

APPEAL NO. 022183  
FILED OCTOBER 9, 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 30, 2002. The hearing officer determined that the appellant/cross-respondent (claimant) did not sustain a compensable injury on \_\_\_\_\_; that the claimed injury does not include lumbar degenerative disc disease; that the claimant did not have disability; that she did not timely report the claimed injury to her employer; that she did not timely file a claim for compensation with the Texas Workers' Compensation Commission (Commission) or have good cause for failing to do so; that the respondent/cross-appellant (carrier) is relieved from liability because of the claimant's failure to timely file a claim for compensation; that the carrier has not waived the right to contest compensability of the claimed injury by not timely doing so; and that the carrier is liable for the payment of accrued benefits under Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 124.3 (Rule 124.3) for the period beginning on \_\_\_\_\_, including income benefits beginning on October 1, 1999, and continuing through November 19, 2000, as a result of its failure to dispute the claimed injury or initiate benefits within seven days of receiving notice of the injury. The claimant appeals the injury, disability, timely notice and untimely filing determinations, as well as the waiver determination and its resulting effect on compensability and disability. The carrier appeals the determination that it is liable for benefits pursuant to Rule 124.3, contending that the rule is invalid. The carrier responds to the claimant's appeal, urging affirmance of the disputed determinations. The appeal file contains no response to the carrier's appeal.

DECISION

We affirm in part and reverse and render in part.

The claimant alleged that she sustained a work-related back injury on \_\_\_\_\_, when she was moving furniture for her employer. After reviewing the conflicting evidence, the hearing officer found the following: that on \_\_\_\_\_, the claimant experienced a recurrence of back pain, but did not sustain any additional damage or harm to the physical structure of her back; that the claimant did not timely report the claimed injury to her employer or have good cause for her failure to do so; that the employer did not learn of an injury until receiving written notice on October 26, 2000; that the claimant did not file a claim for compensation with the Commission until sometime after October 19, 2000; that as a result of the claimed injury, the claimant was unable to obtain or retain employment from October 1, 1999, through the date of the hearing; that the carrier received written notice of the claimed injury on November 10, 2000; that the carrier filed its notice of denial of the claim on November 20, 2000.

The claimant contends that the hearing officer erred in determining that she did not sustain an injury at work on \_\_\_\_\_. We have reviewed the complained-of determination and conclude that the issue involved a fact question for the hearing

officer. The hearing officer reviewed the record and decided what facts were established. The hearing officer said that he did not find the claimant's testimony regarding her injury to be credible. We conclude that the hearing officer's determination is supported by the record and is 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). The claimant also appeals the determinations that she did not timely report her injury or file a claim within one year. The hearing officer stated that the credible evidence establishes that the claimant did not give notice of the alleged injury to her employer within 30 days. The hearing officer determined that the claimant's claimed injury took place on \_\_\_\_\_, but that the claimant did not file a claim until sometime after October 19, 2000. These determinations are supported by the record and are not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust.

The pivotal issue in this case is whether, irrespective of the claimant's compliance with the requirements to timely notify her employer of an injury and timely file a claim for compensation, the carrier waived its right to contest compensability of the claimed injury by not either initiating payment of benefits or filing a dispute within seven days after receiving written notice of the injury. In the present case, the evidence reflects that the carrier received written notice of the claimed injury on November 10, 2000, and neither initiated payment of benefits or denied the claim until November 20, 2000. Thus, the hearing officer determined that the carrier did not initiate the payment of benefits for the claimed injury within seven days of the date it received written notice of the injury. The Commission previously determined that the holding in Continental Cas. Co. v. Downs, Case No. 00-1309, decided June 6, 2002, which imposes waiver unless the carrier either initiates benefits or disputes a claimed injury within seven days after receiving written notice of the injury, would not be followed until the motion for rehearing process has been exhausted. See TWCC Advisory No. 2002-08 (June 17, 2002).

