

APPEAL NO. 991445

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On June 7, 1999, a contested case hearing (CCH) was held. She (hearing officer) determined that the respondent (claimant) sustained a compensable injury, that appellant (carrier) waived the right to contest the compensability of claimant's \_\_\_\_\_, injury, that claimant filed a claim within one year, and that claimant had disability from (alleged date of injury), to the date of the CCH. Carrier appeals these determinations on sufficiency grounds. The file does not contain a response from claimant.

DECISION

We affirm in part and reverse and remand in part.

Carrier contends that the hearing officer erred in determining that claimant timely filed a claim for her \_\_\_\_\_, injury within one year. Carrier asserts that there was no evidence that claimant's Employee's Notice of Injury or Occupational Disease and Claim for Compensation (TWCC-41) was timely received by the Texas Workers' Compensation Commission (Commission).

Claimant testified that she mailed a TWCC-41 for her \_\_\_\_\_, injury to the Commission in December 1996. A copy of a TWCC-41 dated December 28, 1996, gives a date of injury of "(alleged date of injury)" and states that claimant injured her back moving a crate of frozen food with her foot. Most of the spaces on the TWCC-41 are filled in with handwriting, but a few spaces, including the date, are typewritten. Claimant said she thought the (alleged date of injury), date of injury may have been typed in because that was the date she was taken off work.

Section 409.003 provides, in pertinent part, that an employee or a person acting on the employee's behalf shall file with the Commission a claim for compensation for an injury not later than one year after the date on which the injury occurred. Whether claimant filed a TWCC-41 involved a fact issue for the hearing officer. Texas Workers' Compensation Commission Appeal No. 94568, decided June 17, 1994. We note that there was some evidence that there was confusion on the part of claimant, claimant's doctors, and the Commission regarding claimant's claim files for her three workers' compensation injuries. Claimant said she had filed two other workers' compensation claims for injuries sustained while working for employer and that she believes that her claim files were mixed together at the Commission. Claimant said she had a 1990 carpal tunnel syndrome (CTS) injury sustained at employer during a period of time when employer's workers' compensation carrier was (carrier B). Claimant said she also had a (prior date of injury), injury that included CTS, her neck, and her shoulder, and that the workers' compensation insurance carrier for this injury and her \_\_\_\_\_, back injury was carrier. Claimant said she found

out in July 1998 that the Commission did not have a claim file open for the \_\_\_\_\_, back injury. A July 21, 1998, notice letter from the Commission states that the Commission "inadvertently established duplicate files on" her claim regarding her (prior date of injury), (CTS, neck and shoulder) injury. (Dr. G) signed an August 11, 1997, Initial Medical Report (TWCC-61) that states a date of injury of (prior date of injury), mentions CTS and cervical pain, but includes in the diagnoses, "low back mechanical pain." In the TWCC-61, Dr. G states that claimant was injured in 1990 and "reinjured in 1996." In a report dated the same date, Dr. G stated that claimant's 1990 injury was to her hands, that her 1996 back injury was caused by pushing a cart, that her lumbar area is inflamed, and that her diagnoses included "radicular back pain" and "muscle spasm." This indicates that Dr. G was including a back injury in the (prior date of injury), claim. The hearing officer determined that claimant did send a TWCC-41 to the Commission in December 1996 regarding her \_\_\_\_\_, back injury, but that it was lost.

