

APPEAL NO. 022430
FILED OCTOBER 30, 2002

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A consolidated contested case hearing (CCH) was held on August 22, 2002. The hearing officer began the CCH with one claim, but upon questioning of the appellant/cross-respondent (claimant), it became apparent that she was claiming two injuries with the same _____, date of injury. The hearing officer decided that it was appropriate to create a second claim file and conduct a consolidated CCH. Docket Number 1 was assigned to the alleged occupational disease injury caused by continual standing (hereafter, the standing injury), and Docket Number 2 was assigned to the alleged specific incident injury caused by a fall from a ladder (hereafter, the falling injury).

The parties agreed at the CCH that the issues relating to the standing injury were whether the claimant sustained a compensable injury; whether she timely notified her employer of the injury; and whether she had disability as a result of the injury, and, if so, for what period. The parties also agreed at the CCH that the issues relating to the falling injury were whether the claimant sustained a compensable injury; whether she timely notified her employer of the injury; whether she had disability as a result of the injury, and, if so, for what period; and whether the respondent/cross-appellant (carrier) waived the right to dispute compensability of the claimed injury by not contesting compensability in accordance with Section 409.021. As to the standing injury, the hearing officer determined that the claimant did not sustain a compensable injury on _____, as a result of standing continuously; that the carrier is relieved of liability because the claimant did not timely notify her employer of her alleged standing injury; and that the claimant has no disability from the alleged standing injury. As to the falling injury, the hearing officer determined that the claimant did not sustain a compensable injury on _____; that the carrier is relieved of liability because the claimant did not timely notify her employer of her alleged falling injury; that the claimant has no disability from the alleged falling injury; and that the carrier did not waive the right to dispute compensability of the claimed injury by not timely contesting compensability of the alleged injury (the carrier waiver issue). The parties stipulated that the carrier received written notice of the claimant's alleged injuries on December 31, 2001, and that the carrier disputed the alleged injuries on January 9, 2002. The hearing officer noted that the decision of the Texas Supreme Court in the Continental Casualty Company v. Downs, 815 S.W.3d 803 (Tex. 2002), (to the effect that a carrier waives its right to contest compensability of a claim if it fails to comply with Section 409.021(a) by either agreeing to begin the payment of benefits or giving written notice of its refusal to pay within seven days after receiving notice of an injury) was not final at the time of the CCH, and followed Texas Workers' Compensation Commission (Commission) guidance to not give the Downs decision precedential effect. She did determine (apparently in consideration of Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 124.3(a)(2) (Rule 124.3(a)(2))) that if the carrier was determined to be liable for

temporary income benefits (TIBs), the TIBs would be for the period beginning January 7, 2002, and ending January 9, 2002.

The claimant files an appeal of the hearing officer's determination that the carrier did not waive the right to dispute the compensability of the injury, because the Downs case has now become final. The carrier files conditional appeals of certain Findings of Fact relating to whether the claimant sustained an injury and the carrier also conditionally appeals the hearing officer's implied determination that, if the Downs decision becomes final, the carrier did waive the right to dispute the compensability of the claim by not contesting within seven days, and would be liable for medical and income benefits. The carrier responds to the claimant's appeal. The claimant did not file a response to the carrier's appeal.

DECISION

Affirmed in part; reversed and rendered in part; and reversed and remanded in part.

THE DOWNS ISSUE

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.

The carrier asserts in its response to the claimant's appeal that the Downs carrier waiver issue only applies to the falling injury. We agree. The parties agreed at the beginning of the CCH that the issues were as outlined above, and the standing injury case did not have an issue regarding carrier waiver. Accordingly, we will discuss Downs as it applies to the falling injury claim.

The hearing officer either explicitly or implicitly made findings to the effect that the claimant did not slip, lose her balance, or otherwise fall while descending a ladder on _____; that she has sustained a thoracic strain and a strain to her right shoulder, but did not do so while working for the employer; that the medical evidence does not establish any injury to the cervical or lumbar spine; that the claimant did not timely notify her employer of an injury within 30 days of _____; and that the claimant has not had disability as a result of a compensable injury. The above determinations relate to factual issues in the case and are supported by sufficient evidence in the record. The 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). The pivotal issue in this case, however, is whether, under the now-final decision in Downs, 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 alleged injury. As stipulated, the carrier had written notice of the claim on December 31, 2001, and filed its Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) disputing the claim on January 9, 2002. The carrier therefore 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, and has lost the right to contest compensability. The carrier's argument that a finding of carrier waiver should not result in a reversal of the ultimate decision relieving the carrier of liability because the claimant failed to timely notify the employer of the injury also fails. We have held that the carrier's loss of the right to contest compensability includes the loss of its right to assert a defense under Section 409.002 based upon the claimant's failure to give timely notice of injury to her employer. Downs, *supra*; see also Appeal No. 021944-s, *supra*; and Texas Workers' Compensation Commission Appeal No. 022027-s, decided September 30, 2002. The carrier's argument that failure to timely file the TWCC-21 did not result in a waiver in this case because no income benefits had accrued prior to the filing the TWCC-21 is without merit. Downs.

APPLICATION OF WILLIAMSON

The carrier also argues that the failure to file a TWCC-21 does not create an injury where none existed, citing Continental Casualty Company v. Williamson, 971 S.W.2d 108 (Tex. App.-Tyler 1998, no pet. h.). The hearing officer did discuss the Williamson case in her Statement of the Evidence, correctly suggesting that since she had found that the claimant has an injury (thoracic strain and strain to her right shoulder), regardless of whether it occurred in the course and scope of her employment, if the carrier is found to have waived its right to contest compensability, the carrier would be responsible for the injury. Since under Downs the carrier did waive the right to contest compensability, and there is an injury, the carrier is indeed responsible for the injury. See Texas Workers' Compensation Commission Appeal No. 022274, decided October 17, 2002.

RESOLUTION OF FALLING INJURY

Based upon the above, we find that the hearing officer erred in determining that the carrier timely disputed compensability of the claimant's falling injury and the implicit determination that the carrier did not waive its right to contest the compensability of the claimed falling injury, and that the claimant did not sustain a compensable thoracic strain injury or a compensable right shoulder strain injury. Based upon the now final decision in Downs, we reverse those determinations that the claimant did not sustain a compensable injury and render a new decision that the claimant did sustain a compensable thoracic strain injury and right shoulder strain injury. Because we find that the claimant did sustain a compensable injury on _____, we remand the case back to the hearing officer solely to determine whether or not the claimant had disability due to her compensable injury. We would point out to the hearing officer that

Rule 124.3(a)(2) appears to be incompatible with the holding in the Downs decision, and should not be considered when determining disability.

RESOLUTION OF STANDING INJURY

As noted above, there was no issue of carrier waiver with regard to the standing injury. To the extent that the claimant's appeal can be considered an appeal as to the standing injury, we conclude that there is sufficient evidence to support the hearing officer's determinations that there was no lumbar injury resulting from standing, that the claimant did not timely report such an injury to her employer, and that the claimant did not have disability as a result of the standing injury. Cain, supra. Even if carrier waiver applied, the finding of the hearing officer that there was no lumbar spine injury would bring the Williamson rationale into play, and we would affirm the decision that the standing injury is not a compensable injury, and that the claimant would not have disability as a result of the standing injury.

The hearing officer's decision is affirmed in part, reversed and rendered in part, and reversed and remanded in part, as set out above.

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

**C.J. FIELDS
5910 NORTH CENTRAL EXPRESSWAY, SUITE 500
DALLAS, TEXAS 75206.**

Michael B. McShane
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Veronica Lopez
Appeals Judge