

APPEAL NO. 022091-s
FILED OCTOBER 7, 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 July 17, 2002. The hearing officer determined that the appellant (carrier) has waived the right to dispute compensability of the claimed injury by not contesting the injury in accordance with Section 409.021; that the respondent (claimant) sustained a compensable mental trauma injury on _____; that the claimant failed to timely file a claim for compensation with the Texas Workers' Compensation Commission (Commission) within one year of the injury as required by Section 409.003, but the carrier is not otherwise relieved from liability under Section 409.004 as the carrier waived the right to dispute compensability of the claimed injury by not contesting the injury in accordance with Section 409.021; and that the claimant has disability resulting from the injury sustained on _____, beginning on August 13, 1998, and continuing through the date of the CCH. The carrier appealed the merits of the injury and disability determinations, and asserted it is not liable for benefits because of the claimant's failure to timely file a claim. The file does not contain a response from the claimant. The claimant's employer at the time of the alleged injury was present at, and participated in the hearing, and filed a response to the carrier's appeal, urging affirmance.

DECISION

Affirmed as reformed.

REFORMATIONS

We reform the Decision and Order of the hearing officer to add the fourth issue of disability to the list of issues on page 1. The issue included in the benefit review conference (BRC) report and actually litigated and determined at the CCH is as follows:

4. Did the Claimant have disability resulting from the injury sustained on _____?

We reform Conclusion of Law No. 6 and the Decision paragraph to correct an obvious typographical error by changing the word "Carrier" to "Claimant" to reflect the determination that the claimant has disability. We further reform Conclusion of Law No. 6 and the Decision paragraph to comport with Finding of Fact No. 11 by replacing the phrase "and continuing through Claimant's date of statutory maximum medical improvement" (MMI) with the phrase "and continuing through the date of this hearing." For the sake of clarification we note that disability can exist after the claimant has reached MMI, but that temporary income benefits cease when disability ends or when a claimant reaches MMI, whichever is earlier.

FACTS

The facts of this case are set out in great detail in the hearing officer's Statement of the Evidence, and will not be repeated with the same detail here. The claimant testified that she became the target of unwelcomed affection from an unknown coworker sometime in 1997. She stated that various gifts and cards would be left at her desk and sent to her home; that after discovering the identity of the person leaving the gifts, she and her supervisor confronted the responsible coworker in April of 1998; that the coworker's posture toward her became threatening and she and her supervisor were afraid the coworker would attack her; that she was transferred to another building, but the harassment started up again about two weeks later; that the coworker was becoming more violent; and that on _____, she filed a formal sexual harassment complaint against the coworker which resulted in his termination that same day. The claimant testified that she wanted to go home out of fear, but her supervisor wanted her to stay so that she could be protected. It is undisputed that before leaving the employer's premises, the coworker came to the claimant's work area and attacked her with a hand-made knife. He held the knife to the claimant's throat and stated that he intended to kill her. Fortunately, several other employees were able to subdue him before he was able to inflict any damage on the claimant with the knife, however, the claimant testified that he did slam her head against the floor. The coworker was arrested and convicted of aggravated assault. The claimant was subsequently diagnosed as having post-traumatic stress disorder (PTSD) and has not worked since the attack (except for half a day on August 12, 1998).

PROCEDURAL HISTORY

The employer filed an Employer's First Report of Injury or Illness (TWCC-1) listing an _____, PTSD injury to the claimant dated September 24, 1998. The carrier's Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) indicates that it received the first written notice of the injury on September 29, 1998. The TWCC-21 is dated November 30, 1998, and is file stamped as being received by the Commission on December 1, 1998. The basis of the carrier's denial was that the claimant was not in the course and scope of her employment, and the altercation was over a personal matter and did not arise out of her job duties. To date, the claimant has never filed an Employee's Notice of Injury or Occupational Disease and Claim for Compensation (TWCC-41) or any other document or report purporting to be notice of an intent to file a claim. In fact, a review of the record indicates that the claimant has never indicated a desire to pursue a claim for benefits through the Commission because she has a civil suit pending in District Court. The only reason this matter ever came before the Commission is because the employer filed what was referred to as a "writ of mandamus" (which was not included among the exhibits presented at the CCH) to compel the Commission to set this matter for a BRC due to the employer's interest in reimbursement of expenses in connection with care extended to the claimant.

