

APPEAL NO. 000433

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 January 31, 2000. With respect to the issues before him, the hearing officer determined that the respondent/cross-appellant (claimant) was not in the course and scope of his employment at the time of his injury on _____; that the claimant's current neck and back problems are a result of the injury he sustained on _____; that the appellant/cross-respondent (carrier) timely contested compensability in accordance with Section 409.021 and Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 124.6 (Rule 124.6); and that the claimant did not have disability because he did not sustain a compensable injury. In his appeal the claimant contends that the hearing officer erred in his determinations that he was not in the course and scope of his employment at the time of his injury; that the carrier timely contested compensability; and that he did not have disability. In its response to the claimant's appeal, the carrier urges affirmance. In its appeal, the carrier argues that the hearing officer's determinations that the claimant's current neck and upper back problems are a result of the injury he sustained on _____, and that the claimant was unable to obtain and retain employment at his preinjury wage as a result of the _____, injury from July 19 to July 26, 1999, from July 30 to July 31, 1999, and from August 6, 1999, through the date of the hearing, January 31, 2000, are against the great weight of the evidence. The appeal file does not contain a response to the carrier's appeal from the claimant.

DECISION

Affirmed in part and reversed and rendered in part.

The claimant testified that on _____, he was a production assistant with (employer) working at its plant located on an air force base. He stated that at about 5:30 a.m. on _____, he parked in a parking lot where most of his coworkers who worked on the same aircraft, including his supervisor, parked. The claimant testified that he was walking across a grassy area between the parking lot and a sidewalk, when he lost his footing and fell forward, striking his chin directly on the sidewalk. The claimant stated that after the fall, his mouth was bleeding, his bottom teeth were loose, and he had a lot of pain in his jaw. The claimant testified that during the six weeks he had worked for the employer, he had always parked in the same parking lot; that no one with the employer had ever told him where to park or that he should not park in that lot; and that the parking lot is closer to the guard shack, the entrance to the employer's facility, than the other public parking lot. On cross-examination, the claimant acknowledged that the parking lot is not owned or leased by the employer; that the lot where he parked on _____ is open to anyone on the base; that no identification is required to park there; and that the sidewalk adjacent to the parking lot is also open to anyone on the base.

The claimant stated that after the fall, he got up and went in to work; that he continued to work until about 9:00 a.m., when he had to leave because of the pain in his jaw; and that he sought medical treatment at the emergency room of a military hospital. The claimant stated that initially his jaw and teeth were his main concern; however, he stated that he experienced neck and upper back pain about a day or so after the incident. The first reference to neck and upper back pain in the claimant's medical records appears in the August 4, 1999, progress notes of Dr. T, the employer's doctor. The claimant stated that Dr. T released him to work light duty but that when he went back to work, he was performing his usual duties; therefore, he sought treatment with Dr. D, a chiropractor. Dr. D took the claimant off work and has continued him in an off-work status since August 1999. In a letter of September 13, 1999, Dr. D opined that the claimant has a cervical herniated disc, "which is causing the neck and mid-back subjective and objective findings." In a November 3, 1999, "To Whom it May Concern" letter, Dr. D noted that the claimant's objective testing revealed a "large palpable muscle spasm bilaterally in the cervical spine along with a positive foramina compression test." Dr. D noted that "these findings are very common for a traumatic blow to the head or jaw" and opined that the claimant's injuries "are a direct result" of his _____, injury.

On December 18, 1999, the claimant was involved in a motor vehicle accident, where he was stopped on the highway and was struck from the rear, causing his car to flip from the impact. He testified that he injured his neck, shoulders, back and knees in that accident. He acknowledged that the pain and lack of mobility in his neck were worse after the automobile accident; however, he insisted that he also had pain and restricted range of motion prior to the accident because of the _____, incident, noting that he was off work because of the fall at the time of the motor vehicle accident.

Ms. B, a safety analyst for the employer, testified that the parking lot, grassy area, and the sidewalk where the claimant fell was owned by the air force base. In addition, Ms. B testified that she completed the Employer's First Report of Injury or Illness (TWCC-1) on July 23, 1999, and faxed a copy of the report to the carrier. The carrier does not dispute that the TWCC-1 provided its first written notice of the claimed injury on July 23, 1999. On August 5, 1999, 13 days after it received written notice of the alleged injury, the carrier completed a Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) in which it accepted an injury to the jaw and teeth; however, it disputed that the injury extended to any other part of the claimant's body. On August 16, 1999, 24 days after it received written notice of the injury, the carrier filed a second TWCC-21 in which it contended that the claimant was not in the course and scope of his employment at the time of his fall.

