

APPEAL NO. 011883
FILED SEPTEMBER 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 on July 11, 2001. The appellant (claimant) appeals the hearing officer's determinations that the claimant did not sustain a compensable injury in the form of an occupational disease with a date of injury of _____; that the claimant has not had disability; and that the respondent (carrier) did not waive the right to dispute compensability of the claimed injury. The carrier responded.

DECISION

The hearing officer's decision is affirmed.

INJURY AND DISABILITY ISSUES

The hearing officer did not err in determining that the claimant did not sustain a compensable injury in the form of an occupational disease with a date of injury of May 27, 2000, and that the claimant has not had disability. A repetitive trauma injury is defined in Section 401.011(36). The claimant testified that he injured his back as a result of repetitive work activities, including shoveling mud and pulling logs. The claimant had the burden to prove that he was injured in the course and scope of his employment. Johnson v. Employers Reinsurance Corporation, 351 S.W.2d 936 (Tex. Civ. App.-Texarkana 1961, no writ). Conflicting evidence was presented at the CCH. 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. The hearing officer's decision is supported by sufficient evidence and is not so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. Without a compensable injury, the claimant would not have disability as defined by Section 401.011(16).

WAIVER ISSUE

The hearing officer did not err in determining that the carrier has not waived the right to contest compensability of the claimed injury under Section 409.021. The claimant has the burden of proving when written notice of the injury was received by the carrier. Texas Workers' Compensation Commission Appeal No. 000775, decided May 25, 2000. See *also* Texas Workers' Compensation Commission Appeal No. 001044, decided June 23, 2000.

There is evidence from the employer's testimony that the claimant notified the employer in June 2000, after he had been terminated from employment on May 27, 2000, that he had injured his back on _____. In a Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) the carrier recited that it first received written notice

of the claimant's claimed back injury of _____, on July 7, 2000, and in that TWCC-21, which was filed with the Texas Workers' Compensation Commission (Commission) on July 12, 2000, which was within 60 days of the recited date of written notice of the back injury, the carrier contested the compensability of the injury. In a subsequent TWCC-21, the carrier noted that the date of injury was now asserted to be May 27, 2000; that the claimed injury was a chest muscle; and that it first received written notice of the injury on September 8, 2000. The second TWCC-21 was filed with the Commission on September 29, 2000, which was within 60 days of the recited date of written notice of a May 27, 2000, date of injury, and in it the carrier contested the compensability of the injury.

In Texas Workers' Compensation Commission Appeal No. 981432, decided August 12, 1998, the Appeals Panel noted that where the evidence suggests that at the time the TWCC-21 is filed, there is a question as to the date of injury and whether the claimant is contending that he sustained an occupational disease or a specific injury, it would be elevating form over substance to determine that a TWCC-21 with an incorrect date of injury is ineffective to serve as a timely contest of compensability, and rendered a decision in that case that the carrier had timely contested compensability. In the instant case, the hearing officer resolved the conflicting evidence and determined that the carrier did not waive the right to dispute the compensability of the claimed injury. The hearing officer's decision that the carrier did not waive the right to contest the compensability of the claimed injury is supported by sufficient evidence and is not so against the great weight and preponderance of the evidence as to be clearly wrong and unjust.

EVIDENTIARY RULINGS

Several of the claimant's exhibits were not admitted into evidence based on a failure to timely exchange those exhibits with the carrier. The claimant complains of the ruling excluding those exhibits. It has been held that in order to show reversible error in the exclusion of evidence, it must be shown that the ruling was in error and that the error was reasonably calculated to cause and probably did cause the rendition of an improper decision. Hernandez v. Hernandez, 611 S.W.2d 732 (Tex. Civ. App.-San Antonio 1981, no writ). The claimant has failed to show that error, if any, in the hearing officer's ruling constituted reversible error. The claimant also complains of the effectiveness of the ombudsman's assistance. We generally do not review whether an ombudsman satisfactorily assisted an employee. Texas Workers' Compensation Commission Appeal No. 011590, decided August 16, 2001.

The hearing officer's decision and order are affirmed.

The true corporate name of the insurance carrier is **AMERICAN HOME ASSURANCE COMPANY** and the name and address of its registered agent for service of process is

**CORPORATION SERVICES COMPANY
800 BRAZOS, COMMODORE 1, SUITE 750
AUSTIN, TEXAS 78701.**

Robert W. Potts
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Thomas A. Knapp
Appeals Judge