

APPEAL NO. 022375-s
FILED OCTOBER 31, 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 begun on June 11, 2002, but a motion to continue was granted and the hearing was concluded on August 13, 2002. The hearing officer determined that the appellant (claimant) did not sustain a compensable injury in the course and scope of employment with the employer on _____; that the claimant did not have disability from a compensable injury; and that the respondent (carrier) did not waive the right to dispute compensability of the claimant's claimed injury of _____. The claimant appeals those determinations and the carrier responds, urging affirmance.

DECISION

Affirmed.

The claimant has worked as a lift truck operator for employer since 1988. On _____, he claimed that he injured his lower back while lifting a 35- to 40-pound box. He made an immediate report of injury to his supervisor. He was diagnosed with lower back pain at the medical center on the employer's premises and released to return to work with lifting restrictions. He had a follow-up visit at the medical center on October 1, 2001, and was again released to return to work with lifting restrictions, and scheduled for another appointment. At the follow-up appointment on October 8, 2001, the claimant was taken off work for suspicion of nonwork-related psychological problems, and was told he could not return to work until he had a release from a psychiatrist. He began seeing a chiropractor on October 15, 2001, for his lower back, and was taken completely off work. Subsequent work releases kept the claimant off work until February 26, 2002, when his treating chiropractor certified that he was at maximum medical improvement with a five percent impairment rating. The claimant's employment was terminated on March 2, 2002, because he would not release his psychiatric records to his employer.

The carrier completed and filed a Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) on September 28, 2001, acknowledging receipt of written notice of the claimed lower back injury on September 27, 2001. The carrier indicated that it would pay benefits when they accrue, subject to further investigation, and filed the TWCC-21 with the Texas Workers' Compensation Commission (Commission) on October 2, 2001. The carrier subsequently prepared a second TWCC-21 dated October 25, 2001, and filed it with the Commission on the same date, indicating that it had investigated the claimed injury and was denying that the claimant sustained an injury in the course and scope of his employment.

Witnesses for the carrier testified that, on the claimed date of injury, the claimant caused damage to some boxes that were about to be loaded for shipment, that he

apparently attempted to load the damaged boxes on trucks before supervisors saw the damage, and that he made denials of any wrongdoing in a “screaming, loud, and aggressive voice,” when confronted about the damaged boxes.

The hearing officer specifically “determined that Claimant was neither credible nor truthful in the presentation of his claim.” He “further determined that Claimant concocted and fabricated his claimed lower back injury of _____, after he was confronted by [his supervisor] for being dishonest and deceptive concerning the damaging and loading of boxes....”

COMPENSABLE INJURY AND DISABILITY

The hearing officer determined that the claimant did not sustain a compensable injury and that he has not had disability from a compensable injury. There was conflicting evidence presented to the hearing officer. 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).

CLAIMANT’S ARGUMENT ON WAIVER OF RIGHT TO DISPUTE

The hearing officer made a finding that the claimant did not sustain a compensable injury that arose out of and in the course and scope of his employment. He did not specifically find that the claimant did not have damage or harm to the physical structure of his body. In this case, there is evidence that the claimant has some damage to the physical structure of his body, so we are not confronted with the situation which is covered by the rationale of Continental Casualty Co. v. Williamson, 971 S.W. 2d 108, 110-111 (Tex. App.-Tyler 1998, no pet.h.), when there is no damage or harm to the physical structure of the body.

Prior to the date of the hearing in the present case, the Commission determined that the Texas Supreme Court decision in Continental Casualty Co. v. Downs, 81 S.W.3d 803 (Tex. 2002), which held that a carrier must adhere to a seven-day “pay or dispute” requirement, would not be followed until the motion for rehearing process in the Texas Supreme Court had been exhausted. See TWCC Advisory No. 2002-08 (June 17, 2002). 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 that we are now following Downs because, “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.”

It is undisputed that the carrier agreed to begin the payment of benefits within seven days after receiving written notice of the injury. Section 409.021. The carrier filed its first TWCC-21 with the Commission within seven days after it received written notice of the claimant's injury, stating: "The carrier will pay benefits, if and when they accrue, subject to further investigation." On October 25, 2001, the carrier filed its second TWCC-21 disputing the claim. The hearing officer determined that the carrier did not waive the right to dispute compensability of the claimed injury because the carrier contested the claimed injury as it was required to do pursuant to Sections 409.021 and 409.022. We agree that the carrier met the "deadline" of seven days to pay or dispute established by Section 409.021, and discussed by the Texas Supreme Court in its decision in Downs, *supra*. This does not completely resolve the questions raised by the appeal.