The hearing officer, following the Commission procedure in effect on the date of the hearing, determined that the carrier did not waive its right to contest compensability of the claimed injury, but that the carrier was liable for accrued benefits pursuant to Rule 124.3. However, 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. As noted above, the carrier did not comply with the requirements of Section 409.021(a) by either agreeing to initiate benefits or filing a notice of refusal within seven days. Thus, it has lost its right to contest compensability, which includes its right to assert defenses under Sections 409.002 and 409.004 based upon the claimant's failure to give timely notice of injury to her employer and to timely file a claim for compensation. Downs, supra; see also Texas Workers' Compensation Commission Appeal No. 022027-s, decided September 30, 2002; Texas Workers' Compensation Commission Appeal No. 022113, decided October 3, 2002; and Texas Workers' Compensation Commission Appeal No. 022091-s, decided October 7, 2002.

Regarding the carrier's appeal that Rule 124.3 exceeds the Commission's authority, that it exceeds Section 409.021, and that it was improperly applied, we note that we have reversed the hearing officer's determinations applying Rule 124.3. In reversing and rendering, the Appeals Panel is not applying Rule 124.3, but is applying Downs.

In her appeal, the claimant contended that the hearing officer erred in determining that her injury did not extend to and include lumbar degenerative disc disease. Degenerative disc disease was the "chief diagnosis" and the "damage or harm" to the body in this case. It is the heart of the claimed injury and claimed period of disability in this case. The hearing officer has found the carrier to be liable for benefits based on the "claimed injury." We cannot intelligently review the record on the appealed issues of injury, waiver, and disability without confronting the recasting of the primary injury in this case as an "extent" issue, because whether degenerative disc disease is the claimed injury undercuts all these issues. The "claimed injury" clearly included degenerative disc disease. The hearing officer found that the claimant sustained only pain from her multilevel degenerative disc disease, and that the claimed incident on \_\_\_\_\_, did not aggravate her degenerative disc disease, stenosis, or spondylolithesis. Therefore, the carrier was obligated to dispute the compensability of this condition but waived such right to dispute. The legal consequence of the waiver in this case is that the carrier may not assert that the degenerative disc disease was an ordinary disease of life and that the injury does not include degenerative disc disease. To resolve the "fatal conflict" in the decision, we therefore reverse the conclusion of law that the compensable injury does not include the lumbar degenerative disc disease. We render a decision that the carrier waived the right to dispute the claimed injury and therefore the injury that is compensable includes degenerative disc disease. See Texas Workers' Compensation Commission Appeal No. 021569, decided August 12, 2002.

We affirm that part of the hearing officer's decision that determined that the claimant did not sustain an injury in the course and scope of employment, that she did not timely report her claimed injury, and that she did not timely file a claim. We reverse that part of the hearing officer's decision that determined that the claimant did not sustain a compensable injury, that the claimed injury does not include degenerative disc disease, that the carrier is liable for the payment of accrued benefits under Rule 124.3, and that the carrier has not waived the right to contest the compensability of the claim. We render a decision that the carrier waived the right to contest the compensability of the claim, which includes the right to assert a defense regarding timely filing of a claim and timely reporting of an injury. We render a decision that the carrier waived the right to contest compensability of the \_\_\_\_\_, claimed injury, which includes degenerative disc disease, that the claimant's claimed injury is compensable as a

matter of law, and that the carrier is liable for benefits, including income benefits from October 1, 1999, through the date of the hearing.

The true corporate name of the insurance carrier is **TEXAS PROPERTY AND CASUALTY INSURANCE GUARANTY ASSOCIATION** for **Reliance National Indemnity Company, an impaired carrier** and the name and address of its registered agent for service of process is

**MARVIN KELLY, EXECUTIVE DIRECTOR  
T. P. C. I. G. A.  
9120 BURNET RD.  
AUSTIN, TEXAS 78758.**

---

Judy L. S. Barnes  
Appeals Judge

CONCUR:

---

Elaine M. Chaney  
Appeals Judge

---

Veronica Lopez  
Appeals Judge