

APPEAL NO. 030028
FILED FEBRUARY 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 was held on December 16, 2002. The hearing officer determined that the respondent (carrier herein) did not waive its right to contest the compensability, as it timely disputed the injury of _____, asserted by the appellant (claimant herein); that, as there was no horseplay, horseplay was not a producing cause of the injury asserted by claimant; that the injury asserted by the claimant was caused by the claimant's willful intention to unlawfully injure his coworker, relieving the carrier of liability; that, as a consequence of the carrier being relieved of liability, the claimant did not sustain a compensable injury on _____; and the claimant did not have disability. The claimant appeals, contending that the hearing officer erred in determining that the carrier timely disputed the compensability of the _____, injury; in determining that the injury was caused by the claimant's willful intention to unlawfully injure a coworker; in determining that the claimant did not sustain a compensable injury; and in determining that the claimant did not have disability. The carrier responds that the decision of the hearing officer should be affirmed.

DECISION

Finding sufficient evidence to support the decision of the hearing officer and no reversible error in the record, we affirm the decision and order of the hearing officer.

The claimant was injured when he was struck with a pipe by a coworker during an altercation. Not surprisingly, there is conflicting evidence concerning the events leading up to this injury as to what was said and done by both the claimant and the coworker. The carrier first received written notice of the claimant's injury when the claimant's attorney sent notice by facsimile transmission to the carrier on April 22, 2002, at 6:07 p.m. The carrier contends that it sent a Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) to the (City) field office of the Texas Workers' Compensation Commission (Commission) by facsimile transmission on April 29, 2002, at 4:07 p.m. Also in evidence was a copy of a TWCC-21 file-marked by the Commission on April 30, 2002.

CARRIER WAIVER

Section 409.021(a) requires that a carrier dispute compensability within seven days of first receiving written notice of an injury or waive its right to dispute compensability. See Continental Casualty Company v. Downs, 81 S.W.3d 803 (Tex. 2002). The claimant appeals the hearing officer's conclusion that the carrier did not waive its right to contest compensability because it timely disputed compensability by disputing it within seven days of first receiving written notice of the claimant's injury. The hearing officer bases this conclusion on the following two factual findings:

8. On the morning of April 23, 2002 the Carrier first received written [Employee's Notice of Injury or Occupational Disease and Claim for Compensation (TWCC-41)] form sent by facsimile transceiver [sic] the night before.
9. On April 29 and again on April 30, 2002, the Carrier filed its TWCC-21 with the Commission to contest compensability of the Claimant's injury of _____.

The claimant argues that Finding of Fact No. 8 is incorrect as matter of law contending that pursuant Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 102.4(h) (Rule 102.4(h)), the date of receipt of the TWCC-21 was the date it was sent to the carrier by facsimile transmission and not the following business day. We have held that the date of receipt of a communication sent by electronic transmission after normal business hours is the next business day. Texas Workers' Compensation Commission Appeal No. 030105, decided February 21, 2003. We also note that the hearing officer's finding that the carrier filed a TWCC-21 with the Commission on April 29, 2002, is supported by the evidence and is an independent ground for finding that the carrier disputed compensability within seven days of first receiving written notice of the injury.

COMPENSABILITY

Section 406.031(a) of the 1989 Act provides that an employer's insurance carrier is liable for compensation if the injury arises out of the course and scope of employment. Certain injuries, however, are expressly excluded from coverage. These include an injury caused by the employee's willful attempt to injure himself or to unlawfully injure another person. Section 406.032(1)(B).

Whether a claimant was acting in the course and scope of his employment when he received an injury is a question of fact. Orozco v. Texas General Indemnity Co., 611 S.W.2d 724 (Tex. Civ. App.-El Paso 1981, no writ). In the case before us, the hearing officer was confronted with conflicting testimony. The issue was purely one of credibility, and the hearing officer's ultimate resolution of this conflict is supported by the evidence. This is so even though another fact finder might have drawn other inferences and reached other conclusions. Salazar v. Hill, 551 S.W.2d 518 (Tex. Civ. App.-Corpus Christi 1977, writ ref'd n.r.e.). The claimant also contends that the hearing officer applied the wrong legal standard because he did not track the language of Section 406.032(1)(B) in his findings and conclusions. While it might have been better if the hearing officer had just stuck with the language of the 1989 Act, we do not find that the hearing officer applied an incorrect legal standard in resolving the issue of compensability.

DISABILITY

Finally, with no compensable injury found, there is no loss upon which to find disability. By definition disability depends upon a compensable injury. See Section 401.011(16).

The decision and order of the hearing officer are affirmed.

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

**CORPORATION SERVICE COMPANY
800 BRAZOS, SUITE 750, COMMODORE 1
AUSTIN, TEXAS 78701.**

Gary L. Kilgore
Appeals Judge

CONCUR:

Daniel R. Barry
Appeals Judge

Edward Vilano
Appeals Judge