INJURY AND DISABILITY

We affirm the hearing officer's determinations that the claimant sustained a mental trauma and closed head injury while in the course and scope of her employment on _____, when she was attacked by a coworker, and that due to the mental trauma injury, the claimant was unable to obtain or retain employment at wages equivalent to her preinjury wages beginning on August 13, 1998, and continuing through the date of the hearing. On appeal of the merits, the carrier asserts that the attack was not in the course and scope of the claimant's employment, that it arose out of personal animosity, and that there was insufficient evidence to support those determinations. The issues presented questions of fact for the hearing officer. The hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a); Texas Employers Ins. Ass'n v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). There was conflicting evidence presented on the disputed issues. It was for the hearing officer, as the trier of fact, to resolve the conflicts and inconsistencies in the evidence and to determine what facts had been established. Garza v. Commercial Ins. Co., 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). Nothing in our review of the record reveals that the hearing officer's determinations that the claimant sustained a mental trauma and closed head injury, and that as a result of the injuries she has been unable to obtain or retain employment at wages equivalent to her preinjury wages beginning on August 13, 1998, and continuing through the date of the hearing are so contrary to the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. As such, no sound basis exists for us to reverse those determinations on appeal. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

WAIVER AND RELIEF FROM LIABILITY

The hearing officer correctly determined that the carrier has waived the right to dispute compensability of the claimed injury by not contesting the injury in accordance with Section 409.021. Not only did the carrier fail to contest the injury within 60 days of receiving notice of the injury pursuant to Section 409.021(c), it failed to begin payment of benefits or notify the Commission and the employee in writing of its refusal to pay within seven days of notice of the injury pursuant to Section 409.021(a) and the recent Texas Supreme Court decision in Continental Casualty Co. v. Downs (Case No. 00-1309). It is undisputed that the carrier received written notice of the injury on September 29, 1998, and that it neither initiated payment of benefits or denied the claim until December 1, 1998, which is over seven days from the date it first received written notice of the injury. The Commission previously determined that the holding in Downs would not be followed until the motion for rehearing process had been exhausted. See TWCC Advisory No. 2002-08 (June 17, 2002). On August 30, 2002, the Texas Supreme Court denied the carrier's motion for rehearing, and the Downs decision, along with the requirement to adhere to a seven-day "pay or dispute" provision, is now final. See Texas Workers' Compensation Commission Appeal No. 021944-S, decided September 11, 2002. As such, the carrier has waived its right to contest the compensability of the claimed injury.

The hearing officer determined that the claimant failed to timely file a claim for compensation with the Commission within one year as required by Section 409.003, but that the carrier is not relieved of liability under Section 409.004, as the carrier waived the right to dispute compensability by not contesting the injury in accordance with Section 409.021.

It is a defense to compensability and entitlement to benefits that a claimant has failed to timely file a claim pursuant to Section 409.003. Section 409.004 provides that if a claimant fails to timely file a claim pursuant to Section 409.003, the employer and the employer's insurance carrier are relieved of liability **unless** the employer or the employer's insurance carrier does not contest the claim. As noted above, the carrier did not comply with the requirements of Section 409.021(a) by either initiating benefits or filing a notice of refusal. Thus, the carrier has lost its right to contest compensability, which, we hold, includes its right to assert a defense under Section 409.004 based upon the claimant's failure to timely file a claim for compensation. *Downs, supra*. This result parallels our decision in Texas Workers' Compensation Commission Appeal No. 022027-S, decided September 30, 2002, in which we held that the carrier lost its right to contest compensability, including the right to assert a defense under Section 409.002 that the claimant failed to notify the employer of an injury within 30 days of the injury, due to the carrier's failure to contest the claim in accordance with Section 409.021.

We affirm the decision and order of the hearing officer, as reformed.

The true corporate name of the insurance carrier is **LUMBERMEN'S MUTUAL CASUALTY COMPANY** and the name and address of its registered agent for service of process is

**CORPORATE SERVICE COMPANY
800 BRAZOS
AUSTIN, TEXAS 78701.**

Michael B. McShane
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Margaret L. Turner
Appeals Judge