

APPEAL NO. 990888

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 13, 1999. With respect to the issues before her, the hearing officer determined that the appellant (claimant) did not sustain a compensable injury in the form of an occupational disease; that the claimant did not timely report his alleged injury to his employer and did not have good cause for his failure to do so; that the claimant did not make an election of remedies by applying for and receiving short-term disability benefits; that the claimant did not have disability within the meaning of the 1989 Act because he did not sustain a compensable injury; and that the respondent (carrier) did not waive its right to contest compensability of the claimant's alleged occupational disease injury because it filed its contest within 60 days of the date it received its first written notice of the claimed injury. The parties resolved an issue as to the date of injury of the alleged occupational disease by stipulating that the date the claimant knew or should have known that his injury may be work related was _____. In his appeal, the claimant only challenges the determination that the carrier timely contested compensability of the claimed injury, arguing that there is "no proof" that the carrier's Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) was filed in September 1998 as the hearing officer found. In its response, the carrier urges affirmance.

DECISION

Affirmed.

Our factual recitation will be abbreviated because only the issue of whether the carrier timely contested compensability of the alleged occupational disease injury is before us on appeal. It is undisputed that the carrier received its first written notice of the claimed injury on August 26, 1998. Ms. R, an adjuster with the carrier, testified that in September 1998 she and her supervisor had a "roundtable" discussion concerning the claimant's claim and the decision was made to contest compensability. She stated that she completed the TWCC-21 and sent it regular mail to the Texas Workers' Compensation Commission (Commission). Ms. R testified that she also sent a copy of the TWCC-21 to the claimant and to the carrier's Austin representative. She stated that the TWCC-21 was not returned to the carrier undelivered and that she did not have any indication that it did not reach the Commission.

The claimant introduced a copy of a TWCC-21 dated September 3, 1998, contesting the compensability of the left knee occupational disease injury made the basis of this claim. That copy is date-stamped as having been received by the field office handling the claimant's claim on December 1, 1998. The carrier did not introduce a file-stamped copy of the TWCC-21 reflecting a September 1998 date of receipt at the hearing, apparently because it was not located in the claim file. However, on appeal, the carrier attached a copy of the September 3, 1998, TWCC-21, which is date-stamped as having been received in the field office on September 8, 1998. The carrier explained that it filed a request for a copy of all TWCC-21s filed in another of the claimant's claim files after a similar request in

this case failed to produce a TWCC-21 date-stamped before December 1, 1998. In response to that request, the carrier received the date-stamped copy of the TWCC-21 it filed in September 1998 to contest this claim.

The claimant contends that the hearing officer erred in determining that the carrier did not waive its right to contest compensability of the alleged occupational disease injury in this instance. The claimant maintains that the carrier did not prove that it timely filed its TWCC-21. Section 409.021(c) provides in part that if a carrier does not contest compensability of an injury on or before the 60th day after it receives its first written notice of the injury, the carrier waives its right to contest compensability. The claimant cites Texas Workers' Compensation Commission Appeal No. 982731, decided January 6, 1999, and argues that, under the guidance of that case, there was insufficient evidence to support the hearing officer's determination that the TWCC-21 was "filed" with the Commission in September 1998. Appeal No. 982731 does not necessitate reversal in this case. In that case we noted that the hearing officer was not required to accept an adjuster's testimony as to the date the TWCC-21 was mailed over a date-stamped copy of the document. However, contrary to the claimant's assertions, Appeal No. 982731 does not preclude a hearing officer from doing so. The issue of whether and when a TWCC-21 was filed was a fact question for the hearing officer to determine. The hearing officer is the sole judge of the weight and credibility to be given to the evidence before her. Section 410.165. She was free to consider the testimony of Ms. R regarding the preparation and mailing of the TWCC-21 in determining whether it was filed with the Commission. Texas Workers' Compensation Commission Appeal No. 981321, decided July 29, 1998. The hearing officer determined that the carrier mailed the TWCC-21 to the Commission in September 1998, as Ms. R testified, and that it was received by the Commission shortly thereafter. The hearing officer apparently was convinced that the document was received despite the fact that it was not a part of the claim file. She was free to make that determination on the basis of the adjuster's testimony alone. Nonetheless, we note that the hearing officer's determination in that regard was confirmed when the carrier obtained a file-stamped copy of the September 3, 1998, TWCC-21 contesting compensability of this injury that had mistakenly been filed in another of the claimant's claim files.

The hearing officer's decision and order are affirmed.

Elaine M. Chaney
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

CONCUR IN THE RESULT:

Alan C. Ernst
Appeals Judge