APPEAL NO. 030189
FILED MARCH 7, 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 2, 2002. The hearing officer determined that the respondent (claimant) sustained a compensable injury on _____; that the claimant gave timely notice of the injury to his employer; that the claimant was not intoxicated at the time of the injury; that the appellant (carrier) waived the right to contest compensability of the claimed injury by not doing so in accordance with Section 409.021; that the carrier's second Notice of Refused/Disputed Claim (TWCC-21) was not based on newly discovered evidence that could not reasonably have been discovered at an earlier date; and that the claimant had disability from May 26 through August 29, 2002. The carrier appeals this decision and attaches new evidence to its request for review. The appeal file contains no response from the claimant.

DECISION

Affirmed.

NEW EVIDENCE ON APPEAL

In deciding whether the hearing officer's decision is sufficiently supported by the evidence, we will generally not consider evidence that is offered for the first time on appeal. Texas Workers' Compensation Commission Appeal No. 92255, decided July 27, 1992. To determine whether evidence offered for the first time on appeal requires that the case be remanded for further consideration, we consider whether it came to the appellant's knowledge after the hearing, whether it is cumulative, whether it was through lack of diligence that it was not offered at the hearing, and whether it is so material that it would probably produce a different result. Texas Workers' Compensation Commission Appeal No. 93111, decided March 29, 1993; Black v. Wills, 758 S.W.2d 809 (Tex. App.-Dallas 1988, no writ). We do not find that to be the case with the version of the carrier's TWCC-21 that it attached to its request for review, which was not offered into evidence at the hearing. Accordingly, we decline to consider the TWCC-21 bearing a stamp indicating that it was "acknowledged" on an illegible date in August 2002.

COMPENSABILITY AND DISABILITY

Whether the claimant sustained a compensable injury and had disability were factual questions for the hearing officer to resolve. Injury and disability determinations can be established by the claimant's testimony alone, if believed by the hearing officer. Gee v. Liberty Mut. Fire Ins. Co., 765 S.W.2d 394 (Tex. 1989). 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 from the evidence presented. Nothing in our review of the record indicates that the hearing officer's decision is 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).

TIMELY NOTICE

Section 409.001 requires that an employee, or a person acting on the employee's behalf, shall notify the employer of an injury not later than the 30th day after the date on which the injury occurs. Failure to do so, absent a showing of good cause or actual knowledge of the injury by the employer, relieves the carrier and employer of liability for the payment of benefits for the injury. Section 409.002. Whether timely notice is given is a question of fact for the hearing officer to decide. We find that there is sufficient evidence to support the determination of the hearing officer that the claimant timely notified his employer of the injury pursuant to Section 409.001.

INTOXICATION

Section 406.032 provides, in pertinent part, that an insurance carrier is not liable for compensation if the injury occurred while the employee was in a state of intoxication. The Appeals Panel has noted that courts have held that a claimant need not prove he was not intoxicated as there is a presumption of sobriety, but that when a carrier presents evidence of intoxication, raising a question of fact, the claimant then has the burden to prove that he was not intoxicated at the time of injury. Texas Workers' Compensation Commission Appeal No. 951373, decided September 28, 1995. In the present case, the carrier argues that by producing a written statement from a coworker implying that the claimant had reservations about passing a drug screen test, the burden shifted to the claimant to prove that he was not intoxicated. The hearing officer did not agree and found that the burden did not shift and that the claimant was not intoxicated at the time of the injury. These determinations are supported by the evidence.

WAIVER

The hearing officer did not err in determining that the carrier waived its right to contest compensability of the claimed injury in accordance with Section 409.021. The evidence reflects that the carrier first received written notice of the injury on August 1, 2002, and that the carrier's dispute of the injury was file-stamped on August 13, 2002. As the carrier failed to dispute the injury within seven days as required by Section, 409.021, we perceive no error in the hearing officer's resolution of the waiver issue.

Given our affirmance of the determinations relating to carrier waiver and intoxication, we need not address the carrier's argument on appeal that the hearing officer erred in determining that the second TWCC-21 it filed was not based on newly discovered evidence that could not reasonably have been discovered at an earlier date.

The hearing officer's decision and order is affirmed.

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

C T CORPORATION SYSTEM
350 NORTH ST. PAUL STREET
DALLAS, TEXAS 75201.

_____
Chris Cowan
Appeals Judge

CONCUR:

_____
Judy L. S. Barnes
Appeals Judge

_____
Thomas A. Knapp
Appeals Judge