

APPEAL NO. 020362
FILED MARCH 28, 2002

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on January 15, 2002. The hearing officer determined that the appellant (claimant) did not sustain a compensable repetitive trauma injury; that the claimant knew or should have known the disease may be related to the employment on _____; that the respondent (carrier) is relieved from liability under Section 409.002 because of the claimant's failure to timely notify his employer pursuant to Section 409.001; and that because the claimant did not sustain a compensable injury, he did not have disability. The claimant has appealed, urging that the hearing officer's determinations are against the great weight and preponderance of evidence. The file does not contain a response from the carrier.

DECISION

Affirmed.

The claimant testified that he repaired trailer floors and that he experienced pain to his right shoulder from his repetitive work duties on _____; that he sought medical care from Dr. T on _____; that Dr. T informed him that the shoulder pain was work related; that he reported the right shoulder pain to his employer; and that he presented an off-work slip from Dr. M to his employer on July 30, 2001. There is conflicting evidence as to whether the claimant had repetitive work duties and when he notified the employer of the claimed injury. An MRI dated July 17, 2001, reflects an "[a]dvanced tendinosis/partial tear of the rotator cuff without full thickness tear." The claimant further stated that he has not worked since July 30, 2001, because he is unable to work and Dr. M took him off work.

An occupational disease includes a repetitive trauma injury. Section 401.011(34). The claimant claimed a compensable repetitive trauma injury from performing his work activities. Section 401.011(36) defines a "repetitive trauma injury" as "damage or harm to the physical structure of the body occurring as the result of repetitious, physically traumatic activities that occur over time and arise out of and in the course and scope of employment." The claimant had the burden to prove that he was injured during 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 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 determination that the claimant did not sustain a compensable repetitive trauma 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. Cain v. Bain, 709 S.W.2d 175 (Tex. 1986).

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 resolved the conflicts in the evidence by determining that the date of injury was _____. The hearing officer's determination on this 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.

Section 409.001(a) provides that if an injury is 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 employee knew or should have known that the injury may be related to the employment. The hearing officer determined that the claimant notified his employer on or about July 30, 2001, that he sustained an injury in the course and scope of his employment, which was not within 30 days of the date the claimant knew or should have known that his injury may be related to his employment, and that he failed to show good cause for not timely reporting a work-related injury to his employer. The hearing officer's determination as to the date notice of injury was given to the employer 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. With a date of injury under Section 408.007 of _____, and notice of injury having been given on July 30, 2001, the hearing officer did not err in determining that the claimant failed to timely notify his employer of his claimed injury under Section 409.001.

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 hearing officer did not err in determining that the claimant has not had disability because, without a compensable injury, the claimant could not have disability as defined by Section 401.011(16).

The decision and order of the hearing officer are affirmed.

The true corporate name of the insurance carrier is **TEXAS MUTUAL INSURANCE COMPANY** and the name and address of its registered agent for service of process is

**RUSSELL R. OLIVER
PRESIDENT
221 WEST 6TH STREET
AUSTIN, TEXAS 78701.**

Philip F. O'Neill
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Terri Kay Oliver
Appeals Judge