The claimant initially argues that he was in the course and scope of his employment at the time of his injury under the access doctrine. The access doctrine has long been recognized as an exception to the general rule that workers' compensation benefits do not

apply to injuries received going to and from work. Under that doctrine the term employment for purposes of workers' compensation includes:

not only actual doing of the work, but a reasonable margin of time and space necessary to be used in passing to and from the place where the work is to be done. If the employee be injured while passing, with the express or implied consent of the employer, to or from his work by a way over the employer's premises, or over those of another in such proximity and relation as to be in practical effect, a part of the employer's premises, the injury is one arising out of and in the course of the employment as though it had happened while the employee was engaged in his work at the place of its performance.

Standard Fire Ins. Co. v. Rodriguez, 645 S.W.2d 534, 538 (Tex. App.-San Antonio 1983, writ ref'd n.r.e.) (citations omitted). In Texas Workers' Compensation Commission Appeal No. 972020, decided November 17, 1997, we noted that the question of whether the location of the injury is "in such proximity and relation as to be in practical effect, a part of the employer's premises" is a question of fact for the hearing officer to resolve. In this case, the hearing officer determined that the location where claimant's accident occurred was not part of the employer's premises, or under its control. Rather, the hearing officer determined that claimant's injury occurred in a public area of the base. The hearing officer was acting within his province as the sole judge of the weight and credibility of the evidence under Section 410.165 in so interpreting the evidence before him. Texas Employers Ins. Ass'n v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). Nothing in our review of the record indicates that that determination is so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. As such, no sound basis exists for disturbing that determination on appeal. Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986); Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986). Thus, the hearing officer correctly determined under the reasoning of Texas Compensation Ins. Co. v. Matthews, 519 S.W.2d 630 (Tex. 1974) that the access doctrine does not operate in this case to bring claimant's injury within the course and scope of his employment in that the site of the injury was neither located on employer's premises nor in such proximity or relation as to reasonably be considered a part thereof. Rather, the hearing officer found, and we affirmed the determination as not being against the great weight, that the claimant's injury occurred in a public area and as such was "a consequence of risk and hazards to which all members of the traveling public are subject rather than hazards having to do with and originating in the work or business of the employer." Kelty v. Travelers Ins. Co., 391 S.W.2d 558, 562 (Tex. Civ. App.-Dallas 1965, writ ref'd n.r.e.) (citations omitted).

Next, we consider the claimant's contention that the hearing officer erred in determining that the carrier timely contested compensability in this case. The claimant cites Downs v. Continental Cas. Co., No. 04-99-00111-CV (Tex. App.-San Antonio January 26,

2000) and argues that the carrier waived the right to contest compensability in this case because it did not initiate benefits or file its dispute within seven days of the date it received its first written notice of the claimed injury on _____. The hearing officer determined that the Downs decision did not control in this case because this case involves income benefits rather than death benefits and because the carrier initially accepted compensability of the injury in its August 5, 1999, TWCC-21. In addition, the hearing officer appears to have declined to apply the Downs decision based upon his assessment that the case was incorrectly decided because the Fourth Circuit Court of Appeals "very obviously read only Commission Rule 124.6(b) and totally ignored Section 409.021(c) of the Act passed by the Legislature." At the outset, we cannot agree with the assessment that the Downs court only considered Rule 124.6(b) in making the determination that a carrier who neither pays nor disputes within seven days of the date it receives written notice of the injury waives the right to do so in that the Downs decision does not even reference Rule 124.6. More fundamentally, however, separate and apart from the hearing officer's personal belief as to whether the case was correctly decided, he did not have the authority to disregard the Downs decision and fail to apply it in an instance where it is controlling just as it is unlikely that a district court within one of the counties covered by the Fourth Circuit Court of Appeals would disregard Downs. We are likewise unpersuaded by the efforts to distinguish this case from Downs. The hearing officer initially stated that Downs does not apply here because this is an income benefits case rather than a death case. The hearing officer states that death benefits cases are "specifically distinguished in Rule 124.6(b) from normal income benefits cases." While there are some differences in the way income and death benefits are treated in Rule 124.6, we cannot agree that those differences establish distinct time periods and procedures for contesting compensability depending on whether the carrier is contesting an injury or a death. On the contrary, from its plain language, Section 409.021 establishes the deadlines for a carrier to dispute compensability "after the date on which an insurance carrier receives written notice of an injury." (Emphasis added.) The Downs decision establishes, contrary to the interpretation the Commission had given to Section 409.021, that the carrier has seven days to either initiate benefits or dispute compensability and that its failure to do so results in a waiver of the right to contest. The court determined that the legislature intended to "encourage a carrier uncertain of the compensability of an injury to pay the benefits pending a full investigation of the claim" and that the 60-day period in Section 409.021(c) sets an outside limit on the investigation period of a carrier that initiates benefits within the seven-day period. Lastly, the hearing officer noted that the case at issue is factually distinguishable because the carrier initially accepted the compensability of the jaw/teeth injury in its August 5, 1999, TWCC-21 and only disputed that the injury extended to other parts of the claimant's body in that document. The hearing officer's determination in this regard would have merit if the initial TWCC-21 had been filed within seven days of July 23, 1999, the date it received written notice of the injury. However, the TWCC-21 was not filed by July 30, 1999; rather, it was not filed until August 5, 1999, and under the reasoning of Downs, the carrier had already waived its right to contest compensability at that point. Finding no merit in the attempts to distinguish Downs,

