

APPEAL NO. 011753
FILED SEPTEMBER 11, 2001

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). This case is back before us after our remand in Texas Workers' Compensation Commission Appeal No. 010636, decided May 14, 2001. Initially, a contested case hearing (CCH) was held on March 2, 2001. At that hearing, the hearing officer determined that: (1) on Thursday, _____, the respondent/cross-appellant (claimant) sustained an injury to her right ankle that arose out of and was in the course and scope of her employment; (2) the claimant did not sustain a compensable injury on _____; (3) the claimant did not report an injury to the employer by the 30th day after her injury, pursuant to Section 409.001 and the claimant did not have good cause for failing to do so; (4) the appellant/cross-respondent (carrier) did not waive its right to contest compensability of the claimant's alleged injury in accordance with Section 409.021; (5) due to her work-related injury to her right ankle, the claimant was unable, from September 15 through September 23, 2000, to obtain and retain employment at a wage equivalent to her preinjury wage; and (6) since the claimant did not sustain a compensable injury, the claimant did not have disability.

We noted that the hearing officer determined that the claimant's treating doctor had called the carrier's adjuster during a range of time which included dates inside and outside the 30-day period required for notice under Section 409.001, and remanded the case for the hearing officer to determine the actual date that the carrier was contacted by the treating doctor. The hearing officer determined on remand that the contact occurred on October 11, 2000, giving the carrier actual knowledge of the claimant's ankle injury within 30 days of the injury. This made the claimant's ankle injury a compensable injury, and the hearing officer further found that the claimant had disability from the compensable injury for the period of September 15, 2000, through September 23, 2000. The hearing officer's other determinations were unchanged after the remand hearing.

The carrier has appealed the Findings of Fact and Conclusions of Law which relate to the hearing officer's determination of actual knowledge, compensability of the injury, and the period of disability. The claimant has cross-appealed on the same issues set forth in the initial appeal, specifically, (1) the claimant did timely report the injury in accordance with Section 409.001; (2) the claimant sustained an injury to her back in addition to her ankle; (3) the claimant had disability through the time of the remand hearing; and (4) the carrier waived the right to dispute compensability by failure to comply with Sections 409.021 and 409.022.

DECISION

Affirmed.

The hearing officer's determinations on remand as to notice, compensability of the injury, and disability, including the period of disability, are all factual questions. The

hearing officer is the sole judge of the weight and credibility of the evidence (Section 410.165(a)) and it is for the hearing officer to resolve such conflicts and inconsistencies in the evidence as were present in this case (Garza v. Commercial Insurance Co. of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ)). As an appellate-reviewing body, we will not disturb the challenged factual findings of a hearing officer unless they are so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust and we do not find them so in this case. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951).

The hearing officer's initial determinations that the claimant did not timely report the injury in accordance with Section 409.001, that the claimant did not sustain a low back injury, and that the carrier timely contested compensability are likewise factual determinations which are within the province of the hearing officer to decide. The evidence sufficiently supports each of these determinations, and we decline to substitute our opinion of the evidence for that of the hearing officer.

The claimant also contends that Downs v. Continental Casualty Company, 32 S.W.3d 260 (Tex. App.-San Antonio 2000, pet. filed), which requires a carrier to either pay benefits or give notice of its refusal to pay within seven days of the day it receives written notice of injury, is applicable. We have been asked to apply the Downs decision to similar factual situations, and have declined to do so. Our rationale for doing so is stated in Texas Workers' Compensation Commission Appeal No. 001927, decided September 25, 2000:

However, on August 28, 2000, the [Texas Workers' Compensation] Commission issued Advisory 2000-07 which states, in part, as follows: "After consultation with the Office of the Attorney General and in light of § 410.205(b) of the Texas Labor Code, the Commission understands 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 related Commission's rules, such as those found at [Tex. W.C. Comm'n,] 28 TEX. ADMIN. CODE § 124.2, 124.3, and 132.17, remain in effect." We decline to accept the claimant's challenge to apply the Downs case.

We continue to decline to follow Downs and we affirm the hearing officer's decision on this issue.

The decision and order of the hearing officer are affirmed.

The true corporate name of the insurance carrier is **ARGONAUT SOUTHWEST INSURANCE COMPANY** and the name and address of its registered agent for service of process is

**JOSEPH YANKOVICH
1431 GREENWAY DRIVE, SUITE 450
IRVING, TEXAS 75038-2443.**

Michael B. McShane
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Gary L. Kilgore
Appeals Judge