

APPEAL NO. 001717

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 June 28, 2000. With respect to the issues before him, the hearing officer determined that the respondent (claimant) did not sustain an injury in the course and scope of his employment on _____; that the appellant (carrier) waived its right to contest the compensability of the claimed injury; and that the claimant had disability, as a result of the injury which became compensable as a matter of law due to the carrier's failure to timely contest compensability, from March 4 to July 31, 1999. In its appeal, the carrier argues that the hearing officer erred in finding that it had waived its right to contest compensability. Specifically, the carrier contends that the hearing officer erred in applying Downs v. Continental Cas. Co., No. _____ (Tex. App.-San Antonio January 26, 2000) and asks that we reverse his determinations that the claimant's injury became compensable as a matter of law and that the claimant had disability as a result of his compensable injury. In his response to the carrier's appeal, the claimant urges affirmance. The claimant did not appeal the hearing officer's determination that he did not sustain an injury to his right eye in the course and scope of his employment on _____, and that determination has, therefore, become final pursuant to Section 410.169.

DECISION

Reversed and rendered.

As noted above, the hearing officer determined that the claimant's right eye injury became compensable as a matter of law under Downs because the carrier failed to contest compensability of that injury within seven days of the date it received its first written notice of the claimed right eye injury. In Downs v. Continental Cas. Co., No. _____ (Tex. App.-San Antonio August 16, 2000), the Fourth Court of Appeals in San Antonio issued a decision on rehearing again determining that a carrier waives the right to contest compensability if it fails to either agree to begin payment of benefits or provide written notice of its refusal to pay within seven days after it receives written notice of an injury.

On August 28, 2000, the Executive Director of the Texas Workers' Compensation Commission (Commission), issued Advisory 2000-07 acknowledging the Court of Appeals decision on rehearing in Downs. However, the advisory states that the "August 16th decision in the *Downs* case should not be considered as precedent at least until it becomes final upon completion of the judicial process." In addition, the Director of the Hearings Division has informed the Hearings Division that the Commission's position is that a carrier has 60 days to contest compensability and that hearings staff are to follow the Commission's position statewide pending final resolution of Downs. The Director of Hearings reissued this directive following the issuance of the decision on rehearing in Downs. Based on these directives, we reverse the hearing officer's decision that the claimant's right eye injury became compensable as a matter of law and render a new decision that the carrier did not waive its right to contest compensability in this instance.

The hearing officer made an unappealed finding that the carrier filed its contest of compensability on June 3, 1999, well within 60 days after it received written notice of the claimed injury on May 12, 1999. As such, the claimant's right eye injury did not become compensable as a matter of law.

Given our reversal of the hearing officer's determination that the claimant's injury became compensable due to carrier waiver, we likewise reverse the determination that the claimant had disability from March 4 to July 31, 1999. By definition, the existence of a compensable injury is prerequisite to a finding of disability under Section 401.011(16). In the absence of a compensable injury, there is no loss upon which to find disability.

The hearing officer's decision and order are reversed and a new decision is rendered that the carrier did not waive its right to contest compensability in this case and that the claimant has not had disability because the claimant did not sustain a compensable injury.

Elaine M. Chaney
Appeals Judge

CONCUR:

Kathleen C. Decker
Appeals Judge

Alan C. Ernst
Appeals Judge