

APPEAL NO. 032820  
FILED DECEMBER 16, 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 September 25, 2003. The hearing officer determined that the respondent (claimant) had a compensable (left shoulder) injury on \_\_\_\_\_; that the claimant had disability from July 18, 2002, continuing through the date of the CCH; and that the appellant (carrier) waived the right to contest compensability by not complying with the provisions of Sections 409.021 and 409.022.

The carrier appeals, contending that the claimant did not sustain an injury as alleged and that if he did sustain such injury it was a continuation of a 1991 injury and if not it was an ordinary disease of life. The carrier argues that without a compensable injury the claimant could not have disability, and even if the claimant had compensability, the claimant's disability would be limited to three weeks. The carrier contends that it timely filed a "cert 21." The file does not contain a response from the claimant.

DECISION

Affirmed.

The claimant, a construction superintendent, testified that he sustained a compensable left shoulder injury (torn rotator cuff) on \_\_\_\_\_, when he slipped and fell while cleaning at a construction site. It is undisputed that the claimant had sustained a compensable left shoulder injury in a similar fall in 1991. Whether the claimant's 1991 left shoulder injury had resolved as the claimant contends, or whether it continued to give him problems as several medical records would indicate, is a factual determination for the hearing officer to resolve. Basically, this case comes down to what evidence the finder of fact chooses to believe. There was conflicting evidence, both documentary and testimonial, presented on the disputed issues. It is the hearing officer, as the sole judge of the weight and credibility of the evidence (Section 410.165(a)) who resolves the conflicts in the evidence and determines what facts have been established. In doing so, the hearing officer 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). This is equally true of the medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). On the injury issue, 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 manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

The claimant continued to work after his \_\_\_\_\_, injury until he had left shoulder surgery (repair of the torn rotator cuff) on July 18, 2002. The claimant

apparently continued to receive his salary until July 31, 2002, and thereafter was laid off with some kind of pay severance, which paid him until August 31, 2002. Disability is defined as the inability because of the compensable injury to obtain and retain employment at the preinjury wage. (Section 401.011(16)). The fact that the claimant received some kind of severance pay may affect the amount of temporary income benefits that he is paid but does not necessary preclude a finding of disability. Further, the carrier argues that the claimant “failed to show that he could not obtain sedentary employment.” That is the incorrect standard. The question is, could the claimant obtain and retain employment at the preinjury wage. We would further note that the Appeals Panel has many times held that disability may be proven by the claimant’s testimony alone if believed by the hearing officer. Gee v. Liberty Mutual Fire Insurance Company, 765 S.W.2d 394 (Tex. 1989). Texas Workers' Compensation Commission Appeal No. 92285 decided August 14, 1992.

On the carrier waiver issue, it is undisputed that the carrier received first written notice of the injury on February 20, 2003. In evidence is a Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) dated February 20, 2003, which the carrier asserts is a “cert 21” (box 1 is marked to show that benefits would be paid as accrued). Also in evidence is an internal carrier document entitled “File Activities Report” which indicates “From cert 21 Subject Received Re: Downs 21 64823408 F G Thur. 2/20/03 4:12 PM.” The carrier contends that this shows that the February 20, 2003, TWCC-21 was filed electronically with the Texas Workers' Compensation Commission. The hearing officer apparently thought differently stating:

File Activities Report submitted by the Carrier to purportedly prove that the cert 21 was sent on [February 20, 2003] does not even rise to the level of a confirmation of transmittal receipt. . . .

We decline to say that determination is either incorrect as a matter of law or is against the great weight and preponderance of the evidence.

We have reviewed the complained-of determinations and conclude that the hearing officer’s determinations are supported by the evidence and are not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain, supra.

We affirm the hearing officer's decision and order.

The true corporate name of the insurance carrier is **CONTINENTAL CASUALTY COMPANY** and the name and address of its registered agent for service of process is

**CT CORPORATION SYSTEM  
350 NORTH ST. PAUL STREET  
DALLAS, TEXAS 75201.**

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Thomas A. Knapp  
Appeals Judge

CONCUR:

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Gary L. Kilgore  
Appeals Judge

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Margaret L. Turner  
Appeals Judge