APPEAL NO. 022109
FILED OCTOBER 4, 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 was held on July 31, 2002. The hearing officer determined that (1) the appellant (claimant) sustained a repetitive trauma injury at work, but the claimant did not sustain a compensable repetitive trauma injury because the respondent (carrier) is relieved from liability under Section 409.002 and 409.001; (2) the date of injury is _____; (3) the carrier is relieved from liability under Section 409.002, because the claimant failed to timely notify the employer of an injury pursuant to Section 409.001, without good cause; (4) because the claimant did not sustain a compensable injury, he did not have disability; and (5) the carrier did not waive the right to contest compensability of the claimed injury, because the carrier timely contested the injury in accordance with Section 409.021. The claimant appeals the injury, date of injury, notice, and disability determinations on sufficiency grounds. The carrier responds, urging affirmance. The hearing officer's waiver determination was not appealed and is, therefore, final. Section 410.169.

DECISION

We affirm.

We have reviewed the complained-of determinations and conclude that the issues involved fact questions for the hearing officer. The hearing officer reviewed the record and decided what facts were established. We conclude that the hearing officer's determinations are not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

Regarding the dissent, the hearing officer's waiver determination was not in any way appealed by the claimant and is, therefore, final. Section 410.169. Because the claimant did not raise this issue in any way, even under the most liberal construction of his brief, we cannot address the issue on appeal. The Appeals Panel will not reverse a hearing officer's decision based on error that is not raised on appeal.

We affirm the hearing officer's decision and order.

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

PRENTICE-HALL CORPORATION SYSTEM, INC.
800 BRAZOS
AUSTIN, TEXAS 78701.

_____
Judy L. S. Barnes
Appeals Judge

CONCUR:

_____
Philip F. O'Neill
Appeals Judge

DISSENTING OPINION:

I respectfully dissent. The issues in this case included whether the claimant sustained a compensable repetitive trauma injury and "Has the Carrier waived the right to contest compensability of the claimed injury by not timely contesting the injury in accordance with Texas Labor Code Section 409.021?" The hearing officer determined:

CONCLUSIONS OF LAW

2. Claimant sustained a repetitive trauma injury as same is defined in the Act, but Claimant did not sustain a compensable repetitive trauma injury, because the Carrier is relieved from liability under Texas Labor Code Sections 409.002 and 409.001.

4. The Carrier has not waived the right to contest compensability of the claimed injury, because the Carrier did timely contest the injury in accordance with Texas Labor Code Section 409.021.

Regarding the waiver issue, the hearing officer, in the discussion portion of his decision,

commented:

> The Carrier received its first notice of the claimed injury no earlier than January 16, 2002 and filed its [Payment of Compensation or Notice of Refused/Disputed Claim] TWCC-21 disputing compensability on February 11, 2002. This is arguably a situation to which the case of Continental Casualty Company v. Downs, No. 00-1309 in the Texas Supreme Court, applies. However, Advisory 2002-08 made it clear that the [Texas Workers' Compensation] Commission is not yet following Downs. Since the TWCC-21 was certainly filed within 60 days of the first notice to the Carrier, there is no Carrier waiver.

Fairly clearly, the hearing officer considered Downs but applied TWCC Advisory 2002-08.

On August 30, 2002, the Texas Supreme Court denied the carrier's motion for rehearing in Downs. In Advisory 2002-15, the Commission advised that "the Downs decision, and the requirement to adhere to a 7 day 'pay or dispute' provision is now final. All previous Advisories issued by the Commission regarding this issue are superceded by this advisory and the Supreme Court decision."

The claimant in this case clearly appeals the fact that he "sustained a compensable injury." Equally clearly the hearing officer determined that the claimant had sustained a repetitive trauma injury and the sole reason that the hearing officer decided compensability against the claimant was because the claimant failed to give timely notice to the employer under Section 409.001. The hearing officer also made clear, at least to me, that the carrier had not timely contested compensability but that since Downs was not final he was required to apply Advisory 2002-08. Downs has now become final and TWCC Advisory 2002-08 has been superceded by Advisory 2002-15 applying Downs.

It appears somewhat disingenuous to me to say that because the claimant did not specifically mention Downs that his appeal failed when the hearing officer made clear in his discussion that he would have applied Downs except for Advisory 2002-08, which has since been superceded. I would have liberally construed the claimant's appeal of compensability, applied Downs, and reversed the hearing officer's decision and rendered a new decision that the carrier had not complied with the requirements of Section 409.021(a) by either agreeing to initiate benefits or filing a notice of refusal and thereby lost its right to contest compensability, which includes its rights to assert a defense under 409.002 based upon the claimant's failure to give timely notice of his injury to his employer. *See* Texas Workers' Compensation Commission Appeal No. 022027-s, decided September 30, 2002. When the Appeals Panel sees an incorrect application of the law, I believe that we have an obligation, if not a legal duty, to correct such legal error. The fact that the request for review does not specifically appeal the incorrect conclusion of law should not govern our application of the law. Ombudsman might wish to advise unrepresented claimants, in the future, to add a sentence to any

appeal, appealing any and all other matters adverse to the claimant's interest.

_____
Thomas A. Knapp
Appeals Judge