

APPEAL NO. 030098
FILED MARCH 10, 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 December 3, 2002. The hearing officer determined that the respondent (claimant) sustained a compensable low back injury on _____; that the claimant timely reported his injury to the employer; that because the appellant (carrier) failed to raise the issue of the claimant's failure to timely file a claim, the carrier is not relieved of liability under Section 409.004; and, that the carrier's defense of compensability is limited to the defenses listed on the Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21).

The carrier appealed all the disputed issues on various factual and legal grounds. The appeal file does not contain a response from the claimant.

DECISION

Affirmed.

It is undisputed that the claimant, a shop mechanic, sustained a compensable left knee injury (not the injury at issue in this case) on (date of previous injury). The claimant had left knee surgery using spinal anesthesia on March 27, 2000. The claimant testified that "about a month later" he returned to work at light duty and that his back began to bother him. At the CCH, the claimant was not very precise on his dates. There is evidence that suggests that the claimant believes his back pain may be due to the spinal anesthesia injection. The claimant also testified that on _____, he was asked to adjust the brakes of a vehicle and while doing so his back "popped" and he had intense pain. The claimant stated it took two men to help him up and that he reported the injury to his immediate supervisor that day and saw a doctor the following day. The claimant was eventually diagnosed as having a mild annular disk bulge at L4-5 and L5-S1. The claimant filed his Employee's Notice of Injury or Occupational Disease and Claim for Compensation (TWCC-41) on August 10, 2001. The carrier, on its TWCC-21 dated March 20, 2002, stated that it received first written notice of the claim on March 14, 2002, and disputed that the claimant received an injury as alleged, and disputed that the claimant gave timely notice.

The crux of the case is whether the claimant sustained a new back injury on _____, or whether his condition is due to the spinal anesthesia or whether he has a back condition at all. The carrier's appeal emphasizes evidence in its favor; however, the hearing officer's decision is supported by the Texas Workers' Compensation Commission (Commission) required medical examination doctor, who states "I believe the back problems are the results of the specific incident on 6/3/00 [sic, should be _____] rather than the results of the epidural steroid injection on (not the

injury at issue in this case).” Other parts of the report can be read to support the carrier’s theory. In any event, the hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). Where there are conflicts in the evidence, the hearing officer resolves the conflicts and determines what facts the evidence has established. This is equally true of medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ).

The carrier also appeals the fact that the issue as originally stated, and the TWCC-41, alleged a date of injury of “[alleged date of injury], not _____,” and asserts that it was improper for the hearing officer to “essentially add an issue in this regard, concerning the date of injury.” Without referring to Appeals Panel decisions on this point, we will note that the carrier’s representative specifically asked the claimant on what date he was alleging that he injured his back and when he said _____, the hearing officer pointed out that a (alleged date of injury), date of injury had been alleged. The hearing officer asked if the parties wanted to change the alleged date of injury to _____, and the carrier’s representative stated “that is not a problem for the carrier.” The hearing officer then said she was changing the alleged date of injury and the carrier’s representative added “we don’t dispute that particular part of it.” (Tape 1, side A, counter No. 502.) Whatever objection the carrier may have had was not preserved for appeal.

The carrier also contends that the claimant did not timely file a claim pursuant to Section 409.004. Section 409.004 provides that the failure to file a claim for compensation with the Commission as required by Section 409.003 (no later than one year after the date of injury) relieves the employer and the carrier from liability unless there was good cause for the failure to file the claim or the employer or carrier does not contest the claim. The Appeals Panel has held that the failure to timely file a claim must be raised by the carrier as an affirmative defense. Texas Workers’ Compensation Commission Appeal No. 94224, decided April 1, 1994. Section 409.022(a) provides that a carrier’s notice of refusal to pay benefits under Section 409.021 must specify the grounds for refusal and pursuant to Section 409.022(b) the grounds for the refusal specified in the notice constitute the only basis for the carrier’s defense unless the defense is based on newly discovered evidence. In view of the carrier’s failure to raise the affirmative defense in its TWCC-21 we need not address the contention that there was no tolling because the employer was not required to file a Employer’s First Report of Injury or Illness (TWCC-1) because there was no lost time.

For the reasons stated we conclude that the hearing officer’s decision is supported by the evidence and 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).

We affirm the hearing officer's decision and order.

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
AUSTIN, TEXAS 78701.**

Thomas A. Knapp
Appeals Judge

CONCUR:

Judy L. S. Barnes
Appeals Judge

Terri Kay Oliver
Appeals Judge