine M. Chaney
Appeals Judge

CONCUR:

_____
Chris Cowan
Appeals Judge

_____
Edward Vilano
Appeals Judge