APPEAL NO. 022124
FILED SEPTEMBER 30, 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 23, 2002. The appellant (self-insured) appeals the hearing officer's determinations that respondent 2 (claimant) sustained a compensable injury on (2001 injury); that the self-insured waived the right to contest compensability of the claimed injury by not timely contesting the injury; and that the claimant had disability from February 5, 2001, and continuing through the date of the CCH. The claimant and respondent 1 (carrier) respond, urging affirmance. The hearing officer's determination that the (1991 injury), compensable injury does not include the current right side lumbar disc protrusion/sprain, strain and/or lumbar radiculopathy has not been appealed and has become final. Section 410.169.

DECISION

We affirm in part and reverse and render in part.

The carrier in this case was the entity that had coverage for the claimant's (1991 injury), injury; the self-insured was the entity liable for the asserted (2001 injury), injury. Briefly, we note that some complication of the facts had to do with the occurrence of the earlier compensable injury to the claimant's back on (1991 injury). However, she said that she had essentially recovered from that injury and was working. Nevertheless, she was under active treatment and was undergoing a second opinion process for surgery for this injury, beginning shortly after the time when she contended she sustained another injury, on (2001 injury), when she exacerbated her condition by lifting a 24-pound box of cheese. The claimant contended that she was unable to work after this date. Medical records use the 1991 injury date at times close to the 2001 injury. The claimant applied for short term disability benefits in early 2001.

INJURY/DISABILITY

Conflicting evidence was offered on whether the claimant sustained a new injury and whether she had disability from that injury. To the extent that the self-insured contended that disability resulted from her 1991 injury, it had the burden of proving that injury to be the sole cause of inability to work after (2001 injury). Texas Employers Insurance Association v. Page, 553 S.W.2d 98, 100 (Tex. 1977); Texas Workers' Compensation Commission Appeal No. 92068, decided April 6, 1992.

The hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). Although different inferences could certainly be drawn, after review of the record and the complained-of determinations, we have concluded that there is sufficient legal and factual support for the hearing officer's decision on the injury and resultant disability. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986). Accordingly, we

affirm the hearing officer's decision and order that the claimant sustained a compensable injury by aggravation on (2001 injury), and had disability beginning on _____, and continuing through the date of the CCH.

WAIVER

Because the hearing officer has also found that the claimant sustained a compensable injury on (2001 injury), the matter of waiver is somewhat moot. Nevertheless, we agree that the hearing officer erred by finding a waiver.

The self-insured disputed the compensability of the (2001 injury) injury, by filing a Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) on May 18, 2001. This form asserted that written notice of injury was first received on May 7, 2001. This corresponds to the date when the adjusting service for the self-insured would have likely received the Employer's First Report of injury or Illness (TWCC-1) that was also filled out on May 7, 2001. However, the claimant testified that she began receiving income benefits in May 2001, and there is a TWCC-21 in the claimant's exhibits which is dated May 10, 2001, which accompanied a check for temporary income benefits relating back to the period beginning February 5, 2001, shown as the first date of lost time on the TWCC-1. The claimant admitted that although she told her supervisor she was injured at work the same day as the injury, she does not know when the self-insured (as such) first received written notice of her claim. The claimant argued that the self-insured completed documents relating her claim within a month of when she first reported her injury but no such documents were offered into evidence.

The claimant testified that she went to her doctor on February 7, 2001, and that she gave notice of her claim that same day, when she gave her doctor's "off work notice" to the self-insured. Although the claimant testified that she told her employer the "off work note" was related to her injury on (2001 injury), the "off work note" she gave to the self-insured does not indicate that the claimant is being taken off work due to an injury. There were no other written documents admitted into evidence that the claimant alleged gave the self-insured written notice of the claim prior to May 7, 2001.

We agree that the hearing officer erred in this case in applying waiver against the self-insured. The hearing officer has used the wrong standard for reckoning the date from which the 7- and 60-day time periods set forth in Section 409.021 should be counted, by starting from the date he ascertained that the claimant's supervisor had "actual knowledge" of her injury. This date is not relevant to beginning the period for which a dispute of compensability is required, even if the carrier is, as here, a self-insured. Rather, the carrier is required to react within 7 or 60 days of receipt of "written notice of injury", as defined in Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE §124.1(a) (Rule 124.1(a)). By definition, the TWCC-1 is written notice of injury, and when this notice is not in evidence it is the earliest receipt of "any other communication regardless of source, which fairly informs the carrier of the name of the injured employee, the identity of the employer, the approximate date of the injury and information which

asserts the injury is work related" as set out in Rule 124.1(a)(3). We cannot read into a definition of “written” notice that such other communication may be verbal.

The only evidence of receipt of written notice by the self-insured is the TWCC-21 which names May 7, 2001, as this date. It appears that the self-insured initiated benefits within 7 days of this date, then disputed compensability within 60 days. The case of Continental Casualty Co. v. Downs, 45 Tex. Sup. Ct. J. 755 (June 6, 2002) does not therefore apply and there was no waiver in accordance with 409.021(c).

Accordingly, we affirm the hearing officer's decision and order that the claimant sustained a compensable injury with a date of injury of (2001 injury), and that the claimant had disability from the compensable injury, and reverse the hearing officer’s decision and order that the self-insured waived the right to contest the compensability of the injury and render a new decision that the self-insured did not waive the right to contest the compensability of the injury because the claimant did not sustain her burden of proof that the self-insured did not dispute the claim within 60 days of written notice pursuant to Section 409.021.

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

CORPORATION SERVICE COMPANY
800 BRAZOS
AUSTIN, TEXAS 78701.

The true corporate name of the self-insured is **ALBERTSON'S INCORPORATED** and the name and address of its registered agent for service of process is

CT CORPORATION SYSTEM
350 NORTH ST. PAUL STREET
DALLAS, TEXAS 75201.

_____
Susan M. Kelley
Appeals Judge

CONCUR:

_____
Gary L. Kilgore
Appeals Judge

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Veronica Lopez
Appeals Judge