

APPEAL NO. 030587
FILED APRIL 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 (CCH) was held on February 5, 2003. The appellant (carrier) appeals the hearing officer's determinations that the respondent (claimant) has a torn ligament in his left shoulder; that the carrier is not relieved of liability pursuant to any section of the 1989 Act; that the carrier has waived the right to dispute the compensability of the claim; and that the claimant has disability beginning August 30, 2002, and continuing through the date of the CCH. The claimant responds, urging affirmance.

The hearing officer's determinations that the claimant did not sustain an injury at work on _____; that the claimant did not report an alleged injury within 30 days to his employer; and that the claimant does not have good cause for failure to timely notify his employer of the alleged injury, have not been appealed. During the course of the CCH the parties stipulated that the date of the alleged injury is _____, and that the claimant did not sustain a repetitive trauma injury at work.

DECISION

Affirmed as modified.

NEW EVIDENCE ATTACHED TO APPEAL

At the outset, we note that the carrier attaches documents to its appeal that were not offered at the CCH. We will not generally consider evidence submitted 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 a 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). The evidence the carrier attaches to its appeal could have been secured with due diligence prior to the CCH; consequently, we will not consider those documents for the first time on appeal.

CARRIER WAIVER

This case turns on whether the carrier waived the right to contest compensability of the claimed injury by not timely contesting an injury in accordance with Section 409.021 and the decision in Continental Casualty Company v. Downs, 81 S.W.3d 803 (Tex. 2002). Section 409.021 provides that the insurance carrier is to begin the payment of benefits as required by the 1989 Act or notify the Texas Workers'

Compensation Commission (Commission) and the claimant of its refusal to pay benefits within seven days after receiving written notice of the injury (the “pay or dispute” provision). Claimant’s Exhibit No. 1 is a Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21), which reflects that the carrier received written notice of the claim of injury on August 22, 2002, and forwarded its denial of the claim to the Commission on September 17, 2002, as evidenced by the Commission date stamp, which is clearly not within the seven-day period mandated by Section 409.021. Claimant’s Exhibit No. 2 is a second TWCC-21 reflecting that the carrier received the first written notice on September 11, 2002. This TWCC-21 has a Commission date stamp of November 4, 2002. Claimant’s Exhibit No. 4 is a certified letter that the claimant mailed to the employer, which was received by the employer on August 27, 2002. The employer’s invoice person testified that she was given a copy of the claimant’s letter by the store manager on September 3, 2002, and wrote on the letter that it was received on that date. She also admitted that she wrote the claim number from the carrier on the letter, but denied that she wrote the claim number on the same date that she received the letter.

The hearing officer found that the carrier first received written notice of the claimed injury on August 22, 2002, and that the carrier did not begin paying temporary income benefits as required by the 1989 Act or dispute compensability within seven days of receiving written notice. The hearing officer concluded that the carrier waived its right to contest the compensability of the claimed injury in accordance with Section 409.021.

The hearing officer, as finder of fact, is the sole judge of the relevance and materiality of the evidence, as well as of the weight and credibility that is to be given the evidence. Section 410.165 (a). It was for the hearing officer, as trier of fact, to resolve the inconsistencies and conflicts in the evidence. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). The trier of fact may believe all, part, or none of the testimony of any witness. Aetna Insurance Company v. English, 204 S.W.2d 850 (Tex. Civ. App.-Fort Worth 1947, no writ). When reviewing a hearing officer’s decision for factual sufficiency of the evidence we should reverse such decision only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986). Applying this standard, we find sufficient evidence to support the hearing officer’s determination that the carrier waived the right to contest compensability according to Section 409.021.

Next, the carrier argues that even if it waived the right to dispute compensability of the claim, Continental Casualty Company v. Williamson, 971 S.W.2d 108 (Tex. App.-Tyler 1998, no pet.), applies. In that case, the court held that “if a hearing officer determines that there is no injury, and that finding is not against the great weight and preponderance of the evidence, the carrier’s failure to contest compensability cannot create an injury as a matter of law.” The Appeals Panel has previously recognized that Williamson is limited to situations where there is a determination that the claimant did

not have an injury, that is, no damage or harm to the physical structure of the body, as opposed to cases where there is an injury, which was determined by the hearing officer not to be causally related to the claimant's employment. Texas Workers' Compensation Commission Appeal No. 020941, decided June 6, 2002. When a carrier waives its right to contest compensability of the injury, the injury becomes compensable, as a matter of law, provided that there is physical harm or damage to the body, and the carrier is liable for workers' compensation benefits. Texas Workers' Compensation Commission Appeal No. 023017, decided January 27, 2003. The hearing officer determined that the claimant has a "torn ligament" and that determination is supported by the result of a MRI; consequently there was damage or harm to the physical structure of the body and Williamson does not apply.

DISABILITY

Whether the claimant had disability is a factual question for the hearing officer to resolve. We have reviewed the disability determination and conclude that the hearing officer's decision is supported by sufficient evidence. Cain, *supra*.

MODIFY DECISION

Finally, the carrier asks, in its appeal, that we modify the decision and order to reflect that the claimant sustained an injury to his elbow, not his shoulder. The hearing officer's Finding of Fact No. 8 states, "Claimant does have a torn ligament in his left shoulder." Apparent from the record is that the claimant has a torn ligament in his left elbow; consequently, we modify the hearing officer's references to the left "shoulder" to left "elbow."

As modified, we affirm the decision and order of the hearing officer.

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.**

Roy L. Warren
Appeals Judge

CONCUR:

Elaine M. Chaney
Appeals Judge

Thomas A. Knapp
Appeals Judge