

APPEAL NO. 030268  
FILED MARCH 25, 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 January 16, 2003. With respect to the disputed issues before her, the hearing officer determined that the respondent/cross-appellant (claimant) sustained a compensable injury to his low back on \_\_\_\_\_, but that he did not have disability as a result of the compensable injury. The hearing officer further resolved that the claimant timely reported his injury to his employer pursuant to Section 409.001, such that the appellant/cross-respondent (carrier) was not relieved of liability under Section 409.002, and that the carrier waived its right to contest the compensability of the claimed injury by not timely contesting it pursuant to Sections 409.021 and 409.022. Both parties appeal the determinations made against them on sufficiency of the evidence grounds. The carrier also argues that it did not waive its right to contest the compensability under Sections 409.021 and 409.022 because it complied with Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 124.3 (Rule 124.3). The carrier also responds to the claimant's appeal, urging that the hearing officer's no disability determination be affirmed. There is no response in the file from the claimant.

DECISION

Affirmed.

We first address the document, an MRI report dated January 30, 2003, that the claimant attached to his appeal to be considered for the first time. In deciding whether the hearing officer's decision is sufficiently supported by the evidence we generally only consider evidence that was submitted into the record at the hearing. Texas Workers' Compensation Commission Appeal No. 92255, decided July 27, 1992. To determine whether evidence offered for the first time on appeal requires that 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). While the MRI report is dated after the CCH and the claimant adequately explains why he did not have it prior to the CCH, it does not meet the prong that it would "probably produce a different result," as the hearing officer determined that the claimant *did* sustain a low back injury. Therefore, we will not consider the report on appeal.

The hearing officer did not err in determining that the claimant sustained a compensable injury on \_\_\_\_\_, and that he timely reported the injury to his employer. The claimant testified that he injured his low back on the date of injury, and that he told one supervisor, the foreman, on November 1, 2001, and the owner on November 2, 2001. The foreman testified in conflict with the claimant's injury and reporting testimony. The carrier presented evidence by the owner of the employer, who

testified that the claimant had not told him about his alleged compensable injury until late December 2001, or early January 2002. Under the 1989 Act, the hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). The hearing officer was acting within her province as the fact finder in resolving the injury and reporting issues in favor of the claimant and nothing in our review of the record demonstrates that the hearing officer's determination is so against the great weight of the evidence as to be clearly wrong or manifestly unjust. Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986); Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

The hearing officer did not err in determining that the carrier waived its right to contest the compensability of the injury under Sections 409.021 and 409.022 because it failed to timely "pay or dispute" within seven days of its written notice of the injury. It was undisputed, and the hearing officer took official notice of the date, that the carrier filed its Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) on February 11, 2002. The claimant argued that the carrier had written notice of his claim on November 7, 2001, and the carrier argued that the date of its written notice was January 29, 2002. The hearing officer agreed with the January 29, 2002, date of written notice, and found that the February 11, 2002, filing of the TWCC-21 was not timely in accordance with Sections 409.021 and 409.022. In its appeal, the carrier argued that it had complied with Rule 124.3 and cited Texas Workers' Compensation Commission Appeal No. 023010-s, decided January 9, 2003, in support of its argument. However, we note that Appeal No. 023010-s is distinguishable because in that case, the carrier did timely initiate payment of benefits, which was not the case here. The record supports the hearing officer's waiver determination. See Cain, *supra*.

"Disability" is defined in Section 401.011(16) as "the inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage." The claimant testified that he was a tattoo artist, and could make "much more" money performing tattoo work, but did not because he found it distasteful and had no transportation. The hearing officer reasoned that while the claimant sustained a compensable injury, his inability to obtain and retain employment at his preinjury wage was not due to that injury; thus, she did not err in determining that the claimant did not have disability.

The hearing officer's decision and order is affirmed.

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

**ALBERT SCOTT TAYLOR, PRESIDENT  
12225 GREENVILLE AVENUE, SUITE 490  
DALLAS, TEXAS 75243.**

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Terri Kay Oliver  
Appeals Judge

CONCUR:

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Chris Cowan  
Appeals Judge

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Robert W. Potts  
Appeals Judge