

APPEAL NO. 022231
FILED OCTOBER 16, 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 (CCH) was held on August 7, 2002. The hearing officer resolved the disputed issues by deciding that the respondent (claimant) sustained a compensable left shoulder injury with a date of injury of _____; that the claimant timely notified the employer of a work related injury; and that the claimant's disability began on March 9, 2002, and had not ended as of the date of the CCH. The appellant (carrier) appealed, arguing that the Decision and Order of the hearing officer is based upon factual findings which are so against the great weight and preponderance of the evidence as to be manifestly unjust. The appeal file does not contain a response from the claimant.

DECISION

Affirmed as modified.

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 sustained a compensable left shoulder injury, in the form of an occupational repetitive trauma type 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, supra.

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 April 15, 2002, that he sustained an injury in the course and scope of his employment, which was within 30 days of the date the claimant knew or should have known that his injury may be related to his employment. 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.

Temporary income benefits (TIBs) are due when an injured worker has not reached maximum medical improvement and has disability. Section 408.101(a). 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." In this case, there was sufficient evidence to support the hearing officer's determination that the claimant had disability from March 9, 2002, through the date of the CCH.

However, compensable disability cannot be found before the date of injury. Section 408.082(b) and (c) make clear that accrual of income benefits payable for disability begins "after the date of injury." TIBs cannot be paid for the period of time prior to _____. See Texas Workers' Compensation Commission Appeal No. 950521, decided May 18, 1995. Because the accrual of income benefits is a dependent on application of the statute in the case we modify Conclusion of Law No. 5 to read:

Claimant has had disability resulting from the occupational repetitive type trauma beginning March 9, 2002, and continuing through the date of the hearing in this matter. However, accrual of income benefits did not begin until after the _____, the date of injury.

We note that the provision of medical benefits is not likewise circumscribed. Texas Workers' Compensation Commission Appeal No. 94991, decided September 7, 1994.

Subject to the modification as to the inception of the period for which income benefits may be paid, we affirm the hearing officer's decision, not finding it to be against the great weight and preponderance of the evidence so as to be manifestly unfair or unjust. Atlantic Mutual Insurance Company v. Middleman, 661 S.W.2d 182 (Tex. App.-San Antonio 1983, writ ref'd n.r.e.).

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

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

Margaret L. Turner
Appeals Judge

CONCUR:

Michael B. McShane
Appeals Judge

Philip F. O'Neill
Appeals Judge