

APPEAL NO. 041065  
FILED JUNE 28, 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 February 11, 2004. The hearing record was reopened and ultimately closed on March 25, 2004. The hearing officer determined that the date of the respondent's (claimant) claimed injury is \_\_\_\_\_; that he did not sustain a repetitive trauma injury while in the course and scope of his employment on \_\_\_\_\_; that he did not give timely notice of the injury to his employer; that the appellant (carrier) waived the right to contest compensability of the claimed injury by not disputing it in accordance with Section 409.021; and that due to the carrier's waiver, it is not relieved of liability for the claimed injury due to the claimant's failure to timely notify the employer of the injury, and that the claimant sustained a compensable repetitive trauma injury with a date of injury of \_\_\_\_\_. The carrier appeals these determinations and asserts that the hearing officer committed procedural error in failing to add a requested issue and in reopening the hearing record to admit a Texas Workers' Compensation Commission (Commission) record. The appeal file does not contain a response from the claimant.

DECISION

Affirmed as reformed.

Finding of Fact No. 7 reflects that the claimant filed a written claim for compensation (TWCC-41) with the Commission on May 21, 2002. This date is an obvious typographical error. Finding of Fact No. 7 is reformed to reflect that the TWCC-41 was filed on May 21, 2003.

The carrier asserts that in resolving the waiver issue, the hearing officer erred in reopening the hearing record to admit Hearing Officer's Exhibit No. 6, a copy of the "EES-11," wherein the Commission gave written notice of the claimant's claimed injury to the carrier. The Appeals Panel has required hearing officers to take official notice of essential Commission records where compliance with the 1989 Act is at issue. See Texas Workers' Compensation Commission Appeal No. 031441, decided July 23, 2003, and cases cited therein. We would also point out that Hearing Officer's Exhibit No. 5, a computer printout created by the Commission, which contains essentially the same information contained in the complained-of exhibit, was admitted during the hearing without an objection by the carrier. For these reasons, we perceive no reversible error in the admission of Hearing Officer's Exhibit No. 6.

Section 409.021(a) requires that a carrier act to initiate benefits or to dispute compensability within seven days of first receiving written notice of an injury or waive its right to dispute compensability. See Continental Casualty Company v. Downs, 81 S.W.3d 803 (Tex. 2002); Texas Workers' Compensation Commission Appeal No. 030380-s, decided April 10, 2003. The hearing officer found that the carrier waived its

right to dispute compensability because it received written notice on May 28, 2003, and did not dispute the compensability of the claimed injury until September 11, 2003. The evidence supports the hearing officer's finding of waiver. The carrier also argues that even if it waived the right to dispute compensability of the claimed injury it is not liable for the injury under Continental Casualty Co. v. Williamson, 971 S.W.2d 108 (Tex. App.-Tyler 1998, no pet. h.). We have interpreted Williamson to mean that a carrier's failure to timely dispute does not create an injury only when there is no injury. If the claimant has established a condition that meets the definition of injury under Section 401.011(26), it does not matter that the cause of the injury may be outside the course and scope of employment because causation is no longer in dispute when a Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) has not been timely and properly filed. See Texas Workers' Compensation Commission Appeal No. 992584, decided January 3, 2000, and Texas Workers' Compensation Commission Appeal No. 981640, decided September 2, 1998. Under the facts of this case, the carrier's reliance on Williamson is misplaced as the evidence supports that the claimant has an injury.

The date of injury for an occupational disease is the date the employee knew or should have known that the disease may be related to the employment (Section 408.007) and is a factual question for the hearing officer to resolve. 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's determination that the date of the claimant's claimed injury is \_\_\_\_\_, is sufficiently supported by the evidence and is not 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).

Given our affirmance of the waiver issue, we need not address the carrier's argument that the hearing officer erred in declining to add the issue of whether the claimant timely filed a claim for compensation. A carrier that does not timely dispute the compensability of a claim cannot avail itself of the timely filing defense provided in Section 409.003. See Texas Workers' Compensation Commission Appeal No. 022091-s, decided October 7, 2002. Similarly, when a carrier loses its right to contest compensability, it cannot assert a defense under Section 409.002 based upon the claimant's failure to give timely notice of injury to the employer. Texas Workers' Compensation Commission Appeal No. 022027-s, decided September 30, 2002.

The hearing officer's decision and order are affirmed as reformed.

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

**CORPORATION SERVICE COMPANY  
701 BRAZOS STREET, SUITE 1050  
AUSTIN, TEXAS 78701.**

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Chris Cowan  
Appeals Judge

CONCUR:

\_\_\_\_\_  
Robert W. Potts  
Appeals Judge

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Edward Vilano  
Appeals Judge