Carrier contends that the hearing officer confused claimant's testimony regarding whether claimant received a "reply from the Commission" soon after allegedly mailing the TWCC-41 to the Commission in December 1996. In the decision and order, the hearing officer stated that claimant testified that she filed a claim with the Commission in December 1996 and that "she said she received a reply from the Commission because the date of injury on the claim was incorrect." The hearing officer stated that the TWCC-41 may have been lost after it was returned to claimant for corrections. However, claimant did not testify that the Commission replied or returned a 1996 TWCC-41 to her for corrections. In Finding of Fact No. 8, the hearing officer determined that "claimant filed a claim for compensation regarding the \_\_\_\_\_, injury with the Commission on December 28, 1996." We conclude that the hearing officer's determination in Finding of Fact No. 8 is so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust and we reverse it. However, we would note that a doctor bill or report received by the Commission could also constitute a "claim" for purposes of Section 409.003(1). Texas Workers' Compensation Commission Appeal No. 94546, decided June 7, 1994; Cadengo v. Compass Insurance Co., 721 S.W.2d 415 (Tex. App.- Corpus Christi 1989, no writ). The Appeals Panel may affirm the judgment of the fact finder if it can be sustained on any reasonable theory supported by the evidence. See Texas Workers' Compensation Commission Appeal No. 93502, decided August 4, 1993. In this case, the TWCC-61 from (Dr. A) regarding the \_\_\_\_\_, back injury also could be considered as a "claim." Texas Workers' Compensation Commission Appeal No. 962230, decided December 23, 1996; Texas Workers' Compensation Commission Appeal No. 970713, decided June 4, 1997. In the decision and order, the hearing officer stated that the Commission received Dr. A's TWCC-61 on June 19, 1996, and this is supported by the received stamp on the document. We conclude that the hearing officer did not err in determining that a claim was timely filed within one year.

Carrier contends the hearing officer's determination that claimant sustained a compensable back injury is not supported by sufficient evidence. Carrier asserts that: (1)

the incident at work did not cause an injury; (2) claimant failed to immediately report an injury or seek medical assistance; (3) claimant had experienced prior problems with her back; and (4) the MRI findings are not necessarily indicative of an injury.

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.

Claimant testified that on \_\_\_\_\_, she was pushing a box with her foot when she felt a sharp pain from her buttocks down her legs, with resulting numbness. Claimant said she called her boss, (Mr. T), to report an injury and he filled out an Employer's First Report of Injury or Illness (TWCC-1) and said he would forward it to the Commission. In a handwritten statement, Mr. T said claimant called in to report a low back injury in May 1996 and that a TWCC-1 was "filled out and forwarded at that time." He said claimant told him she injured herself pushing cases of food with her foot. The TWCC-1 was not received by the Commission. Claimant testified that she had soreness in her back after her injury and that her symptoms began to increase. She said she had a routine appointment with her family doctor, Dr. A, on May 30, 1996, and that she told him about her back injury. The record contains a TWCC-61 from Dr. A that reports a back injury from moving a box at work, with a stated date of injury of \_\_\_\_\_. A stamp indicates that the TWCC-61 was marked "received" by the Commission on June 19, 1996. An imaging request form from Dr. G, apparently created in late 1997, lists a date of injury of (prior date of injury), but requests preauthorization for an MRI of the lumbar spine and mentions radicular symptoms. A December 1997 MRI report states that claimant had moderate degenerative disc disease without evidence of herniation. Claimant said Dr. G was treating her for all of her injuries.

The hearing officer determined that claimant sustained an injury to her back while moving a box of frozen vegetables with her foot. The hearing officer resolved the conflicts in the evidence and determined that claimant sustained a compensable back injury. The hearing officer could and did find from the evidence that claimant sustained a back injury

even though she did not immediately seek medical attention and even though the MRI report does not show a herniation. We will not substitute our judgment for the hearing officer's because her determination is not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain, supra. We affirm the determination that claimant sustained a compensable injury.

Carrier next challenges the sufficiency of the evidence to support the hearing officer's disability determination. Carrier asserts that claimant did not have disability because she did not timely file a claim. We have already affirmed the hearing officer's determination that a claim was timely filed and we reject this contention. Carrier next asserts that claimant's testimony did not support the disability finding and that the reason claimant was taken off work was because of her prior CTS injury and not because of her back injury. We apply the Cain, supra, standard of review to this challenge.

