

APPEAL NO. 022155
FILED SEPTEMBER 27, 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 August 8, 2002. The hearing officer resolved the disputed issues by deciding that the appellant/cross-respondent (claimant) sustained a compensable repetitive trauma injury with a date of injury of _____; that the claimant has not had disability; and that the respondent/cross-appellant (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 appealed the hearing officer's determination that she has not had disability. The claimant also appealed the hearing officer's determination that the carrier did not waive its right to contest compensability of the injury, citing the Texas Supreme Court decision in Continental Casualty Company v. Downs (No. 00-1309). The carrier appealed the hearing officer's determination that the claimant sustained a compensable repetitive trauma injury.

DECISION

We affirm in part and reverse and render in part.

The claimant had the burden to prove that she sustained a repetitive trauma injury as defined by Section 401.011(36) and that she had disability as defined by Section 401.011(16). Conflicting evidence was presented on the disputed issues of whether the claimant sustained a compensable repetitive trauma injury and whether she has had disability. The hearing officer determined that the claimant sustained a compensable repetitive trauma injury but that she has not had disability. The hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). As the trier of fact, the hearing officer resolves the conflicts in the evidence and determines what facts have been established. We conclude that the hearing officer's determinations on the compensable injury and disability issues are supported by sufficient evidence and are not so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175 (Tex. 1986).

With regard to the waiver issue, it is undisputed that the carrier did not agree to begin the payment of benefits or give written notice of its refusal to pay within seven days after receiving written notice of the injury. The carrier filed its Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) with the Texas Workers' Compensation Commission (Commission) nine days after it received written notice of the claimant's injury, and in the TWCC-21 disputed the compensability of the injury. Recently, in Texas Workers' Compensation Commission Appeal No. 021944-s, decided September 11, 2002, the Appeals Panel applied the Downs decision in determining that a carrier had waived its right to contest the compensability of a claimed injury, explaining as follows: "The Commission has previously determined that the holding in Downs would not be followed until the motion for rehearing process has 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." Consequently, in the instant case, we hold that the hearing officer erred in determining that the carrier did not waive its right to contest compensability.

The hearing officer's determinations that the claimant sustained a compensable repetitive trauma injury with a date of injury of _____, and that the claimant has not had disability are affirmed. We reverse the hearing officer's determination that the carrier did not waive its right to contest compensability of the injury and render a decision that, because the carrier failed to meet the seven-day pay-or-dispute deadline in Section 409.021(a), it may not now contest compensability of the injury.

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

**GARY SUDOL
12222 MERIT DRIVE
DALLAS, TEXAS 75251.**

Robert W. Potts
Appeals Judge

CONCUR:

Judy L. S. Barnes
Appeals Judge

Margaret Turner
Appeals Judge