

APPEAL NO. 011685
FILED AUGUST 24, 2001

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 in. The hearing officer resolved the disputed issues by deciding that the appellant/cross-respondent (claimant) sustained a compensable injury on _____; that the claimant had disability from April 20, 2000, through June 20, 2000; that the respondent/cross-appellant (self-insured) is relieved of liability under Section 409.002 because the claimant failed to timely notify the self-insured of her injury under Section 409.001 and did not have good cause for failing to timely notify the self-insured of her injury; and that the claimant is not barred from pursuing Texas workers' compensation benefits under the doctrine of election of remedies. The claimant appealed the hearing officer's decision that the self-insured is relieved of liability under Section 409.002 because the claimant failed to timely notify the self-insured of her injury and that she had disability from April 20, 2000, through June 20, 2000. The self-insured appealed the hearing officer's decision that the claimant sustained a compensable injury and that she had disability from April 20, 2000, through June 20, 2000. There is no appeal of the hearing officer's decision that the claimant is not barred from pursuing workers' compensation benefits under the election of remedies doctrine. Each party filed a response.

DECISION

Affirmed in part and reversed and rendered in part.

NOTICE OF INJURY

Section 409.001(a) provides that, for injuries other than an occupational disease, an employee or a person acting on the employee's behalf shall notify the employer of the employee of an injury not later than the 30th day after the date on which the injury occurs. Section 409.001(b) provides that the notice may be given to the employer or to an employee of the employer who holds a supervisory or management position. The claimant has the burden to show that she timely reported her injury to her employer. Travelers Insurance Company v. Miller, 390 S.W.2d 284 (Tex. Civ. App.-El Paso 1965, no writ). To be effective, notice of injury needs to inform the employer of the general nature of the injury and the fact that it is job related. DeAnda v. Home Insurance Company, 618 S.W.2d 529 (Tex. 1980). Thus, where the employer knew of a physical problem, but was not informed that it was work related, there was not notice of injury. Texas Employers' Insurance Association v. Mathes, 771 S.W.2d 225 (Tex. App.-El Paso 1989, writ denied). A claimant who fails to give timely notice of injury to his employer has the burden to show good cause for such failure. Aetna Casualty & Surety Company v. Brown, 463 S.W.2d 473 (Tex. Civ. App.-Fort Worth 1971, writ ref'd n.r.e.).

The claimant testified that she notified her supervisor that she was injured at work within a month of the claimed injury of _____. Other evidence reflected that the claimant told various people at work that she was injured at home and that she did not notify the self-insured or anyone in a supervisory or management position that she was claiming that she was injured while working for the self-insured until July 10, 2000. The self-insured's assistant human relations manager testified that neither she nor the claimant's supervisor were aware that the claimant was claiming a work-related injury until July 2000. The hearing officer found that the claimant notified the self-insured of her injury and the fact that it was work related on July 10, 2000, and that the claimant failed to show good cause for her failure to notify the self-insured within 30 days of the injury. The hearing officer concluded that the self-insured is relieved of liability under Section 409.002 because of the claimant's failure to timely notify the self-insured of her injury under Section 409.001. The claimant contends that the evidence establishes that she did give timely notice of injury to the self-insured. The hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). As the finder of fact, the hearing officer resolves the conflicts in the evidence and determines what facts have been established from the evidence presented. The hearing officer's findings and decision on the notice issue are supported by sufficient evidence and are not so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. Accordingly, the hearing officer's determinations that the claimant failed without good cause to timely notify the self-insured of her injury and that the self-insured is relieved of liability under Section 409.002 are affirmed.

COMPENSABLE INJURY

The self-insured appeals the hearing officer's finding that on _____, the claimant sustained an injury to her low back in the course and scope of her employment. Section 401.011(12) contains the definition of "course and scope of employment." There was conflicting evidence as to whether the claimant was injured in the course and scope of her employment. The claimant testified that she injured her low back assisting a bedridden patient. Generally, in workers' compensation cases, the testimony of the claimant alone may establish that an injury occurred. See Houston General Insurance Company v. Pegues, 514 S.W.2d 492, 494 (Tex. Civ. App.-Texarkana 1974, writ ref'd n.r.e.). The hearing officer's finding that the claimant sustained an injury in the course and scope of her employment is supported by sufficient evidence, is not against the great weight and preponderance of the evidence, and is affirmable.

