

APPEAL NO. 023071
FILED JANUARY 24, 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 November 5, 2002. The hearing officer resolved the disputed issues by deciding that on _____, the respondent (claimant) sustained a compensable injury to her neck only, and that the claimant had disability from January 16, 2001, through the date of the CCH. The appellant (carrier) timely appealed the hearing officer's determinations that the claimant sustained a compensable injury to her neck and that she had disability from January 16, 2001, through the date of the CCH. The claimant filed a timely response requesting affirmance of the hearing officer's determinations that the claimant sustained a compensable injury to her neck and that she had disability for the time period found by the hearing officer. In her response, the claimant states that she disagrees with the hearing officer's finding that the claimant failed to establish that her bilateral carpal tunnel syndrome (CTS) resulted from her _____, motor vehicle accident (MVA) and requests that we modify the hearing officer's decision to include the bilateral CTS as part of the compensable injury. While the claimant's response was timely filed as a response, it was not filed within the time period for filing an appeal. Consequently, we do not consider the claimant's contention regarding her CTS.

DECISION

The hearing officer's decision is affirmed.

Applying Sections 410.202(a) and (d) and Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE §§ 102.5(d) and 143.3(c), the claimant was deemed to have received the hearing officer's decision on November 18, 2002, which was five days after it was mailed to the claimant, and the claimant had until December 11, 2002, to mail or file her appeal with the Texas Workers' Compensation Commission (Commission), which was the 15th day after the deemed date of receipt, excluding Saturdays and Sundays and holidays listed in Section 662.003 of the Texas Government Code. Since the claimant sent her response to the Commission by facsimile transmission on December 27, 2002, the response was not timely filed as an appeal. Thus, that portion of the response which requests that the claimant's CTS be found to be part of her work-related injury will not be considered. The response was timely filed as a response because the response was due on December 31, 2002.

It is undisputed that the claimant was in the course and scope of her employment when she was involved in an MVA on _____. The claimant contended that she sustained a neck injury and bilateral CTS as a result of the MVA. The carrier contended that the claimant did not sustain any injury in the MVA. Conflicting evidence was presented on the injury 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 claimant's testimony, and the testimony and reports of her treating doctor, support the hearing officer's decision that the claimant sustained an injury to her neck in the work-related MVA. The hearing officer's determination that the claimant sustained a compensable neck injury 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 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 contended that the claimant did not have disability. Conflicting evidence was presented on this issue. The claimant testified that she has been unable to work and has not worked since January 16, 2001, because of her neck injury sustained in the MVA. The claimant's testimony and the testimony and reports of her treating doctor support the hearing officer's decision that the claimant had disability, as defined by Section 401.011(16), from January 16, 2001, through the date of the CCH. The hearing officer's determination that the claimant had disability from January 16, 2001, through the date of the CCH is not so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. Cain, supra.

The carrier contends that the claimant did not have disability from January 16, 2001, through February 2001, because it is undisputed that she was paid her preinjury wage during that period of time. Although the claimant testified that she was paid her preinjury wage through February 2001, her testimony reflects that she was not working from January 16, 2001, through February 2001, and the hearing officer determined that her inability to work was because of her compensable injury. The record was not developed regarding the reason the claimant continued to be paid through February 2001 while off work. We do not know if the employer intended to initiate the payment of benefits pursuant to Section 408.003(a), whether the payments were post-injury earnings under Rule 129.2(c), or whether the payments were not post-injury earnings under Rule 129.2(d). Under these circumstances, we cannot conclude that the hearing officer erred in determining that the claimant had disability.

The hearing officer's decision and order are affirmed.

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

**BOB KNOWLES
5205 NORTH O'CONNOR BOULEVARD
IRVING, TEXAS 75039.**

Robert W. Potts
Appeals Judge

CONCUR:

Chris Cowan
Appeals Judge

Gary L. Kilgore
Appeals Judge