

APPEAL NO. 002297

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 September 19, 2000. With respect to the issues before him, the hearing officer determined that the appellant (claimant) did not sustain a compensable injury on _____; that the respondent (carrier) would be relieved of liability under Section 409.002 because of the claimant's failure to timely report his alleged injury to his employer under Section 409.001; that the carrier did not waive its right to contest compensability of the claimed injury by failing to contest in accordance with Section 409.021(c); and that the claimant did not have disability because he did not sustain a compensable injury. In his appeal, the claimant asserts error in the hearing officer's determination that the carrier had not waived its right to contest compensability by failing to do so within seven days of the date it received written notice of the alleged injury. The claimant also challenges the disability determination, noting that the hearing officer made factual findings that would support a conclusion that the claimant had disability, if he were determined to have a compensable injury. In its response to the claimant's appeal, the carrier urges affirmance. The claimant did not appeal the hearing officer's determination that he did not sustain a neck injury in the course and scope of his employment on _____, and that determination has, therefore, become final pursuant to Section 410.169.

DECISION

Affirmed.

In an unappealed fact finding, the hearing officer found that the carrier received written notice of the alleged injury on _____, and that the carrier filed its Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) contesting compensability on March 14, 2000, more than seven days and less than 60 days after February 16, 2000. In Downs v. Continental Cas. Co., No. 04-99-00111-CV (Tex. App.-San Antonio January 26, 2000), the Fourth Court of Appeals in San Antonio determined that under Section 409.021(c), a carrier waives its right to contest compensability if it fails to either agree to begin paying benefits or files its dispute within seven days of the date it received its first written notice of the claimed injury. In Downs v. Continental Cas. Co., No. 04-99-00111-CV (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, the hearing officer did not err in determining that the carrier did not waive its right to contest compensability by not initiating benefits or filing its dispute within seven days of February 16, 2000.

The hearing officer's decision and order are affirmed.

Elaine M. Chaney
Appeals Judge

CONCUR:

Kathleen C. Decker
Appeals Judge

CONCURRING OPINION:

I concur in the majority's decision and write separately to point out that if the carrier had received written notice on or after March 13, 2000, the effective date of Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 124.3 (Rule 124.3), the rule would dictate that the carrier would be liable for benefits that accrued and were payable prior to the date it filed its dispute. Rule 124.3(a) provides, in relevant part:

Except as provided in subsection (b) of this section, upon receipt of written notice of injury as provided in §124.1 of this title (relating to Notice of Injury) the carrier shall conduct an investigation relating to the compensability of the injury, the carrier's liability for the injury, and the accrual of benefits. If the carrier believes that it is not liable for the injury or that the injury was not compensable, the carrier shall file the notice of denial of a claim (notice of denial) in the form and manner required by §124.2 of this title (relating to Carrier Reporting and Notification Requirements).

- (1) If the carrier does not file a notice of denial by the seventh day after receipt of the written notice of injury, the carrier is liable for any benefits that accrue and shall initiate benefits in accordance with this title.

- (2) If the carrier files a notice of denial after the seventh day but before the 60th day after receipt of written notice of the injury, the carrier is liable for and shall pay all benefits that had accrued and were payable prior to the date the carrier filed the notice of denial and only then is it permitted to suspend payment of benefits.

It is undisputed that the carrier filed its dispute on March 14, 2000, more than seven and less than 60 days after receiving written notice of the injury. Thus, if Rule 124.3(a)(2) were applicable in this instance, the carrier would have been liable for the benefits that accrued and were payable prior to March 14, 2000, despite the fact that the injury was determined not to be compensable. See Texas Workers' Compensation Commission Appeal No. 002220-S, decided November 7, 2000.

Gary L. Kilgore
Appeals Judge