

APPEAL NO. 000879

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 March 31, 2000. The hearing officer determined that: (1) the appellant (claimant) did not sustain a work-related injury; (2) the date of the alleged injury was \_\_\_\_\_; (3) claimant did not report her injury within 30 days, but had good cause for failing to do so; (4) the issue of disability was improvidently certified and was not in dispute; and (5) respondent (carrier) timely contested compensability of the alleged injury within 60 days. The claimant appealed the injury, disability, and carrier waiver determinations on sufficiency grounds. She also complains that her attorney did not adequately present her case. Carrier responded that the Appeals Panel should affirm the hearing officer's decision and order.

DECISION

We affirm in part and reverse and render in part.

Claimant contends the hearing officer erred in determining that she did not sustain an injury in the course and scope of her employment. She asserts that: (1) the records of Dr. SW show that her herniated discs were causally related to her work; and (2) the hearing officer mistakenly thought claimant was not credible, but any confusion in this regard was caused by the fact that her attorney was not prepared. The hearing officer summarized the evidence in the decision and order. Briefly, claimant said that on \_\_\_\_\_, she helped to clean equipment out of a shed and stack boxes on shelves in the shed. She said that she was "worn out" by the end of the day. Two days later, her children called an ambulance because claimant's arm felt numb and she began having severe spasms in her neck. Claimant said that hospital personnel gave her pain medication and that on Monday, \_\_\_\_\_, Dr. ST told her she just had "arthritis." She said she did not find out that an MRI had revealed herniated cervical discs until Dr. P told her this on October 1, 1999. Claimant said she then reported the injury on October 5, 1999. There was medical evidence that claimant had cervical herniations or protrusions with one effacing the thecal sac. Dr. SW stated that claimant's herniations were "most probably" caused by moving boxes at work.

In this instance, the hearing officer determined that the claimant did not sustain an injury at work. A review of the hearing officer's decision demonstrates that she was not persuaded by the claimant's evidence that her activities at work caused the herniated discs. The hearing officer decided what weight to give to the claimant's testimony and the medical evidence regarding causation. The hearing officer was acting within her province as the fact finder in deciding to reject the claimant's testimony and the other evidence tending to demonstrate that she had injured her neck working in the shed. Our review of the record does not reveal that the hearing officer's determination that the claimant did not sustain a work-related injury is so against the great weight of the evidence as to be clearly

wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986). Accordingly, no basis exists for us to reverse that determination on appeal.

Claimant contends the hearing officer erred in determining that disability was not in dispute. She asserts that her attorney did not explain what happened at the CCH regarding the disability issue, which had been reported as an issue at the benefit review conference. At the CCH, the hearing officer asked what days claimant had been off work due to her injury. Claimant listed a number of days, but said she did not know which of these days she had missed only part of the day. The hearing officer noted that it did not appear that claimant had enough evidence regarding disability. Claimant's attorney then asked to withdraw the issue and carrier's representative stated that there was no objection. The hearing officer then said, "let's just say it's not an issue," and asked, "you agree?" Unnamed persons then indicated agreement and there was no indication that any person disagreed. An attorney employed to represent a claimant before the Texas Workers' Compensation Commission (Commission) is the agent of the claimant; The attorney's action or inaction within the scope of employment is attributable to the client. Texas Workers' Compensation Commission Appeal No. 93605, decided August 26, 1993. Therefore, claimant was bound by the agreement to withdraw the disability issue. However, we note that the hearing officer did not actually address the issue on the merits, so the disability issue has not yet been determined and can be raised at a later time.

Claimant also complained generally that her attorney was not prepared. We note that the Appeals Panel does not have jurisdiction to address such contentions, which are essentially matters between a claimant and her attorney. See Texas Workers' Compensation Commission Appeal No. 94030, decided February 15, 1994.

Claimant contends the hearing officer erred in determining that carrier did not waive the right to contest the compensability of the injury. There was damage or harm to claimant's body in the form of herniated discs, so Continental Casualty Company v. Williamson, 971 S.W.2d 108 (Tex. App.-Tyler 1998, no pet. h.), cited by carrier, does not apply. The parties stipulated that: (1) carrier received notice of the claimed injury on October 5, 1999; (2) carrier disputed the injury on October 14, 1999; and (3) no benefits have been paid on this claim.

In this case, carrier did not file a Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) within the seven-day period and did not pay benefits. Therefore, because carrier did not initiate benefits or file a dispute within seven days, it waived the right to contest the compensability of the claimed injury in this case. See Downs v. Continental Cas. Co., No. 04-99-00111-CV (Tex. App.-San Antonio January 26, 2000, no pet. h.); Texas Workers' Compensation Commission Appeal No. 000433, decided April 12, 2000.

We note that the hearing officer determined that Downs is "unpublished" and is "not final," so it does not apply. However, the last page of the Downs decision shows that it is a

published decision. Further, despite the fact that a litigant has chosen to appeal the decision, it is the decision of a Texas appellate court which has not been reversed or overruled and we will follow it, given the fact that there is no contrary authority from another appellate court.

We affirm that part of the hearing officer's decision and order that determined that claimant did not sustain an injury in the course and scope of her employment and that disability was not an issue at the CCH. We reverse that part of the hearing officer's decision and order that determined that carrier did not waive the right to contest the compensability of the claimed injury and we render a decision that carrier waived the right to contest compensability of the \_\_\_\_\_, injury, and that that injury has become compensable as a matter of law.

Judy L. Stephens  
Appeals Judge

CONCUR:

Philip F. O'Neill  
Appeals Judge

Dorian E. Ramirez  
Appeals Judge