The self-insured also appeals the hearing officer's conclusion of law that the claimant sustained a compensable injury on _____. Section 401.011(10) defines "compensable injury" as "an injury that arises out of and in the course and scope of employment for which compensation is payable under this subtitle." In the instant case, the hearing officer determined that the claimant failed without good cause to timely notify the self-insured of her injury, a determination that we are affirming. In Texas Workers' Compensation Commission Appeal No. 001855, decided September 20, 2000, the Appeals Panel stated:

The Appeals Panel has pointed out the differences between an injury in the course and scope of employment and a compensable injury. It has encouraged the proper use of those terms to avoid confusion. This is especially important in cases such as the one before us in which the issue of injury in the course and scope of employment and the issue of whether a carrier is relieved of liability because a claimant did not timely notify the employer of an injury or did not timely file a claim with the Commission, resulting in an injury sustained in the course and scope of employment not being a compensable injury are before the hearing officer.

See *also* Texas Workers' Compensation Commission Appeal No.991704, decided September 23, 1999 (wherein the Appeals Panel affirmed a hearing officer's finding that a claimant was injured in the course and scope of employment, but reversed the conclusion of law that the claimant sustained a compensable injury because the claimant did not have good cause for failing to timely report the injury to the employer and thus the carrier was relieved of liability under Section 409.002); and Texas Workers' Compensation Commission Appeal No. 951709, decided November 29, 1995 (wherein the Appeals Panel pointed out that it had held that if an injury is not timely reported, the claimant does not have a compensable injury and the claimant, as a matter of law, does not have disability). In accordance with our prior decisions construing the term "compensable injury, reverse the hearing officer's decision that the claimant sustained a compensable injury and render a decision that the claimant did not sustain a compensable injury because she failed to timely notify the self-insured of the injury.

DISABILITY

Section 401.011(16) defines "disability" as "the inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage." Both parties appeal the hearing officer's finding that "the claimant was unable to obtain and retain employment at her preinjury wages from April 20, 2000, through June 20, 2000." The claimant contends that she was unable to work due to her work-related injury from April 20, 2000, through the date of the CCH, and the carrier contends that the claimant was not unable to work. The appealed finding, which does not tie the inability to obtain and retain employment to the work-related injury and which leaves the cause of such inability open to question, is nonetheless supported by sufficient evidence, including portions of the claimant's testimony and portions of the medical records; is not against the great weight and preponderance of the evidence; and is affirmable.

Both parties also appeal the hearing officer's conclusion of law that the claimant had disability resulting from the injury sustained on _____, from April 20, 2000, through June 20, 2000. Without a compensable injury, the claimant could not have disability as defined by Section 401.011(16); therefore, we reverse the hearing officer's decision that the claimant has had disability and render a decision that the claimant has not had disability.

The hearing officer's decision that the self-insured is relieved of liability under Section 409.002 because of the claimant's failure to timely notify the self-insured of her injury under Section 409.001 is affirmed. The hearing officer's findings that the claimant sustained an injury to her low back in the course and scope of her employment and that the claimant was unable to obtain and retain employment at her preinjury wage from April 20, 2000, through June 20, 2000, are also affirmed. However, because the claimant failed without good cause to timely notify the self-insured of her injury, thus relieving the self-insured of liability under Section 409.002, the hearing officer's determinations that the claimant sustained a compensable injury and that the claimant has had disability are reversed and a decision is rendered that the claimant did not sustain a compensable injury and has not had disability.

Robert W. Potts
Appeals Judge

CONCUR:

Elaine M. Chaney
Appeals Judge

Susan M. Kelley
Appeals Judge