

APPEAL NO. 021635  
FILED ON JULY 31, 2002

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 May 23, 2002. The hearing officer resolved the disputed issues by deciding that the appellant (claimant) did not sustain a compensable injury on \_\_\_\_\_; that the claimant has not had disability because he did not sustain a compensable injury; that the respondent (carrier) is not relieved of liability under Section 409.002 because the claimant timely notified his employer of his claimed injury under Section 409.001; and that the carrier did not waive its right to dispute the compensability of the claimed injury "by contesting the injury in accordance with Section 409.021."

The claimant appeals, contending that: (1) the hearing officer failed to address whether the carrier completely complied with Section 409.021, in spite of the parties' stipulation that the carrier disputed the compensability of the claimant's claimed injury within 60 days of being notified of the claim, because there was no evidence proffered by the carrier of a dispute within the first seven days, citing Continental Casualty Company v. Downs, Texas Supreme Court, No. 00-1309; and (2) disability was denied only because there was a finding of a noncompensable injury, thus if the Appeals Panel finds that the claim is compensable, the period of disability should be awarded as indicated in Finding of Fact No. 3. The claimant requests that we reverse the hearing officer's decision on the waiver issue and find that the claimant has disability.

The carrier responds that the claimant did not make an argument at the CCH that there was a waiver of the right to contest compensability, thus that argument should not be considered for the first time on appeal, and also cites Texas Workers' Compensation Commission (Commission) Advisory 2002-08, dated June 17, 2002. The carrier requests that we affirm the hearing officer's decision.

DECISION

The hearing officer's decision is affirmed.

The issues at the CCH were:

1. Did the claimant sustain a compensable injury on \_\_\_\_\_?
2. Did the claimant sustain disability secondary to a compensable injury, and, if so, for what periods?
3. Is the carrier relieved from liability under Section 409.002 because of the claimant's failure to timely notify his employer pursuant to Section 409.001?

4. Has the carrier waived the right to dispute compensability of the claimed injury by not contesting the injury in accordance with Section 409.021?

After the hearing officer announced the disputed issues, the parties entered into certain stipulations, including the following:

- C. The claimant notified the employer of his injury within 30 days of \_\_\_\_\_.
- D. The carrier disputed the compensability of the claimant's claimed injury within 60 days of being notified of the claim.

The hearing officer then stated at the CCH:

Having stipulated to these, the two final issues, issues three and four are resolved and they are resolved as follows: The conclusion of law will be that the carrier is not relieved from liability under Texas Labor Code 409.002 because the claimant timely notified his employer and issue 4, the conclusion of law will be that the carrier has not waived the right to dispute compensability of the claimed injury by contesting the injury in accordance with the Texas Labor Code.

The hearing officer then said that they would proceed on the compensability and disability issues. Neither party made any objection to the foregoing statements of the hearing officer.

The claimant's attorney then gave an opening statement in which no mention was made of the waiver issue, and the carrier's attorney's opening statement also made no mention of the waiver issue.

In closing argument, the claimant's attorney said that there were two issues before the hearing officer, and proceeded to argue the evidence that he believed supported the claim that the claimant sustained an on-the-job injury and had disability. He requested that the hearing officer make findings that the claimant sustained a compensable injury and had disability. He did not mention the waiver issue. The carrier's attorney agreed in his closing argument that there were two issues before the hearing officer and argued the evidence that he believed supported findings that the claimant did not sustain an injury while working for the employer and did not have disability. The carrier's attorney made no mention of the waiver issue in his closing argument. The claimant's attorney made no mention of the waiver issue in his rebuttal argument.

Section 409.021(a) provides that an insurance carrier shall initiate compensation under this subtitle promptly, and that not later than the seventh day after the date on

which an insurance carrier receives written notice of an injury, the insurance carrier shall: (1) begin the payment of benefits as required by this subtitle; or (2) notify the Commission and the employee in writing of its refusal to pay and advise the employee of: (A) the right to request a benefit review conference; and (B) the means to obtain additional information from the Commission. Section 409.021(c) provides that, if an insurance carrier does not contest the compensability of an injury on or before the 60th day after the date on which the insurance carrier is notified of the injury, the insurance carrier waives its right to contest compensability, and that the initiation of payments by an insurance carrier does not affect the right of the insurance carrier to continue to investigate or deny the compensability of an injury during the 60-day period.

In Downs v. Continental Casualty Company, 32 S.W.3d 260 (Tex. App.-San Antonio 2000), the court held that a carrier waives its right to deny compensability if it fails to comply with Section 409.021(a) by either agreeing to begin the payment of benefits or giving written notice of its refusal to pay within seven days after receiving written notice of an injury.

Commission Advisory 2000-07, dated August 28, 2000, states in part that:

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.

On June 6, 2002, the Texas Supreme Court affirmed the court of appeals' judgment in the Downs case (No. 00-1309).

Commission Advisory 2002-08, dated June 17, 2002, notes the Texas Supreme Court's affirmance of the court of appeals' decision and states in part:

After consultation with the Office of the Attorney General, the Commission is advised that the *Downs* decision is not final until opportunities for rehearing have been exhausted. The Commission understands that a request for rehearing of that decision will be filed by the insurance carrier party to that case. Therefore, the 7 day 'pay or dispute' provision in the *Downs* case is not final pending the motion for rehearing.

We have been informed by the clerk's office of the Texas Supreme Court that a motion for rehearing was filed in the Downs case on July 22, 2002, and that that motion is currently pending before the court.

With regard to the appealed waiver issue, the hearing officer set forth in her decision the parties' stipulation that the carrier disputed the compensability of the claimant's claimed injury within 60 days of being notified of the claim, and made the following conclusion of law: "The Carrier has not waived the right to dispute

compensability of the claimed injury by contesting the injury in accordance with Texas Labor Code Sec. 409.021.” The claimant contends that the hearing officer erred in failing to address whether the carrier completely complied with Section 409.021, despite the 60-day stipulation, because there was no evidence of a dispute within the first seven days, citing the Texas Supreme Court’s decision in the Downs case.

We do not agree with the claimant’s contention for the following two reasons. First, after the parties stipulated that the carrier disputed the compensability of the claimant’s claimed injury within 60 days of being notified of the claim, and the hearing officer announced, without objection by either party, that the waiver issue was resolved and that the conclusion of law would be that the carrier has not waived the right to dispute the compensability of the claimed injury by contesting in accordance with the Texas Labor Code, neither party made any mention of the waiver issue and proceeded as if that issue was resolved. Second, at no time during the CCH did the claimant’s attorney mention the Downs case or contend that the carrier had waived its right to contest compensability by failing to comply with the seven-day provision in Section 409.021(a). Under these circumstances, we do not find that the hearing officer committed reversible error in not making a finding with regard to the seven-day provision in Section 409.021(a).

With regard to the disability issue, there is no appeal of the hearing officer’s finding that on \_\_\_\_\_, the claimant did not sustain an injury to his lumbar spine while in the course and scope of his employment. Thus, the claimant did not sustain a compensable injury, and, without a compensable injury, the claimant would not have disability as defined by Section 401.011(16). The hearing officer did not err in determining that the claimant has not had disability because there was no compensable injury.

The hearing officer’s decision and order are affirmed.

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

**ALBERT SCOTT TAYLOR, PRESIDENT  
12225 GREENVILLE AVENUE, SUITE 490  
DALLAS, TEXAS 75243.**

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Robert W. Potts  
Appeals Judge

CONCUR:

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Philip F. O'Neill  
Appeals Judge

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Roy L. Warren  
Appeals Judge