

APPEAL NO. 030295
FILED MARCH 27, 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 8, 2002, with the record closing on December 15, 2002. The hearing officer determined that (1) the appellant (carrier) waived the right to contest compensability of the claimed injury by not timely disputing the injury in accordance with Section 409.021; (2) the respondent (claimant) did not sustain right carpal tunnel syndrome in the course and scope of his employment, but the injury is compensable by virtue of the carrier's waiver; (3) the date of injury (DOI) is _____; (4) although the claimant failed to timely notify his employer of a work-related injury pursuant to Section 409.001, the carrier is not relieved from liability under Section 409.002 due to the carrier's waiver; and (5) the claimant did not have disability resulting from the right carpal tunnel injury. The carrier appeals the waiver, injury, and notice determinations on sufficiency of the evidence grounds and asserts that the hearing officer erred in taking official notice of the Texas Workers' Compensation Commission (Commission) "Notice to Carrier of Injury" (CS-11).¹ The carrier also appeals the hearing officer's Finding of Fact No. 14 regarding disability. The claimant urges affirmance. The hearing officer's DOI determination was not appealed and is, therefore, final. Section 410.169.

DECISION

Affirmed as reformed.

WAIVER

We first address the carrier's assertion that the hearing officer erred in taking official notice of the Commission's CS-11 letter in this proceeding. Specifically, the carrier contends that the claimant had a duty to request a copy of the document from the Commission and exchange it with the carrier in accordance with Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 142.13(c) (Rule 142.13(c)). By taking official notice of the CS-11, the carrier argues, the hearing officer deprived the carrier of due process "because it was not able to adequately prepare a defense and procure evidence to show that the letter was not received by the carrier." The record indicates that the claimant requested, but was denied, a duplicate of the CS-11 from the Commission. Because the CS-11 bears directly on the issue of carrier waiver and the Commission refused to provide a duplicate copy to the claimant, the hearing officer took official notice of the document over the carrier's objection. We have, in analogous cases, required that a hearing officer take official notice of essential Commission forms where timely filing requirements are in issue. See Texas Workers' Compensation Commission Appeal No. 941171, decided October 17, 1994; Texas Workers' Compensation Commission Appeal No. 002287, decided November 13, 2000; Texas Workers' Compensation Commission Appeal No. 010696, decided April 26, 2001; and Texas

¹ Formerly, EES-11.

Workers' Compensation Commission Appeal No. 012101-s, decided October 22, 2001. Under the circumstances presented here, we cannot conclude that the hearing officer abused his discretion in taking official notice of the Commission's CS-11. Morrow v. H.E.B., 714 S.W.2d 297 (Tex. 1986). With regard to the carrier's due process argument, we note that the carrier was given a sufficient opportunity to present evidence and did offer evidence regarding its theory of when written notice was first received by the carrier. Accordingly, we perceive no reversible error.

The hearing officer did not err in determining that the carrier waived the right to contest compensability of the claimed injury by not timely disputing the injury in accordance with Section 409.021. This was a question of fact for the hearing officer to resolve. The hearing officer is the sole judge of the weight and credibility of the evidence and, as the trier of fact, resolves the conflicts and inconsistencies in the evidence. Section 410.165(a). In view of the Commission's CS-11, the hearing officer could find that the carrier failed to timely dispute the compensability of the claimed injury. The hearing officer's determination 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).

INJURY AND NOTICE

The hearing officer did not err in making the complained-of injury and notice determinations. The carrier's appeal of the injury and notice determinations is premised upon the success of its appeal with regard to carrier waiver. Given our affirmance of the waiver determination, we likewise affirm the hearing officer's injury and notice determinations.

DISABILITY

The carrier appeals the hearing officer's Finding of Fact No. 14 which provides: "The claimant has been unable to obtain and retain employment from July 26, 2002, through the date of the hearing in this matter, but that inability is not a result of the claimant's right carpal tunnel syndrome." For purposes of this claim, the carrier is not aggrieved by this finding of fact. However, the record reflects that the claimant is asserting a separate compensable injury, in a separate claim, with a concurrent period of disability. Because the hearing officer's finding in this proceeding may be read to establish a period of disability with regard to the claimant's other claimed injury, we reform Finding of Fact No. 14 to state, "The claimant has not been unable to obtain and retain employment from July 26, 2002, through the date of the hearing in this matter, as a result of the right carpal tunnel syndrome."

OTHER MATTERS

The carrier contends that improper, non-verbal communication took place between the claimant and his mother during the claimant's direct and cross-examination testimony. Our review of the record reveals that the claimant's mother was disclosed as

a witness at the outset of the hearing. The carrier, however, did not invoke the rule and the claimant's mother initially remained in the hearing room. During cross-examination of the claimant, the carrier alleged that the claimant was looking to his mother for guidance on how to answer the questions posed. While the hearing officer stated that he did not observe the alleged communications, the hearing officer, nonetheless, excluded the claimant's mother from the hearing room and admonished her not to discuss the case with any witness. We perceive no error in the hearing officer's handling of this case. Additionally, we note that the carrier was not prejudiced by the alleged communications, if any, because the carrier's liability for this claim is based primarily upon the documentary evidence with regard to the issue of waiver.

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.**

Edward Vilano
Appeals Judge

CONCUR:

Daniel R. Barry
Appeals Judge

Robert W. Potts
Appeals Judge