The hearing officer determined that claimant had disability from (alleged date of injury), through the date of the CCH. Claimant said (Dr. Z) took her off work on (alleged date of injury), because of her wrist injury. Claimant indicated that she had been placed on light-duty status after her back injury, that employer provided a helper for two months, and that she then obtained help with her work in other ways after that. Claimant testified that she believed her back injury has prevented her from performing full-duty work. In a May 1996 report, Dr. A stated that claimant had a lumbosacral strain and that she should avoid frequent bending and lifting. In an August 25, 1998, report, Dr. G discussed claimant's lumbar injury, the problems with her workers' compensation claim, and said that "at this time we feel [claimant] is unable to obtain gainful employment." This evidence and the claimant's testimony about her ability to work due to this injury support the hearing officer's disability determination. The Appeals Panel has said that "a restricted release to work, as opposed to an unrestricted release, is evidence that the effects of the injury remain, and disability continues." Texas Workers' Compensation Commission Appeal No. 92432, decided October 2, 1992. Claimant indicated that she was taken off work due to her wrist injury, but also said that she continued to have back problems that limited her ability to function. The hearing officer could and did find from this evidence that claimant's back injury was a cause of her disability after (alleged date of injury). We will not substitute our judgment for the hearing officer's because her disability determination is not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain.

Carrier next contends that the hearing officer erred in determining that it waived the right to contest the compensability of claimant's claim. Carrier asserts that the hearing officer erred in determining that, pursuant to Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 124.1(d) (Rule 124.1(d), it was presumed to have received Dr. A's TWCC-61 on June 19, 1996, the date that it was received by the Commission. The hearing officer determined that carrier did not file a dispute until September 21, 1998. The TWCC-61 referred to by the hearing officer states that the carrier for the employer is carrier B, which is not the carrier in

this case. Dr. A mistakenly listed the wrong carrier in the TWCC-61, perhaps because carrier B was the carrier for claimant's prior 1990 CTS claim.

Section 409.021(c) provides in part that 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. Rule 124.6(c) provides in part that if a carrier disputes compensability after payment of benefits has begun, the carrier shall file a notice of refused or disputed claim on or before the 60th day after the carrier received written notice of the injury or death. Rule 124.1(a) provides that written notice of injury as used in Section 409.021 consists of the insurance carrier's earliest receipt of: (1) the employer's first report of injury; (2) the notification provided by the Commission under subsection (c) (of Rule 124.1); or (3) if no first report of injury has previously been filed by the employer, any other notification regardless of source, which fairly informs the insurance carrier of the name of the injured employee, the identity of the employer, the approximate date of the injury, and facts showing compensability.

Because the wrong carrier was listed on Dr. A's TWCC-61, we conclude that the hearing officer should not have applied the presumption of See Rule 124.1(d). If the wrong carrier was listed on the TWCC-61, it is unlikely that carrier received Dr. A's TWCC-61 at the same time that the Commission received it. It is more likely that, if a copy was mailed to an insurance carrier, any such copy was sent to the carrier listed on the TWCC-61: carrier B. We conclude that the hearing officer's determination that carrier received Dr. A's TWCC-61 on June 19, 1996, is against the great weight and preponderance of the evidence and we reverse it. We also reverse the determination that carrier waived the right to contest compensability of the claimed injury. Because this is an issue-driven dispute resolution system, we remand the carrier waiver issue to the hearing officer for reconsideration.

We affirm that part of the hearing officer's decision and order that determines that claimant sustained a compensable injury, that she had disability, and that a claim was filed within one year. We reverse the hearing officer's determination regarding carrier waiver and remand that issue for reconsideration consistent with this decision.

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 Commission's Division of Hearings, pursuant to Section 410.202. See Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

Judy L. Stephens  
Appeals Judge

CONCUR:

Philip F. O'Neill  
Appeals Judge

Gary L. Kilgore  
Appeals Judge