APPEAL NO. 021613
FILED AUGUST 19, 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 May 30, 2002. The hearing officer determined that the appellant/cross-respondent (claimant) did not sustain a compensable occupational disease injury on _____; that the claimant did not have disability; and that the respondent/cross-appellant (carrier) did not waive the right to contest the compensability of the claimed occupational disease. The claimant appealed, arguing that the hearing officer's compensability and disability determinations are against the great weight and preponderance of the evidence. The claimant also argues that the hearing officer erred in resolving the carrier waiver issue, citing Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 124.3(a)(2) (Rule 124.3(a)(2)) and Continental Cas. Co. v. Downs, 45 Tex. Sup. Ct. J. 755 (June 6, 2002). In its response to the claimant's appeal, the carrier urges affirmance. In its cross-appeal, the carrier argues that the hearing officer erred in determining that the carrier received its first written notice of the claimed injury on _____. In his response to the carrier's cross-appeal, the claimant urges affirmance of the challenged determination.

DECISION

Affirmed, as modified.

The hearing officer did not err in determining that the claimant did not sustain a compensable injury in the form of an occupational disease. The hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). As the fact finder, the hearing officer resolves the conflicts and inconsistencies in the evidence and decides what facts the evidence has established. In this instance, the hearing officer was not persuaded that the claimant sustained his burden of proving the causal connection between his employment and the infection on his foot. Nothing in our review of the record demonstrates that the hearing officer's determination in that regard is so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Accordingly, no sound basis exists for us to reverse the challenged determination on appeal. Cain v. Bain, 709 S.W.2d 175 (Tex. 1986).

Next, we consider the hearing officer's determination that the carrier did not waive its right to contest compensability in this instance. The hearing officer determined that the carrier received its first written notice of the claimed injury on _____, in accordance with the information provided on the carrier's Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21), and that it filed its contest of compensability on March 8, 2002, the day the TWCC-21 is date-stamped as having been received by the Texas Workers' Compensation Commission (Commission). Although the date that the carrier lists as the date of its first written notice on its TWCC-21 would normally be persuasive evidence of that date, in this case it is not. _____, is the date that the claimant developed his infection. However, in his

testimony, the claimant acknowledged that he did not suspect that his infection was work related until an appointment with his treating doctor on February 28, 2002. Thus, the record simply does not support a determination that the carrier had written notice of the fact that the claimant was alleging that his infection was work related on _____, nearly two months before the claimant first suspected that his condition might be work related. To the contrary, the record reflects that the carrier received written notice that the claimant was asserting a work-related infection, when it received the Employer's First Report of Injury or Illness (TWCC-1), which was prepared on March 5, 2002. As noted above, the carrier filed its TWCC-21 on March 8, 2002, three days after the earliest date it could have received written notice of the fact that a work-related injury was being claimed. As such, the contest of compensability was filed within the seven-day period provided in Rule 124.3(a)(2) such that the carrier's liability for benefits was not triggered under that rule. In addition, we note that while the Commission is not following the Supreme Court's decision in Downs, *supra*, in accordance with Advisory 2002-08 dated June 17, 2002, it appears that the carrier's contest of compensability would also be timely under Downs. Based upon our determination that the record does not support the finding that the carrier received its first written notice of the claimed injury on _____, we modify Finding of Fact No. 6 to state that "the carrier received first written notice of the claimed injury on or about March 5, 2002."

Given our affirmance of the hearing officer's determination that the claimant did not sustain a compensable injury, we likewise affirm his determination that the claimant did not have disability. By definition, the existence of a compensable injury is a prerequisite to a finding of disability. Section 401.011(16).

The true corporate name of the insurance carrier is **ZURICH NORTH AMERICA** and the name and address of its registered agent for service of process is

GARY SUDOL
ZURICH NORTH AMERICA
12222 MERIT DRIVE, SUITE 700
DALLAS, TEXAS 75251.

_____
Elaine M. Chaney
Appeals Judge

CONCUR:

_____
Gary L. Kilgore
Appeals Judge

_____
Robert E. Lang
Appeals Panel
Manager/Judge