

APPEAL NO. 001782

On June 22, 2000, a contested case hearing (CCH) was held. The CCH was held under the provisions of the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* The hearing officer resolved the disputed issues by deciding that the appellant (claimant) did not sustain a compensable injury while in the course and scope of his employment with the employer on _____, or on _____; that the respondent (carrier) did not waive the right to contest compensability of the claimant's claimed injury; and that the claimant did not have disability. The claimant requests that the hearing officer's decision be reversed and that a decision be rendered in his favor. The carrier requests that the hearing officer's decision be affirmed.

DECISION

Affirmed.

The hearing officer provided an extensive discussion of the evidence in his decision. The claimant testified that in December 1999 he was being treated by a doctor for low back pain. The claimant initially testified that on _____, he was instructed by the employer to remove a hospital bed from the employer's warehouse and take it to a customer's home and that he injured his low back on _____ while attempting to get a hospital bed out of the employer's warehouse. The claimant later testified that the injury with the hospital bed occurred on _____. The president of the employer testified that two employees were with the claimant in the warehouse when the claimant was getting the hospital bed and that neither of those employees saw the claimant's alleged accident or injury. Dr. C diagnosed the claimant with a disc derangement of L5-S1 in February 2000 and Dr. L, diagnosed the claimant with a lumbar sprain/strain in March 2000. The claimant contended he had disability from February 22, 2000, through the date of the CCH.

The claimant had the burden to prove that he was injured in the course and scope of his employment and that he had disability. The hearing officer found that the claimant was not injured in the course and scope of his employment on _____ or _____, and concluded that the claimant did not sustain a compensable injury on _____ or _____. The hearing officer also determined that the claimant has not had disability. The hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). As the trier of fact, the hearing officer resolves conflicts in the evidence and determines what facts have been established by the evidence presented. We conclude that the hearing officer's decision that the claimant did not sustain a compensable injury on _____ or _____, is supported by sufficient evidence and is not so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Without a compensable injury, the claimant would not have disability as defined by Section 401.011(16).

The carrier first received written notice of the claimant's claimed injury on February 1, 2000, and it filed a Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) with the Texas Workers' Compensation Commission (Commission) on March 13, 2000, in which it disputed the claimant's claim based on no injury in the course and scope of employment. Thus, the carrier's contest of compensability was filed with the Commission on or before the 60th day after the date on which the carrier was notified of the injury. See Section 409.021(c). The hearing officer decided that the carrier did not waive its right to contest the compensability of the claimant's claimed injury.

The claimant contends that the carrier waived its right to contest compensability under the holding in Downs v. Continental Casualty Co., No. 04-99-00111-CV (Tex. App.-San Antonio January 26, 2000), because the carrier did not file its TWCC-21 within seven days of its notice of the claim. The carrier informs us that a Petition for Review by the Texas Supreme Court has been filed in Downs.

The Appeals Panel recently addressed this issue in Texas Workers' Compensation Commission Appeal No. 001717, decided September 7, 2000, wherein we reversed a hearing officer's decision that a carrier had waived its right to contest compensability where the carrier had contested compensability within 60 days, but not within seven days, of receiving written notice of injury. In Appeal No. 001717 the Appeals Panel noted that In Downs v. Continental Casualty Co., No. 04-99-001110CV (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.

The Appeals Panel went on to note in Appeal No. 001717 that on August 28, 2000, the Executive Director of the Commission issued Advisory 2000-07 acknowledging the Court of Appeals decision on rehearing in Downs; that 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"; that 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; and that the Director of Hearings reissued this directive following the issuance of the decision on rehearing in Downs. Based on the aforementioned directives from the Commission, the Appeals Panel in Appeal No. 001717 reversed the hearing officer's decision that the injury became compensable as a matter of law and rendered a new decision that the carrier did not waive its right to contest compensability. Applying our decision in Appeal No. 001717 to the facts of the instant case, we conclude that the hearing officer did not err in deciding that the carrier did not waive its right to contest compensability of the claimed injury.

The hearing officer's decision and order are affirmed.

Robert W. Potts
Appeals Judge

CONCUR:

Gary L. Kilgore
Appeals Judge

Thomas A. Knapp
Appeals Judge