APPEAL NO. 021822
FILED AUGUST 28, 2002

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). Following a contested case hearing held on June 24, 2002, the hearing officer made certain findings of fact and concluded that the appellant/cross-respondent (carrier) did not waive the right to contest the claimed injury in accordance with Section 409.021; that the employer tendered a bona fide offer of employment (BFOE) to the respondent/cross-appellant (claimant) effective from December 15, 2001, through January 16, 2002; that the claimant did not sustain a compensable injury on _____; and that the claimant did not have disability resulting from an injury sustained on _____. The carrier has filed a request for review pointing out that the hearing officer's Finding of Fact No. 6 contains a typographical error, namely, stating the year 2002 instead of 2001, and requesting that Finding of Fact No. 5 be modified to remove the reference to an intervening injury because that finding exceeds the scope of the disability issue litigated in this case. The claimant filed a response contending that it was proper for the hearing officer to find that the claimant's inability to earn his preinjury wage after January 16, 2002, was due to an intervening injury, notwithstanding that there was no disputed issue before the hearing officer concerning an intervening injury. The claimant has filed a request for review stating that he "disputes" the hearing officer's resolution of the carrier waiver, BFOE, compensable injury, and disability issues. The appeal then states two legal reasons for asserting error on the waiver issue and recites some evidence supportive of the claimed injury date of _____. No specific contentions are made concerning the BFOE and disability issues. The carrier responded, asserting the sufficiency of the evidence to support the challenged determinations and the absence of legal error.

DECISION

Affirmed, as reformed.

We do not find merit in the claimant's assigned errors. The claimant testified that on _____, he was performing his duties shrinkwrapping boxes on a pallet from the bottom on up to the top of the stack and that when he straightened up, he had low back pain. The hearing officer's discussion of the evidence makes clear that he did not find credible the claimant's testimony concerning his having sustained the claimed injury, particularly in view of the several different dates of injury asserted by the claimant at various times, and his vagueness concerning the mechanism of injury. Finding of Fact No. 6 states that the claimant "did not sustain damage or harm to his person while in the course and scope of his employment with Employer on _____ [sic], _____ [sic], or _____ [sic]." This finding is not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). We do, however, reform the obvious typographical errors in the year of the claimed injury to read 2001.

Concerning the issue of the carrier having waived its right to contest the compensability of the injury pursuant to Section 409.021, the claimant conceded at the hearing that the carrier filed its Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) disputing the claim on January 28, 2002, which, as the hearing officer has found, is within 60 days of _____, the date of injury asserted by the claimant at the hearing. The claimant then asserted that the carrier had not disputed the claim or started paying benefits within seven days, and, thus, waived its right to contest compensability, citing the decision in Continental Casualty Company v. Downs, Texas Supreme Court, No. 00-1309. We do not find merit in this assigned error for the reasons fully set out in Texas Workers' Compensation Commission Appeal No. 021635, decided July 31, 2002. The claimant's contention is without merit.

Concerning the BFOE issue, neither at the hearing nor in the appeal has the claimant specified any failure of the employer's offer to comply with the requirements for such offers set out in Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 129.6(c) (Rule 129.6 (c)). The claimant's only basis for complaint about the offer was the allegation that it was not effectively communicated to him because it was not written in Spanish or translated for him. However, he acknowledged having signed it in the presence of a Spanish speaking supervisor and having performed the work it specified until his employment was terminated on January 16, 2002, for two consecutive "no show/no call" events. This contention is without merit.

As for disability, the claimant testified that a day after his injury he was released by his doctor to return to work with certain restrictions, and that he then returned to light duty work earning his preinjury wages until his employment was terminated. He contended that he had disability from January 16, 2002, to the date of the hearing because his new treating doctor had taken him off work that day, notwithstanding the termination of his employment for cause on January 17, 2002. We are satisfied that the determination that the claimant did not have disability is sufficiently supported by the evidence. Cain *supra* and King, *supra*.

The carrier complains of Finding of Fact No. 5, which supports the conclusion that the claimant "did not have disability resulting from an injury sustained on _____," because it can be read to find that the claimant was unable to obtain and retain employment at preinjury wages due to an intervening injury and no such intervening injury was in issue before the hearing officer. Finding of Fact No. 5 states that the claimant "was unable to obtain and retain employment at his preinjury wages from January 16, 2000, through the date of the hearing as a result of an intervening injury that occurred on _____." The claimant had made some reference to having pulled on a piece of plastic at work on that date and reinjuring himself. We agree with the carrier that this finding assumes there was a later work-related injury, that such was not a disputed issue in this case, and that the finding could have future *res judicata* implications. Accordingly, we reform Finding of Fact No. 5 to state that the claimant "was not, as a result of the claimed injury of _____, unable to obtain and retain employment at his preinjury wages from January 16, 2002, through the date of the hearing."

The decision and order of the hearing officer are affirmed as reformed.

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

GAIL L. ESTES
1525 NORTH INTERSTATE 35 E, SUITE 220
CARROLLTON, TEXAS 75006.

_____
Philip F. O'Neill
Appeals Judge

CONCUR:

_____
Daniel R. Barry
Appeals Judge

_____
Thomas A. Knapp
Appeals Judge