APPEAL NO. 032636
FILED NOVEMBER 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 was held on September 8, 2003. The hearing officer determined that: (1) the appellant/cross-respondent (carrier) waived the right to dispute compensability of the claimed injury by not timely contesting the injury in accordance with Section 409.021; (2) the respondent/cross-appellant (claimant) sustained a compensable injury on _____, because he has an injurious condition and the carrier waived the right to contest compensability; and (3) the claimant had disability from the compensable injury beginning February 28, 2003, and continuing through the date of the hearing. The carrier appeals these determinations on legal and sufficiency of the evidence grounds. Although he prevailed, the claimant complains of the hearing officer's findings that he did not sustain a specific injury or repetitively traumatic injury at work on _____. The carrier urges affirmance.

DECISION

Affirmed.

WAIVER AND COMPENSABLE INJURY

The hearing officer did not err in determining that the carrier waived its right to dispute the claimed injury by not timely contesting the injury in accordance with Section 409.021. The carrier contends that there is "insufficient evidence of [written] notice in the record to trigger the waiver deadline." Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 124.1(a) (Rule 124.1(a)) provides that written notice of an injury, as used in Section 409.021, consists of the insurance carrier's earliest receipt of the Employer's First Report of Injury (TWCC-1) notification provided from the Texas Workers' Compensation Commission (Commission) under Rule 124.1(c), and if no TWCC-1 has been filed, any other communication regardless of source which fairly informs the carrier of the name of the injured employee, the identity of the employer, the approximate date of the injury and information which asserts the injury is work related. The evidence shows that the carrier received written notice of the injury from the employer on March 18, 2001. *See* Claimant's Exhibit No. 3 and Carrier's Exhibit No. 1. It is undisputed that the carrier submitted a "cert-21" on March 26, 2003, more than seven days after receipt of written notice. In view of this evidence, we cannot conclude that the hearing officer's determination 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).

Next, the carrier argues that it paid benefits as they accrued as required by the 1989 Act and, therefore, did not waive its right to dispute the claimed injury. In Texas Workers' Compensation Commission Appeal No. 030380-s, decided April 10, 2003, citing Continental Casualty Company v. Downs, 81 S.W.3d 803 (Tex. 2002), we held

that Section 409.021 requires a carrier to take some action within seven days of receiving written notice of an injury, and we admonished that a carrier which does nothing and later asserts that it "intended to pay in accordance with the 1989 Act [when benefits accrued]," does so at its own risk. In accordance with our prior decision and the evidence presented in this case, we cannot conclude that the hearing officer erred in determining that the carrier waived its right to dispute the claimed injury.

The carrier also argues that it did not waive its rights under Section 409.021, because the claimant did not sustain an injury. In Continental Casualty Company v. Williamson, 971 S.W.2d 108 (Tex. App.-Tyler 1998, no pet.), 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 recognized that Williamson is limited to situations where there is a determination that the claimant had no injury, 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. In this case, the hearing officer found that the claimant had injuries in the form of strains to the shoulders and thoracic spine. Nothing in our review of the record indicates that this determination is so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain, *supra*. Accordingly, the hearing officer properly concluded that the claimant sustained a compensable injury due to carrier waiver.

As stated above, the claimant complains of the hearing officer's findings that he did not sustain a specific injury or repetitively traumatic injury at work on _____. Given our decision above, the claimant is not an aggrieved party. Accordingly, we decline to address this matter further. *See* Texas Workers' Compensation Commission Appeal No. 991106, decided July 7, 1999; Texas Workers' Compensation Commission Appeal No. 022824, decided December 17, 2002.

DISABILITY

The hearing officer did not err in determining that the claimant had disability from February 28, 2003, through the date of the hearing. This determination involved 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 (Section 410.165(a)) and, as the trier of fact, resolves the conflicts and inconsistencies in the evidence including the medical evidence (Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ)). In view of the evidence presented, we cannot conclude that the hearing officer's determination is so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain, *supra*.

The hearing officer's decision and order are affirmed.

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

LEO MALO
12222 MERIT DRIVE, SUITE 700
DALLAS, TEXAS 75251.

_____
Edward Vilano
Appeals Judge

CONCUR:

_____
Margaret L. Turner
Appeals Judge

CONCURRING OPINION:

I concur in the majority opinion and only write separately to address what I perceive to be the claimant's appeal of the hearing officer's Finding of Fact Nos. 8 and 9. I gather from the claimant's appeal that he is saying that he does not believe the findings that the claimant did not sustain a specific event at work on February 28, 2003, caused an injury nor that the claimant's work was not sufficiently repetitively traumatic to have caused the claimed injury. My review of the record indicates that the hearing officer's determinations on this point to be sufficiently supported by the evidence and not so against the great weight and preponderance of the evidence as to be clearly wrong or unjust. Cain, *supra*.

_____
Thomas A. Knapp
Appeals Judge