APPEAL NO. 032768
FILED DECEMBER 10, 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 16, 2003. The hearing officer determined that the appellant (claimant) did not sustain a compensable (cervical and/or lumbar) injury on _____, that the claimant did not have disability, and that the respondent (carrier) did not waive the right to dispute a claimed injury of _____.

The claimant appealed, essentially on sufficiency of the evidence grounds, contending that the decision "is logically inconsistent," and that the hearing officer erred on the carrier waiver issue. The carrier responds, urging affirmance.

DECISION

Affirmed.

It is largely undisputed that the claimant, an airline crew chief baggage handler, sustained a prior compensable lumbar injury in 1999, received treatment, and returned to work after that injury, and that the claimant sustained a prior cervical injury on (prior date of injury). How much those injuries continued to bother the claimant is in dispute. In February 2003, the claimant's treating doctor was considering releasing the claimant to return to work, however, the employer required a functional capacity evaluation (FCE) to determine the claimant's work ability. The FCE was conducted on _____. It is undisputed that the FCE lasted four hours and 15 minutes. Exactly what the claimant did is unclear. The FCE indicates that the claimant complained of back pain walking, carrying "occasional 50 #," and during the lift, push, pull tow bar. The FCE notes that the claimant had to rest during a 10 minute walk "due to the right lateral hip muscle pain, 3 times for a total of 4 minutes and 20 seconds out of the 10 minutes." The claimant testified after the FCE he was in "excruciating, very sharp, direct pain," had difficulty driving the four hours back home, and had to be helped out of his truck. Basically the claimant's position is that he was in little or no pain prior to the FCE and was in severe pain after the FCE, therefore, the FCE had to have caused the increase in pain. The hearing officer commented that the "theory of how the injuries occurred was vague" and that he was "left simply with speculation that somehow the [FCE] caused a new cervical and lumbar injury by way of aggravation or otherwise."

In evidence are MRI reports dated April 6, 2000 (relating to the 1999 injury), and April 3, 2003. The hearing officer noted that the later 2003 MRI, which showed a large protrusion with extended disc fragments at L5-S1, was "significantly worse than the prior MRI." The claimant contends that the hearing officer's decision is not supported by any medical evidence and on appeal summarizes various medical reports offered by the carrier as indication that there is "no probative medical evidence that contradicts the

claimant's position." The claimant had the burden of proof to show that the FCE, or some aspect of the FCE, caused or aggravated the claimant's cervical and lumbar injuries. Johnson v. Employers Reinsurance Corporation, 351 S.W.2d 936 (Tex. Civ. App.-Texarkana 1961, no writ). Contrary to the claimant's contention that the hearing officer required the claimant to "pinpoint the exact moment the injury occurred," we read the hearing officer's determinations to say that there was insufficient evidence to show how the FCE "played any causation role in the current conditions of the lumbar and cervical spine." The hearing officer's determinations are supported by sufficient evidence and are not against the great weight and preponderance of the evidence.

On the carrier waiver issue, in evidence is a Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) dated May 5, 2003, "acknowledged" by the Texas Workers' Compensation Commission (Commission) on May 6, 2003, which indicates in block 14 that the carrier's first written notice of injury was "04-14-2003." The carrier's adjuster testified this was a (clerical) error and that April 14, 2003, was the date the employer first received verbal notice of the injury. The carrier's position is that it received the first written notice when it received the claimant's Employee's Notice of Injury or Occupational Disease and Claim for Compensation (TWCC-41) from the claimant's attorney on May 1, 2003. Also in evidence are two other TWCC-21's dated May 6, 2003, showing first written notice of the injury on May 1, 2003, filed with the Commission on May 6, 2003. We would also note that the Employer's First Report of Injury or Illness (TWCC-1) shows the date the injury was reported to the employer as being "04-14-03." There is no evidence what the alleged written notice of April 14, 2003, was other than the statement on the first TWCC-21. The hearing officer commented:

> I find the Carrier's explanation of the date of April 14, 2003, plausible and persuasive. This date was simply a mistake and did not reflect reality. The first written notice was actually received on May 1, 2003. Thus, the TWCC-21 was timely. As an aside, I note that the TWCC-41 gave notice only of a lumbar injury. Therefore, a later claim of a cervical injury would be a matter of extent of injury not involving waiver.

Whether the TWCC-21 showing a first written notice of April 14, 2003, was an error as claimed or not was a factual determination within the province of the hearing officer to resolve. He did so and the hearing officer's determination is supported by the evidence.

Although not specifically appealed we note that without a compensable injury there cannot be disability. Section 401.011(16).

The hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). As the trier of fact, the hearing officer resolves the conflicts in the evidence and determines what facts have been established. The hearing officer's decision is supported by sufficient evidence and is not so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. 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 **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.

_____
Thomas A. Knapp
Appeals Judge

CONCUR:

_____
Robert W. Potts
Appeals Judge

_____
Margaret L. Turner
Appeals Judge