

APPEAL NO. 002441

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 September 6, 2000. The issue at the CCH was whether the respondent (carrier) had waived the right to dispute compensability of the appellant's (claimant) injury because it had not filed a dispute within seven days after receiving written notice of injury. Because the claimant's injury had been adjudicated noncompensable in a previous CCH, there was also argument that the claimant had waived the right to raise this argument because it was not raised in an earlier CCH.

The hearing officer held that the case of Downs v. Continental Casualty Company, No. 04-99-00111-CV (Tex. App.-San Antonio, January 26, 2000) would not be applied pending a final outcome of that case.

The claimant has appealed, arguing that the Downs case is good law and should be followed. The carrier responds that the waiver issue was not timely raised and that the Downs case has not been finally adjudicated.

DECISION

We affirm the hearing officer's decision, noting also that the issue was not timely raised at the previous CCH and, therefore, the compensability of that injury could not be collaterally attacked in this proceeding.

We have reviewed the hearing officer's decision and agree that he has properly applied the position of the Texas Workers' Compensation Commission with respect to awaiting an ultimate outcome in the Downs case.

However, to the extent that the hearing officer appears to agree that the state of the law would not have permitted the holding of the Downs case to be timely raised in the previous CCH on the compensability of the injury, we would point out that the claimant in the Downs case itself was able to timely raise this matter, notwithstanding the lack of a court case decision. Also, the existence of the appeal in Downs to the Fourth Court of Appeals was public and known before the court issued its written decision. We cannot agree that an argument or defense based on statutory construction must await the decision of an appeals court in order to be timely raised and preserved. The previous determination on the compensability of the injury therefore became *res judicata* on compensability and, because the waiver argument not having been raised in accordance with Section 410.151(b) in that proceeding, the hearing officer in this proceeding was without authority to relitigate that issue in this proceeding based upon carrier waiver.

We affirm the decision and order of the hearing officer.

Susan M. Kelley
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Judy L. Stephens
Appeals Judge