

APPEAL NO. 030661
FILED APRIL 30, 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 February 13, 2003. The hearing officer determined that the appellant/cross-respondent (claimant) sustained an injury on _____, but did not sustain the injury in the course and scope of her employment; that the respondent/cross-appellant (carrier) waived its right to contest compensability of the claimed injury by failing to timely contest the injury in accordance with Sections 409.021 and 409.022; and that the claimant had disability resulting from the injury sustained on _____, beginning October 4, 2002, and continuing through the date of the hearing. The claimant appealed the hearing officer's determination that she did not sustain the _____, injury while in the course and scope of her employment. The carrier responded, urging affirmance of that determination. The carrier appealed the hearing officer's determinations that it waived its right to contest the compensability of the claimed injury and that the claimant had disability. The claimant responded, urging affirmance of those determinations.

DECISION

Affirmed.

Dispositive to the issues before us is whether or not the carrier waived the right to dispute the compensability of the injury, which forms the basis of this claim, by failing to do so in accordance with Sections 409.021 and 409.022. It is undisputed that the carrier received first written notice of the claim on September 27, 2002. At the commencement of the hearing on this matter, the carrier offered an exhibit which purported to be an E-mailed acknowledgement from the Texas Workers' Compensation Commission (Commission) that it received an electronically filed Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21), (hereinafter referred to as "cert-21" to differentiate between this form purporting to certify that benefits would be paid as they accrued and the TWCC-21 form later filed to dispute the claim) from the carrier on September 27, 2002. The claimant objected to the admittance of the acknowledgement of receipt of the "cert-21" on the grounds that there was no timely exchange. After sustaining the objection, the hearing officer accessed the Commission's computer records and took official notice that the first TWCC-21 contesting compensability in this claim was filed by the carrier on October 15, 2002. The carrier requested a continuance to allow it to obtain testimony from the Commission employee who sent the September 27, 2002, E-mailed acknowledgement that the "cert-21" was received by the Commission on that date. The hearing officer denied that request on the grounds that the carrier had ample time to timely exchange the excluded acknowledgement of receipt of the "cert-21," and because the Commission will not allow its employees to testify. Based upon the above, the hearing officer determined that, although the claimant sustained an injury to her lumbar spine, she failed to establish

that she sustained the injury while at work for the employer; that the claimant has not worked since October 3, 2002, due to the injury to her lumbar spine; that the carrier received first written notice of the claim on September 27, 2002; that the carrier disputed the claim on October 15, 2002; that the carrier waived the right to dispute the compensability of the claimed injury by failing to contest the injury in accordance with Sections 409.021 and 409.022; and that the claimant had disability beginning on October 4, 2002, and continuing through the date of the hearing.

On appeal, the carrier asserts that the excluded acknowledgement was timely disclosed and that the hearing officer erred in not taking official notice of it. The benefit review conference (BRC) report clearly indicates that the carrier was asserting that it had in fact timely filed a "cert-21," initially agreeing to pay benefits as they accrue and are due, but that the carrier had failed to produce a copy of the acknowledgment that the "cert-21" had been received by the Commission as of the date of the BRC. The hearing officer heard the arguments of the parties and determined that the complained-of acknowledgement was not timely exchanged and that it was available long before the hearing. Additionally, the hearing officer properly took official notice of the Commission's records. Regarding the exclusion of the acknowledgement for lack of timely exchange, we have frequently held that to obtain reversal of a judgment based upon the hearing officer's abuse of discretion in the admission or exclusion of evidence, an appellant must first show that the admission or exclusion was in fact an abuse of discretion, and also that the error was reasonably calculated to cause and probably did cause the rendition of an improper judgment. *Texas Workers' Compensation Commission Appeal No. 92241*, decided July 24, 1992; see also *Hernandez v. Hernandez*, 611 S.W.2d 732 (Tex. Civ. App.-San Antonio 1981, no writ). It has also been held that reversible error is not ordinarily shown in connection with rulings on questions of evidence unless the whole case turns on the particular evidence admitted or excluded. *Atlantic Mut. Ins. Co. v. Middleman*, 661 S.W.2d 182 (Tex. App.-San Antonio 1983, writ ref'd n.r.e.). While it is clear that the excluded document was critical to the carrier's case, we find no abuse of discretion in the hearing officer's application of the exchange of evidence rules.

What remains is a sufficiency of the evidence appeal by the claimant. We have reviewed the complained-of determinations and find that the hearing officer's Decision and Order is supported by sufficient evidence to be affirmed. The disputed issue presented questions of fact for the hearing officer. The hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a); *Texas Employers Ins. Ass'n v. Campos*, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). There was conflicting evidence presented on the disputed issues. It was for the hearing officer, as the trier of fact, to resolve the conflicts and inconsistencies in the evidence and to determine what facts had been established. *Garza v. Commercial Ins. Co.*, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). Nothing in our review of the record reveals that the hearing officer's determinations are so contrary to the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. As such, no sound basis exists for us to reverse those determinations on appeal. *Cain v. Bain*, 709 S.W.2d 175, 176 (Tex. 1986).

The hearing officer's decision and order are affirmed.

The true corporate name of the insurance carrier is **FIRE & CASUALTY INSURANCE COMPANY OF CONNECTICUT** and the name and address of its registered agent for service of process is

**CORPORATION SERVICE COMPANY
800 BRAZOS
AUSTIN, TEXAS 78701.**

Daniel R. Barry
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Edward Vilano
Appeals Judge