In a novel, but not unexpected, argument, the claimant contends that the hearing officer erred in making this determination because it was established that the claimant was taken off work completely on October 15, 2001; that the carrier did not dispute the claim until October 25, 2001; that income benefits would have accrued to the claimant during that 10-day period; that such benefits have never been paid to the claimant; and that the failure to pay such benefits renders the carrier's first TWCC-21 "worthless and void." Therefore, the argument goes, the carrier did not "pay or dispute" the claim within seven days of written notice and the claimed injury has become compensable in accordance with Section 409.021(a).

The claimant's argument is not persuasive. The import of the Supreme Court's decision in Downs was to give literal effect to Sections 409.021 and 409.022. The Supreme Court noted the intent of the Legislature to provide employees with a prompt response to their benefit claims, and went on to state:

The Legislature further sought to encourage carriers to initiate benefit payments by providing an unfettered basis to deny compensability for up to sixty days if benefits are initiated, but limiting a carrier who refuses to pay to the ground specified in the notice of refusal, unless the carrier discovers new evidence it could not reasonably have discovered earlier. . . . Thus, interpreting the legislative scheme to require carriers to comply with the seven-day deadline to trigger the sixty-day period to investigate or deny compensability gives meaning to all the provisions of both sections 409.021 and 409.022, and strikes a balance between the injured employee's interest in obtaining prompt payment of benefits or notice of refusal and the carrier's interest in investigating valid grounds for refusal.

The carrier in this case agreed that it would "pay benefits, if and when they accrue." By doing so, the carrier gained an unfettered basis to deny compensability for up to sixty days. Section 409.021(c). The carrier thus avoided the consequences of disputing within seven days (being limited to the grounds for refusal specified in the dispute of the claim, barring newly discovered evidence) or violating the seven-day pay or dispute deadline (losing the right to deny compensability). The claimant contends

that since there has been no payment of benefits, this case essentially reverts back to a case where the carrier failed to “pay or dispute” and the carrier has lost the right to deny compensability. We disagree. The claimant’s argument ignores the practicalities involved in a carrier’s beginning to pay benefits in accordance with Section 409.021. There may not be any benefits which the carrier can immediately pay. Income benefits accrue to a claimant as provided in Section 408.082, and are tied to the economic definition of disability found in the 1989 Act. Whether a claimant is entitled to an income benefit is determined by the facts of each case, and entitlement may or may not occur for some time after an injury, depending upon such matters as whether the claimant misses any time from work, the availability and use of light duty at preinjury wages, use of sick leave or vacation time, wage continuation plans, or intermittent periods of missed work, just to specify some of the variables. Entitlement to medical benefits is covered by Section 408.021, and a claimant may very well seek and obtain medical treatment within seven days of the claimed injury, for which billing is not done until substantially later. The construction of Sections 409.021 and 409.022 requires the application of common sense. We hold that the carrier has complied with what was required of it by agreeing to begin the payment of benefits, and that the remedy suggested by the claimant for the alleged nonpayment of benefits is inappropriate. The carrier is not free, however, to disregard the obligation it undertook by agreeing to begin the payment of benefits. The carrier has received a benefit as mentioned above--it avoided the consequences of disputing within seven days (being limited to the grounds for refusal specified in the dispute of the claim, barring newly discovered evidence) or violating the seven-day pay or dispute deadline (losing the right to deny compensability). The costs to the carrier of receiving that benefit are liability for income benefits that accrue to the claimant prior to the time that a notice of denial of the claim is filed and liability for the cost of medical care extended to the claimant prior to the time that a notice of denial of the claim is filed. In this case, the carrier is liable for income and medical benefits, if any, which accrued between the date of injury and October 25, 2001. To be clear, the issue of liability is decided; the carrier is liable for and shall pay all benefits that had accrued and were payable prior to the date that the carrier filed the notice of denial. See Sections 409.021(e), 409.023(c), and 409.024(b) concerning administrative sanctions for noncompliance with provisions for payment of benefits.

We dismiss Finding of Fact No. 10 as improvidently entered, as it does not relate to any issue that was properly before the hearing officer at this hearing and it is not necessary for resolution of the issues. If specific income benefit amounts or the costs of specific medical treatments are in dispute, the parties may use the dispute resolution process or medical review process, as appropriate.

We affirm the decision and order of the hearing officer as regards his determination that the claimant did not sustain a compensable injury, that the claimant did not have disability, and that the carrier did not waive its right to contest compensability of the claimed injury; however, we hold that the carrier is liable for accrued income and medical benefits from the date of the claimed injury through October 25, 2001.

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

**PACIFIC EMPLOYERS INSURANCE COMPANY
MARCUS CHARLES MERRITT
6600 CAMPUS CIRCLE DRIVE EAST, SUITE 200
IRVING, TEXAS 75063.**

Michael B. McShane
Appeals Judge

CONCUR:

Judy L. S. Barnes
Appeals Judge

Gary L. Kilgore
Appeals Judge