

APPEAL NO. 010691

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). Following a contested case hearing (CCH) held on March 13, 2001. The hearing officer resolved the disputed issues by determining that the respondent/cross-appellant (carrier) waived the right to dispute the compensability of the claimed injury by not contesting the injury in accordance with Section 409.021; that the appellant/cross-respondent (claimant) notified the employer of the claimed injury within 30 days; and that the claimant sustained a compensable injury in the form of an occupational disease. The claimant appeals, claiming that the hearing officer's determinations which are adverse to her are against the great weight of the evidence. The carrier also appeals on sufficiency grounds and requests that the determinations contrary to its position be reversed. The carrier responds to the claimant's appeal, requesting affirmance on the issues on which it prevailed.

DECISION

Affirmed, as reformed.

On _____, the claimant sustained a compensable injury while working for (employer), her employer for 15 years. She sustained an injury to her ribs and also asserted a specific injury to her neck. The carrier contested the neck injury as not part of the compensable injury. A CCH held in March 2000 determined that the neck injury was a preexisting degenerative condition and not compensable. On appeal, the decision was affirmed. Texas Workers' Compensation Commission Appeal No. 000780, decided May 30, 2000. The claimant has now asserted that she has a compensable injury to her neck in the form of an occupational disease with a date of injury of _____. At the previous CCH the claimant did not assert an occupational disease theory, but rather a specific injury.

The claimant's attorney testified to giving notice of the claimed occupational disease injury to the carrier, as admitted by the carrier in its Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) on July 21, 2000. The carrier did not contest the claim until October 6, 2000. The hearing officer determined that the carrier waived its right to contest the claim because it did not timely dispute. Section 409.021(c) of the 1989 Act provides 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." There is sufficient evidence to support the hearing officer's decision that the carrier waived its right to contest this claim.

The carrier relies on Continental Casualty Company v. Williamson, 971 S.W.2d 108 (Tex. App-Tyler 1998, no pet.) for the proposition that the carrier cannot create an injury by waiver where there is none. As to whether there was an injury, the claimant was treated by Dr. W, who issued a report on January 3, 2001, stating that "it is clear that this patient

sustained a work related injury involving her cervical/thoracic spine.” In his report, Dr. W also stated that the repetitive nature of the claimant’s occupation over the past 15 years would easily result in injury to the involved areas. The hearing officer found that the claimant “sustained a compensable injury in the form of an occupational disease.” Because there was a finding of an injurious condition in this case, Williamson does not bar the claimant’s recovery.

The claimant appeals the hearing officer’s finding that the date of injury was _____. The claimant testified that when she hired a lawyer on June 30, 2000, he explained "occupational disease" to her and that this was the first time she knew or should have known of her injury. The claimant testified that her neck started bothering her on _____, when she sustained the injury to her ribs. The hearing officer determined that whether the proper date of injury was _____, or _____, the claimant had notified her employer within 30 days of either of those dates. The hearing officer determined that the date the claimant knew or should have known she had a possible back-related injury was _____. We believe that the _____ date is a typographical error because the hearing officer in his “Statement of the Evidence and Discussion” reference two dates, _____, and _____, and all the evidence on the initial injury state the date thereof as _____. Accordingly, we reform Findings of Fact Nos. 4 and 5 to read _____.

Where the evidence is in conflict, the hearing officer is the sole judge of the weight and credibility that is to be given to the evidence. It is for the hearing officer, as trier of fact, to resolve the inconsistencies and conflicts in the evidence. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex Civ. App.-Amarillo 1974, no writ). This is equally true regarding medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). We are satisfied that the challenged determinations are sufficiently supported by the evidence. In re King’s Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). Consequently, we affirm the hearing officer’s decision as reformed.

Philip F. O’Neill
Appeals Judge

CONCUR:

Elaine M. Chaney
Appeals Judge

Michael B. McShane
Appeals Judge