

APPEAL NO. 023017
FILED JANUARY 27, 2003

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 October 31, 2002. The hearing officer resolved the disputed issues by deciding that the appellant/cross-respondent (claimant) did not sustain an injury in the form of an occupational disease; that the respondent/cross-appellant (carrier) waived the right to contest compensability of the claimed injury by not contesting the injury in accordance with Section 409.021; that the date of injury under Section 408.007 was _____; that the carrier is relieved of liability under Section 409.002 because of the claimant's failure to timely notify her employer of her injury under Section 409.001; and that the claimant has not had disability. The claimant appealed those determinations that are adverse to her and the carrier appealed those determinations that are adverse to it.

DECISION

Affirmed in part and reversed and rendered in part.

The claimant claimed that she sustained respiratory injuries as a result of exposure to mold at her job. The hearing officer considered the conflicting evidence and determined that the claimant did not sustain an injury in the form of an occupational disease as defined by Section 401.011(34). 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. We conclude that the hearing officer's determination that the claimant did not sustain an injury in the form of an occupational disease 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 considered the conflicting evidence and determined that the date of injury was _____. We conclude that the hearing officer's determination on the date of 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, 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 did not report a work-related injury to her employer until March 16, 2001, and that the notice was not timely since the date of injury was _____. We conclude that the hearing officer's determination that the

claimant failed to timely notify her employer of her 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, *supra*.

According to the copy of the Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) in evidence, in which the carrier disputed compensability, the carrier first received written notice of the injury on May 23, 2001, but did not complete the TWCC-21 and file it with the Texas Workers' Compensation Commission until January 8, 2002, which was a period of over seven months. The carrier does not contend that it initiated benefits or filed a notice of intent to do so. In Continental Casualty Company v. Downs, 81 S.W.3d 803 (Tex. 2002), the court held that under Section 409.021 and 409.022, a carrier that fails to begin payments as required by the 1989 Act or send a notice of refusal to pay within seven days after it receives written notice of injury has not met the statutory requisite to later contest compensability. The carrier contends that because the hearing officer found that the claimant's chronic allergic rhinitis and maxillary sinusitis are ordinary diseases of life, the claimant does not have an injury as defined by Section 401.011(26) or an occupational disease as defined by Section 401.011(34) and that the carrier did not waive its right to contest compensability under Continental Casualty Company v. Williamson, 971 S.W.2d 108 (Tex. App. -Tyler 1988, no pet). In Williamson, the court held that if a hearing officer determines that there is no injury, and that finding is not against the great weight and preponderance of the evidence, the carrier's failure to contest compensability cannot create an injury as a matter of law. The Appeals Panel has previously recognized that Williamson is limited to situations where there is a determination that the claimant did not have an injury, that is, no damage or harm to the physical structure of the body, as opposed to cases where there is an injury or disease, which was determined by the hearing officer not to be causally related to the claimant's employment. Texas Workers' Compensation Commission Appeal No. 022274, decided October 17, 2002.

In the instant case, although the hearing officer was not persuaded that the claimant established a causal connection between her employment and her diagnosed chronic allergic rhinitis and maxillary sinusitis (an occupational disease means a disease arising out of and in the course and scope of employment that causes damage or harm to the physical structure of the body), and determined that those conditions were ordinary diseases of life, which would exclude them from being an occupational disease under Section 401.011(34), unless the disease was incident to a compensable injury or occupational disease, she was apparently not persuaded that the claimant had no physical harm or damage to her body as claimed and thus concluded that Williamson did not apply. In light of our recent decisions in Appeal No. 022274, *supra*, and Texas Workers' Compensation Commission Appeal No. 023106, decided January 22, 2003, we cannot conclude that the hearing officer erred as a matter of law in determining that Williamson did not apply to the facts of this case and that the carrier waived the right to contest the compensability of the claimed injury by not timely contesting the injury in accordance with Section 409.021. Thus, the claimant's injury became compensable as

a matter of law. Texas Workers' Compensation Commission Appeal No. 022027-s, decided September 30, 2002.

The hearing officer erred in determining that the carrier is relieved of liability under Section 409.002 because of the claimant's failure to timely notify her employer of her injury pursuant to Section 409.001. Although the claimant did not timely notify her employer of her injury, the Appeals Panel has held that when a carrier loses its right to contest compensability, that includes its right to assert a defense under Section 409.002 based upon the claimant's failure to give timely notice of her injury to her employer. Appeal No. 022027-s, *supra*. We reverse the hearing officer's determination that the carrier is relieved of liability under Section 409.002 because of the claimant's failure to timely notify her employer of her injury pursuant to Section 409.001, and we render a decision that the carrier is not relieved of liability under Section 409.002 because it waived its right to contest compensability. In addition, as was asserted by the claimant in her timely response to the benefit review conference report, at the CCH, and an appeal, the carrier's late-filed TWCC-21 does not assert a notice defense and thus timely notice should not have been a disputed issue at the CCH. See Section 409.022(b).

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's waiver of its right to dispute compensability of the injury did not waive its right to dispute that disability resulted from the injury. Appeal No. 023106, *supra*. In the instant case, the hearing officer determined that the claimant's testimony and medical records used to support her claim for disability were not credible and found that the claimant was not unable to obtain and retain employment at wages equivalent to her preinjury wage as a result of any alleged work-related injury. Although there is conflicting evidence, we conclude that the hearing officer's determination that the claimant has not had disability 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*.

In summary, we affirm the hearing officer's determinations that the claimant did not sustain an occupational disease; that the date of injury under Section 408.007 was _____; that the claimant did not timely notify her employer of her injury; that the claimant has not had disability; and that the carrier waived its right to contest the compensability of the claimed injury by not timely contesting the injury in accordance with Section 409.021. We reverse the hearing officer's determination that the carrier is relieved of liability under Section 409.002 because of the claimant's failure to timely notify her employer of her injury pursuant to Section 409.001, and we render a decision that the carrier is not relieved of liability under Section 409.002. Because of the carrier's waiver, the claimant has a compensable injury as a matter of law, although she has not had disability.

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

BARRY E. CROMBAR II
12222 MERIT DRIVE, SUITE 700
DALLAS, TEXAS 75251.

Robert W. Potts
Appeals Judge

CONCUR:

Elaine M. Chaney
Appeals Judge

Michael B. McShane
Appeals Panel
Manager/Judge