

APPEAL NO. 033352
FILED FEBRUARY 23, 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 was held on December 3, 2003. The hearing officer determined that the respondent (claimant) sustained a lumbar strain in the course and scope of his employment on _____; that at the time of the injury the claimant was intoxicated; that the appellant (carrier) did not timely dispute the injury in accordance with Sections 409.021 and 409.022 and is not entitled to reopen the issue of compensability based upon newly discovered evidence; that because the carrier waived the right to dispute compensability, the injury is compensable despite the fact that the claimant was intoxicated at the time of the injury; and that the claimant did not have disability resulting from the compensable injury. The carrier appeals, asserting that the claimant did not sustain a work-related injury on _____; that the carrier did not waive the right to contest compensability of the claimed injury; and that irrespective of the waiver issue, the carrier was entitled to reopen the issue of compensability based on newly discovered evidence. The appeal file contains no response from the claimant.

DECISION

Affirmed.

The hearing officer did not err in determining that the carrier waived the right to dispute compensability of the claimed injury by not timely contesting it in accordance with Sections 409.021 and 409.022. The only evidence presented at the hearing by the carrier in support of its position that it did not waive the right to contest compensability was an affidavit prepared by one of its adjusters. The affidavit recites that “[w]ithin seven (7) days of written notification [of the claimed injury], [the carrier] mailed a letter to [the claimant]” wherein the carrier informed the claimant “that his claim had been accepted and that [the carrier] would pay all medical and income benefits, if and when, they accrued.” The hearing officer noted that a copy of the aforementioned letter was not in evidence, nor was there any evidence reflecting that the carrier filed a “cert-21” within seven days after September 10, 2002, the date upon which the carrier received written notice of the injury. The hearing officer concluded that the carrier waived the right to contest compensability of the _____, injury. Nothing in our review of the record indicates that the hearing officer’s waiver 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). A carrier that waives the right to contest compensability of a claimed injury is not entitled to reopen the issue of compensability based on newly discovered evidence. Texas Workers' Compensation Commission Appeal No. 031208, decided June 18, 2003, and Texas Workers' Compensation Commission Appeal No. 032540, decided November 14, 2003.

The carrier also asserts that the hearing officer's finding that the claimant sustained an injury in the course and scope of his employment was not supported by the evidence. This issue involved a factual question 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 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)). It was the hearing officer's prerogative to believe all, part, or none of the testimony of any witness, including that of the claimant. Aetna Insurance Company v. English, 204 S.W.2d 850 (Tex. Civ. App.-Fort Worth 1947, no writ). The hearing officer was obviously persuaded from the evidence that the claimant injured his back while lifting boards on the date in question. We perceive no error in the hearing officer's finding that the claimant sustained a lumbar strain in the course and scope of his employment on _____. Furthermore, given our affirmance of the waiver issue and the fact that the medical evidence reflects that the claimant has damage or harm to his back, it was not necessary for the claimant to prove that he was injured while in the course and scope of his employment. Texas Workers' Compensation Commission Appeal No. 030430, decided April 7, 2003, interpreting Continental Casualty Co. v. Williamson, 971 S.W.2d 108 (Tex. App.-Tyler 1998, no pet. h.) Our affirmance of the hearing officer's decision does not necessarily limit the compensable injury to a strain.

The decision and order of the hearing officer are affirmed.

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

**RAY WILSON
9602 CABIN CREEK DRIVE
HOUSTON, TEXAS 77064.**

Chris Cowan
Appeals Judge

CONCUR:

Judy L. S. Barnes
Appeals Judge

Thomas A. Knapp
Appeals Judge