

APPEAL NO. 990738

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 March 2, 1999. She (hearing officer) determined that the appellant (claimant) did not sustain a compensable injury while in the course and scope of his employment, that he did not have disability, that the alleged compensable injury did not extend to claimant's hypertension and cardiomyopathy, and that respondent (carrier) did not waive the right to contest the compensability of claimant's claim. Claimant appeals only the course and scope and carrier waiver determinations, both on sufficiency grounds. Claimant did not appeal the determinations regarding extent of injury or disability. Carrier responds that the Appeals Panel should affirm the hearing officer's decision and order.

DECISION

We affirm.

Claimant first contends the hearing officer erred in determining that he did not sustain a compensable injury while in the course and scope of his employment. Claimant asserts that the evidence established that he was injured while test driving a motorcycle that was to be used as part of claimant's job duties in creating a "motorcycle ministry." Regarding the background facts, briefly, claimant testified that he sustained injuries to his head, face, and elbow, as well as other injuries, in a motorcycle accident. Claimant said he had intended that the church where he was employed as a minister (employer) would purchase the motorcycle for his use in a proposed motorcycle ministry. Claimant said he had planned to ride the motorcycle up to the church altar and he was practicing for that event. Claimant testified that he intended to attract motorcycle-riding professionals to the congregation as a result of the alleged proposed motorcycle ministry. Claimant asserted that this showed that he was in the course and scope of his employment and furthering church business when the motorcycle accident occurred.

The claimant in a workers' compensation case has the burden to prove by a preponderance of the evidence that he or she sustained a compensable injury in the course and scope of employment. Johnson v. Employers Reinsurance Corporation, 351 S.W.2d 936 (Tex. Civ. App.-Texarkana 1961, no writ). The 1989 Act defines "injury" as damage or harm to the physical structure of the body and a disease or infection naturally resulting from the damage or harm. Section 401.011(26). A claimant may meet his burden to establish an injury through his own testimony, if the hearing officer finds the testimony credible. See Texas Workers' Compensation Commission Appeal No. 92083, decided April 16, 1992.

Where there are conflicts in the evidence, the hearing officer resolves the conflicts and determines what facts the evidence has established. As an appeals body, we will not substitute our judgment for that of the hearing officer when the determination is not 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); Texas Workers' Compensation Commission Appeal No. 950456, decided May 9, 1995.

There was some testimony that claimant had intended to start a motorcycle ministry and that he was test driving the motorcycle in question as part of his alleged job duties in creating the motorcycle ministry. However, the hearing officer was the judge of the credibility of the witnesses and medical evidence and he determined whether this evidence was credible. As the fact finder, he considered the issue of whether claimant's injury on _____, occurred while claimant was in the course and scope of his employment, and he resolved this issue against claimant. The hearing officer stated that he did not find claimant's testimony to be credible. The hearing officer obviously did not believe claimant's testimony regarding the use of the motorcycle he was test driving as part of an alleged "motorcycle ministry." We will not substitute our judgment for his regarding credibility because the hearing officer's determination is not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain, *supra*. Given our standard of review we will not overturn the hearing officer's decision. *Id.*

Claimant complains that various fact findings made by the hearing officer do not establish that claimant was not in the course and scope of employment. However, claimant's complaints with regard to these fact findings are, in effect, contentions that the hearing officer should have believed claimant's testimony about whether he was in the course and scope of his employment at the time of the motorcycle wreck. Again, hearing officer was the sole judge of the credibility of the evidence and we will not substitute our judgment for his in that regard.

Claimant contends the hearing officer erred in determining that Ms. R, claimant's administrative assistant, "did not mention any awareness of claimant's intention to purchase the motorcycle for use in a motorcycle ministry." Claimant contends that Ms. R testified that she had heard of this proposed motorcycle ministry. However, reading the hearing officer's determinations in sequence, it appears that the hearing officer was referring to Ms. R's transcribed oral statement rather than her testimony at the CCH. In her statement, which was taken on August 6, 1998, before the CCH, she did not state that claimant intended to start a motorcycle ministry. Instead, she said that claimant owned a boat that he made available to the congregation members and that claimant had also mentioned buying a motorcycle with church funds that would be "like" the boat. We perceive no error.

Claimant contends the hearing officer erred in determining that carrier did not waive the right to contest the compensability of the claimed injury of _____. The hearing officer determined, and claimant apparently does not dispute, that carrier first received written notice of the claimed injury on July 21, 1998. 60 days after July 21, 1998, was September 19, 1998. Carrier filed a Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) on July 31, 1998, which the hearing officer found was the first TWCC-21. On that TWCC-21, carrier stated, in box 43:

Employer is continuing [claimant's] full pay. TWCC-3 [Employer's Wage Statement] and TWCC-2 [Employer's Report for Reimbursement of Voluntary Payments] have been sent to employer. Carrier is continuing to investigate.