we reverse the hearing officer's determination that the carrier timely contested compensability in this case and render a new decision that the carrier waived its right to contest compensability in this instance because it neither filed its dispute nor initiated benefits within seven days of July 23, 1999. Accordingly, the claimant's _____, injury has become compensable as a matter of law.

In its appeal, the carrier asserts that the hearing officer's determinations that the claimant's current neck and upper back problems are a result of his injury sustained on _____, and that the claimant could not obtain and retain employment at his preinjury wage because of his _____ injury for the periods from July 19 to July 26, 1999, July 30 to July 31, 1999, and August 6, 1999, through the date of the hearing are against the great weight of the evidence. Extent-of-injury and disability determinations are questions of fact for the hearing officer to resolve. In arguing that the claimant's injury does not extend to his neck and upper back, the carrier emphasizes the delayed manifestation of the neck and upper back problems in the claimant's medical records. The significance, or lack of significance, of the delayed complaints was a matter left to the hearing officer to resolve. In his discussion the hearing officer noted that those complaints were masked by the claimant's "extreme jaw pain." He was acting within his province as the sole judge of the weight and credibility of the evidence under Section 410.165(a) in deciding to credit the claimant's testimony and the evidence from Dr. D that the fall on _____, was a cause of the claimant's neck and upper back injuries. Nothing in our review of the record demonstrates that the extent-of-injury determination is so contrary to the great weight and preponderance of the evidence as to compel its reversal on appeal. Pool, *supra*; Cain, *supra*. Similarly, we find no merit in the carrier's assertion that Finding of Fact No. 8, which found periods when the claimant could not obtain and retain employment at his preinjury wage because of the _____, injury, is against the great weight of the evidence. The claimant's testimony and the off-work slips from Dr. D provide sufficient evidentiary support for the hearing officer's fact finding that the claimant was unable to obtain and retain employment at his preinjury wage for the stated periods. That finding is not so against the great weight of the evidence as to be clearly wrong or manifestly unjust; therefore, it will not be disturbed on appeal. The hearing officer concluded that the claimant did not have disability because he did not sustain a compensable injury. However, given our reversal of the hearing officer's determination that the carrier timely contested compensability, the claimant's injury has become compensable as a matter of law. Thus, we reverse the determination that the claimant did not have disability and render a new decision that the claimant had disability for the periods from July 19 to July 26, 1999, from July 30 to July 31, 1999, and from August 6, 1999, through the date of the hearing.

The hearing officer's determinations that the claimant was not in the course and scope of his employment at the time of his _____, fall; that his neck and upper back problems were a result of that fall; and that the claimant could not obtain and retain employment at his preinjury wage because of his _____, injury for the periods found by

the hearing officer are affirmed. The hearing officer's determination that the carrier timely contested compensability of the claimant's injury is reversed and a new decision is rendered that the carrier waived its right to contest compensability of the _____, injury and it thus, has become compensable as a matter of law. The hearing officer's determination that the claimant did not have disability because he did not sustain a compensable injury is likewise reversed and a new decision is rendered that the claimant had disability for the periods from July 19 to July 26, 1999, from July 30 to July 31, 1999, and from August 6, 1999, through the date of the hearing.

Elaine M. Chaney
Appeals Judge

CONCUR:

Tommy W. Lueders
Appeals Judge

Judy L. Stephens
Appeals Judge