

APPEAL NO. 001263

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on May 3, 2000. The issues were restated and the hearing officer's decision lists the issues thusly:

1. Did the claimant [appellant] sustain a compensable injury on \_\_\_\_\_.
2. Did the claimant have disability from October 15, 1999 to the present resulting from the injury sustained on \_\_\_\_\_.
3. Is the carrier [respondent] relieved from liability under § 409.002 because of the claimant's failure to timely notify his employer pursuant to § 409.001.
4. Did the carrier waive the right to contest the compensability of the claimed injury by contesting compensability based on the claimant's failure to timely notify his employer.

The fourth issue was reformed in an amended benefit review officer's report as follows:

5. Did the carrier waive the right to contest the compensability of the claimed injury by contesting compensability within 60 days of being notified of the injury.

The fourth issue as discussed by the parties is more accurately reformed as follows:

6. Is the Carrier's TWCC-21 [Payment of Compensation or Notice of Refused/Disputed Claim] filed on November 18, 1999 sufficient to dispute that an injury occurred in the course and scope of employment?

With regard to those issues, the hearing officer determined that the claimant sustained a compensable injury on \_\_\_\_\_ (all dates are 1999 unless otherwise noted); that the claimant had disability from October 15 through the date of the CCH (May 3, 2000); that the claimant timely notified the employer of his injury; and that the carrier's TWCC-21, when fairly read, disputed that the injury occurred in the course and scope of employment. Not timely appealed were the issues that the claimant sustained a compensable injury on \_\_\_\_\_ and that the claimant timely notified his employer of the injury. The claimant appealed the findings and conclusion regarding disability, specifically that disability ended on May 3, 2000, and that the carrier's TWCC-21 fairly and adequately contested injury in

the course and scope of employment, alleging that the TWCC-21 contested only the timely notice to the employer. The carrier filed a response, timely as a response but untimely as an appeal, seemingly contesting disability (the carrier argues that the claimant “did not suffer any disability”) and otherwise requesting affirmance. We will consider the carrier’s response only in that it responds to the claimant’s appeal.

## DECISION

Affirmed.

As noted, the hearing officer basically found in favor of the claimant but the claimant has appealed the hearing officer’s determination on the extent of disability as not being in the course and scope of employment and questions whether the carrier’s TWCC-21 contested compensability. Consequently, our factual recitation will be limited to the appealed issues.

The claimant was employed as a television repairman and the hearing officer found that he sustained a compensable hand/wrist injury on \_\_\_\_\_. The claimant had left wrist surgery on November 2. The hearing officer found disability, which is defined in Section 401.011(16) as the inability to obtain and retain employment at the preinjury wage because of a compensable injury, beginning October 15, when the claimant was placed on light duty and subsequently when the claimant was taken off work altogether for his surgery. The claimant’s treating doctor in 2000 was Dr. Y, who, on a “Disability Certificate” dated March 1, 2000, has the claimant off work “from 4-3-00 to undetermined.” No other doctor has released the claimant to work and the claimant testified that he is unable to work.

The appealed determinations are:

### FINDINGS OF FACT

7. [Dr. B] limited Claimant to light duty work after the November 2, 1999 surgery. [Dr. Y] has limited Claimant’s employment until the date of the hearing on May 3, 2000.
8. Claimant’s \_\_\_\_\_ injury prevented Claimant from obtaining and retaining employment at wages he earned before \_\_\_\_\_ from October 15, 1999 and continuing until May 3, 2000 the day of the hearing.
9. On November 18, 1999 Carrier filed a TWCC-21 stating in block 14 that it first received written notice on November 11, 1999. The TWCC-21 stated follows: “In accordance with Texas Labor Code 409.002 the carrier is relieved of liability of the alleged injury since the employee did not timely notify the employer or supervisor of an on the

job injury within 30 days of the alleged injury. Therefore pursuant to Texas Labor Code 406.031 the carrier denies the employee suffered an injury in the course and scope of employment and denies compensability.” Although not artfully drafted a fair reading of the TWCC-21 indicates Carrier is disputing that Claimant had an injury in the course and scope of employment.

### **CONCLUSIONS OF LAW**

5. Because Claimant has shown by a preponderance of the evidence that his \_\_\_\_\_ injury caused him to be unable to obtain and retain employment at wages he earned before \_\_\_\_\_ from October 15, 1999 and continuing until the date of the hearing on May 3, 2000, he has disability and is entitled to TIBS [temporary income benefits] for such period.
6. Because Carrier’s TWCC-21 fairly read is sufficient to dispute that an injury occurred in the course and scope of employment, the injury did not become compensable by operation of waiver.

The hearing officer limited the claimant’s disability to May 3, 2000, because that was the date of the CCH and a finding of an inability to obtain and retain employment at the preinjury wage because of the compensable injury beyond that date would involve speculation, conjecture, and guess as to a prospective end date of disability some time in the future. It will be the claimant’s burden to prove disability continued after the date of the CCH.

The carrier, at the CCH, contended both that the claimant had not timely reported his injury to the employer and that the claimant had not sustained an injury in the course and scope of employment (basically because of a preexisting injury). The TWCC-21 filed within 7 days of the first written notice stated as the reason for refusing the claim:

In accordance with Texas Labor Code 409.002 the carrier is relieved of liability of the alleged injury since the employee did not timely notify the employer or supervisor of an on the job injury within 30 days of the alleged injury. Therefore pursuant to Texas Labor Code 406.031 the carrier denies the employee suffered an injury in the course and scope of employment and denies compensability.

We note that Section 406.031(a)(2) provides that a carrier is liable for compensation if “the injury arises out of and in the course and scope of employment.” The claimant argues that the word “therefore,” at the start of the second sentence, hinges that ground on the timely notice issue. The carrier argues that the word “therefore” is superfluous and should be ignored. The hearing officer found that a fair reading of the TWCC-21 is sufficient to dispute that an injury occurred in the course and scope of employment. We hold that the

hearing officer's determinations constitute a reasonable interpretation and are not incorrect as a matter of law.

Upon review of the record submitted, we find no reversible error. We will not disturb the hearing officer's determinations unless they are so against the great weight and preponderance of the evidence as to be clearly wrong or unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). We do not so find and, consequently, the decision and order of the hearing officer are affirmed.

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Thomas A. Knapp  
Appeals Judge

CONCUR:

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Elaine M. Chaney  
Appeals Judge

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Judy L. Stephens  
Appeals Judge