Claimant contends that that July 31, 1998, TWCC-21 constituted a "dispute" or contest of compensability and that carrier is limited to the grounds stated in the first TWCC-21. The

hearing officer determined that claimant did not file a dispute when it filed its first TWCC-21. Carrier filed a second TWCC-1 on September 11, 1998, in which it asserted that claimant was not in the course and scope of his employment and that he deviated from his employment as a pastor in riding the motorcycle.

Section 409.021 provides, in pertinent part as follows:

(a) An insurance carrier shall initiate compensation . . . promptly. Not later than the seventh day after the date on which an insurance carrier receives written notice of an injury, the insurance carrier shall:

- (1) begin the payment of benefits as required by this subtitle; or
- (2) notify the commission and the employee in writing of its refusal to pay

(b) An insurance carrier shall notify the commission in writing of the initiation of income . . . benefit payments in the manner prescribed by commission rules.

(c) If an insurance carrier does not contest the compensability of an injury on or before the 60th day after the date on which the insurance carrier is notified of the injury, the insurance carrier waives its right to contest compensability. The initiation of payment by an insurance carrier does not affect the right of the insurance carrier to continue to investigate or deny the compensability of an injury during the 60-day period.

(d) An insurance carrier may reopen the issue of the compensability of an injury if there is a finding of evidence that could not reasonably have been discovered earlier.

(e) An insurance carrier commits a violation if the insurance carrier does not initiate payments or file a notice of refusal as required by this section. . . .

Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 124.6 (Rule 124.6) provides that a carrier that refuses to begin paying temporary income benefits (TIBS) shall notify the commission and the claimant by means of a TWCC-21 which is to contain "a full and complete statement of the grounds for the carrier's refusal to begin payment of benefits." Rule 124.6(a). This notice must be filed no later than the seventh day following receipt of written notice of the injury. If the carrier disputes compensability after the payment of benefits has begun, the carrier must file a notice of the refused or disputed claim no later than the 60th day after receiving written notice of the injury. Rule 124.6(c). Payment or denial of payment of a medical bill is to be made in accordance with Section 408.027 (which essentially provides for payment no later than 45 days after the bill is received). But if a carrier contends that no medical benefits are due because the claimed injury was not compensable, the TWCC-21 disputing or contesting medical benefits must be filed with the commission and claimant no later than the 60th day after receipt of written notice of injury. Finally, Section 409.022 provides essentially that the TWCC-21 must specify the grounds for refusal to pay benefits and these grounds constitute the only basis for the carrier's defense on the issue of compensability absent newly discovered evidence that could not reasonably have been discovered earlier.

The carrier's first written notice of the claimed injury was received July 21, 1998. On July 31, 1998, the carrier filed a TWCC-21 with the commission. On that TWCC-21, carrier did not dispute or state that medical benefits were not due. This first TWCC-21 was not filed within seven days. On September 11, 1998, carrier filed a second TWCC-21 contesting compensability on the ground that claimant had deviated from the course and scope of employment when the accident occurred. This TWCC-21 was filed within the 60-day period.

The hearing officer found that the first TWCC-21 did not constitute a refusal to pay benefits or a dispute of the claim. The hearing officer stated that the reason why carrier did not begin to pay benefits is because employer continued claimant's salary at full pay. The hearing officer determined that the second TWCC-21 disputing compensability was filed before the 60th day after carrier had received written notice of injury. The hearing officer determined that carrier did not waive the right to contest compensability by failing to contest compensability in the initial TWCC-21.

In Texas Workers' Compensation Commission Appeal No. 960949, decided June 27, 1996, the Appeals Panel noted that the carrier in that case did not initiate payment of benefits or file a TWCC-21 within seven days of written notice of the claimed injury even though the notice indicated lost time began on the day of the injury. The Appeals Panel said that that carrier could still, subject to possible administrative penalty, assert a defense by means of a TWCC-21 filed within 60 days of written notice of the claimed injury, but that its defenses would be limited to those asserted in the initial TWCC-21 and could not be supplemented in a later TWCC-21. The Appeals Panel determined that the first TWCC-21 filed in that case did not constitute a refusal to pay the claim.

As in Appeal No. 960949, *supra*, the hearing officer could find from the evidence that carrier was not filing a dispute when it filed its first TWCC-21. Although box 43 on the TWCC-21 is filled in, carrier did not state a basis for dispute. Further, carrier acknowledged that employer was continuing to pay claimant; seemingly as its reason for failing to begin paying TIBS. Carrier did not state that claimant is not entitled to TIBS or indicate that it believes the injury is not compensable. Therefore, we conclude that carrier second TWCC-21 constituted its first dispute of compensability, which was filed within the 60-day period. We conclude that the hearing officer did not err in determining that carrier did not waive the right to contest compensability in this case.

We affirm the hearing officer's decision and order.

Judy Stephens
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Alan C. Ernst
Appeals Judge