

APPEAL NO. 011486
FILED AUGUST 13, 2001

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 held on June 4, 2001, with the record closing on June 5, 2001, the hearing officer determined that the appellant (claimant) sustained a repetitive trauma injury; that the date of the injury is _____; that the claimant timely reported this injury; and that the claimant has had disability since November 21, 2000. The claimant appeals the date of injury determination, contending that the date of injury should be determined to be _____. The claimant also requests the Appeals Panel to resolve "an apparent conflict" between the provision of the 1989 Act under which temporary income benefits do not commence until a claimant has been off work for one week and the provision which ends all income benefits, except for lifetime income benefits (LIBs), upon the expiration of 401 weeks from the date of injury. The claimant also asks the Appeals Panel to review certain photographs submitted after the hearing record was closed. The respondent (self-insured employer) urges in response that the evidence is sufficient to support the challenged date of injury finding.

DECISION

Affirmed.

The hearing officer did not err in finding that the claimant first knew or should have known that his employment with the employer might have caused him to sustain an injury on _____. Section 408.007 provides that the date of injury for an occupational disease is the date on which the employee knew or should have known that the disease may be related to the employment. The hearing officer states in her discussion of the evidence that fixing the date of injury for the claimant's repetitive trauma injury is "extremely difficult," given the state of the evidence. The claimant testified that in 1985 he commenced employment with the self-insured employer as a groundskeeper and drove a tractor on a daily basis; that at sometime in the 1991-1992 period he began to experience numbness and pain in his left toes, which radiated up his leg and into his hip; that since he had arthritis in his upper extremities, he assumed his left leg problems were also due to arthritis; and that he was treated for these symptoms by his family doctor, Dr. F. He contended below and iterates on appeal that he thought all along that his lower extremity symptoms were attributable to arthritis and that he did not know he had a work-related lumbar spine injury until he was advised of such on September 19, 2000, by Dr. L, the referral orthopedic surgeon who operated on his disc herniation at L4-5 in January 2001. The second opinion for spinal surgery report of Dr. T, dated December 13, 2000, states that the claimant's low back pain and bilateral leg pain, worse on the left, "has been an accumulative effect of what he says is 14 years of driving a tractor with no shock absorbers." A medical report from Dr. L dated March 1, 1996, reflects that the claimant was then being considered for spinal surgery. The claimant denied having seen Dr. L at that time, suggesting that the date on the letter is a typographical error.

Mr. B, the supervisor of grounds and operations for the self-insured employer, testified in a deposition that in the 1991-1992 period he worked with the claimant as a groundskeeper; that in 1993 he was promoted to "leader man"; and that still later he was promoted to his current position. He stated that while working with the claimant as a groundskeeper the claimant complained about numbness and pain in his toes; that they discussed these symptoms; and that the claimant attributed them to the frequency of his operation of a clutch when driving the tractor. Mr. B also stated that after he became a leader man he and the claimant continued to discuss the claimant's symptoms, which progressed to radiation up the leg and into the hip, and to the other lower extremity; and that he, Mr. B, reported the claimant's complaints to Mr. C, the supervisor at that time. They surmised that no written accident report was prepared at that time because a specific accidental injury had not been reported.

The hearing officer is the sole judge of the weight and credibility of the evidence (Section 410.169(a)) and, as the trier of fact, resolves the conflicts and inconsistencies in the evidence and determines what facts have been proven by the evidence (Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ)). We are satisfied that the hearing officer's determination of the claimant's date of injury is not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. The hearing officer could conclude that the claimant knew or should have known that he had a work-related injury when he was discussing his symptoms with Mr. B prior to January 1, 1993, and that he did not have to wait until an orthopedic surgeon related to him on September 19, 2000, a specific diagnosis, namely, his L4-5 disc lesion, before knowing he had a work-related injury.

The claimant also complains that the provisions of Section 408.083 effective for dates of injury before September 1, 1995, terminates income benefits (except LIBs) on the expiration of 401 weeks after the date of injury whereas the version of that statute effective for dates of injury after September 1, 1995, contains a provision for occupational disease injuries which terminates income benefits (except LIBs) on the expiration of 401 weeks after the date on which benefits began to accrue. The claimant points out that he did not begin to lose time until November 21, 2000, and states that it would be "manifestly unjust and unfair" for the Appeals Panel to permit him to be deprived of income benefits in the event we affirm the _____, date of injury. We can only say that the claimant's plea in this regard is best addressed to the Texas Legislature.

Finally, we decline to consider photographs attached to the appeal. See Section 410.203(a). The claimant failed to meet the hearing officer's post-hearing deadline for submitting the photographs for the record.

The decision and order of the hearing officer are affirmed.

Philip F. O'Neill
Appeals Judge

CONCUR:

Judy L. S. Barnes
Appeals Judge

Robert W. Potts
Appeals Judge