

APPEAL NO. 012276
FILED NOVEMBER 8, 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 August 23, 2001. The hearing officer resolved the disputed issues by deciding that the appellant/cross-respondent (claimant) did not sustain an injury on _____, while in the course and scope of her employment; that the respondent/cross-appellant (carrier) is relieved of liability under Section 409.002 because the claimant failed to timely notify her employer of her injury pursuant to Section 409.001; and that the claimant has not had disability. The claimant appealed the hearing officer's determinations on the injury, notice, and disability issues. The carrier appeals a finding of fact, but requests that the decision regarding no compensable injury be affirmed.

DECISION

The hearing officer's decision is affirmed.

INJURY IN COURSE AND SCOPE OF EMPLOYMENT ISSUE

The claimant claimed that she suffered an aggravation of a preexisting respiratory problem when she was exposed to a leaking fire extinguisher at work on _____. One of the claimant's doctors opined that the exposure to the fire extinguisher potentially aggravated the claimant's reactive airway dysfunction. A doctor who reviewed the claimant's medical records at the request of the carrier opined that it is more highly probable that the claimant's pulmonary complaints are related to her tobacco abuse. Another doctor who reviewed the claimant's medical records at the carrier's request opined that the claimant has no definable pulmonary disease. The hearing officer considered the conflicting evidence and found in Finding of Fact No. 3 that "The exposure to fumes from a fire extinguisher did not cause harm to Claimant's body and did not result in an injury." The hearing officer concluded that the claimant did not sustain an injury on _____, while in the course and scope of her employment. Conflicting evidence was presented on this issue. 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 that the claimant did not sustain an injury on _____, while in the course and scope of her employment 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. Cain v. Bain, 709 S.W.2d 175 (Tex. 1986).

TIMELY NOTICE ISSUE

The claimant testified that she immediately reported an injury to a person in a supervisory capacity. The carrier's witnesses, who work for the employer in supervisory capacities, testified that, while there was a report of a leaking fire extinguisher on

_____, claimant made no report of an injury from that incident until sometime in March 2001. They indicated that they had no actual knowledge of an injury to the claimant from that incident until the claimant finally reported it in 2001. The claimant completed an incident/injury report in March 2001. The hearing officer considered the conflicting evidence and determined that the carrier is relieved of liability under Section 409.002 because of the claimant's failure to timely notify her employer pursuant to Section 409.001. The hearing officer's determination on the notice issue 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. *Cain, supra*.

DISABILITY ISSUE

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." The carrier takes issue with Finding of Fact No. 4 which states "Due to the claimed injury of _____, Claimant was unable to obtain and retain employment at wages equivalent to the pre-injury wage beginning on _____, and continuing through the date of this hearing." The carrier contends that Finding of Fact No. 4 is inconsistent with Finding of Fact No. 3, which was previously quoted. Because the hearing officer found that the _____, exposure to fumes from the fire extinguisher did not result in an injury to the claimant, we must read Finding of Fact No. 4 to mean merely that the claimant's claimed respiratory problem has prevented her from obtaining and retaining employment at her preinjury wage beginning on _____, for which there is some evidence to support, and not that an injury in the course and scope of employment on _____, has prevented her from earning her preinjury wage. In any event, because the hearing officer determined that the claimant did not sustain an injury on _____, while in the course and scope of her employment, the claimant did not have a compensable injury on that date, and thus the hearing officer correctly concluded that the claimant did not sustain disability.

The hearing officer's decision and order are affirmed.

The true corporate name of the insurance carrier is **(SELF-INSURED)** and the name and address of its registered agent for service of process is

**FRANCIS FAYE
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Robert W. Potts
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Philip F. O'Neill
Appeals Judge