

APPEAL NO. 033132
FILED JANUARY 27, 2004

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 November 4, 2003. The hearing officer determined that: (1) the respondent (claimant) sustained a compensable injury on _____; (2) the appellant (carrier) is not relieved from liability under Section 409.002, because the claimant did not timely notify the employer pursuant to Section 409.001; (3) the claimant had disability from May 30 through July 4, 2002, and then again from May 7, 2003, through the date of the CCH; (4) the claimant did not file with the Texas Workers' Compensation Commission (Commission) a claim for compensation for an injury within one year pursuant to Section 409.003, however, the claimant had good cause pursuant to Section 409.004(1); and (5) Section 409.008 of the Act applies, and the one year statute of limitations is tolled. The carrier appealed, arguing that the hearing officer's determinations are against the great weight and preponderance of the evidence. The appeal file does not contain a response from the claimant.

DECISION

Finding sufficient evidence to support the decision of the hearing officer and no reversible error in the record, we affirm the decision and order of the hearing officer.

The claimant testified that he injured his right knee at work on _____, and that he reported a work-related injury to his employer on November 8, 2001. The claimant stated that he relied on the employer's representation that it did not provide workers' compensation insurance coverage, and that he filed a claim later than one year after the date of injury when he became aware that the employer did provide workers' compensation coverage. There is conflicting evidence.

COMPENSABLE INJURY AND DISABILITY

The claimant had the burden to prove that he sustained a compensable injury and that he had disability as defined by Section 401.011(16). Johnson v. Employers Reinsurance Corporation, 351 S.W.2d 936 (Tex. Civ. App.-Texarkana 1961, no writ). Those issues presented a question of fact for the hearing officer to resolve. The hearing officer is the sole judge of the relevance and materiality of the evidence and of its weight and credibility. Section 410.165(a). The hearing officer resolves the conflicts and inconsistencies in the evidence and decides what facts the evidence has established. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). After reviewing the record, we find sufficient evidence to support the compensable injury and disability determinations.

TIMELY NOTIFICATION

The 1989 Act generally requires that an injured employee or person acting on the employee's behalf notify the employer of the employee of the injury not later than 30 days after the injury occurred. Section 409.001. The burden is on the claimant to prove the existence of notice of injury. Travelers Insurance Company v. Miller, 390 S.W.2d 284 (Tex. Civ. App.-El Paso 1965, no writ). In the present case, there was conflicting evidence as to whether or not the claimant gave timely notice of a _____, injury to his employer. It was the province of the hearing officer to resolve the conflicting evidence. Applying the standard of review discussed above, we find sufficient evidence to support the hearing officer's timely notice determination.

TIMELY FILING OF CLAIM

Section 409.004 provides that the failure to file a claim for compensation with the Commission as required by Section 409.003 (not later than one year after the date of injury) relieves the employer and the carrier of liability unless good cause exists for failure to timely file a claim or the employer or the carrier does not contest the claim. Whether good cause exists is a matter left up to the discretion of the hearing officer, and the determination will not be set aside unless the hearing officer acted without reference to any guiding rules or principles. Texas Workers' Compensation Commission Appeal No. 002816, decided January 17, 2001, citing Morrow v. H.E.B., Inc., 714 S.W.2d 297 (Tex. 1986). We have held that the appropriate test for the existence of good cause is whether the claimant acted as a reasonably prudent person would have acted under the same or similar circumstances. Texas Workers' Compensation Commission Appeal No. 94244, decided April 15, 1994. In the instant case, the hearing officer determined that the claimant did not file an Employee's Notice of Injury or Occupational Disease and Claim for Compensation (TWCC-41) with the Commission within one year of his _____, work-related injury because he relied on the employer's representation that it did not provide workers' compensation coverage, and as soon as the claimant learned of his employer's workers' compensation coverage, he acted as a reasonably prudent person and filed his TWCC-41. In view of the evidence presented, we cannot conclude that the hearing officer abused her discretion in determining that the claimant had good cause for failing to timely file a TWCC-41 with the Commission.

TOLLING STATUTE

Section 409.008 provides that if an employer or the employer's insurance carrier has been given notice or has knowledge of an injury to or the death of an employee and the employer or insurance carrier fails, neglects, or refuses to file the report under Section 409.005 (Employer's First Report of Injury or Illness (TWCC-1)), the period for filing a claim for compensation under Sections 409.003 and 409.007 does not begin to run against the claim of an injured employee or legal beneficiary until the day on which the report required under Section 409.005 has been furnished. The resolution of the timely filing issue revolves around whether the time for filing was tolled. This hinges on

when the employer had actual knowledge of the injury. Having affirmed the hearing officer's determination that the claimant gave timely notice of his injury to his employer, we find that there was sufficient evidence to support the determination that the one-year statute of limitations is tolled.

We affirm the decision and order of the hearing officer.

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

**CINDY GHALIBAF
7610 STEMMONS FREEWAY, SUITE 350
DALLAS, TEXAS 75247.**

Gary L. Kilgore
Appeals Judge

CONCUR:

Chris Cowan
Appeals Judge

Edward Vilano
Appeals Judge