

APPEAL NO. 022608
FILED NOVEMBER 25, 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 September 11, 2002. The hearing officer resolved the disputed issues by deciding that the appellant (claimant) did not sustain a compensable injury on or about _____; that the respondent (carrier) waived its right to contest compensability of the claimed injury by not timely contesting the injury in accordance with Section 409.021; that the carrier is relieved of liability under Section 409.002 because of the claimant's failure to timely notify his employer of his injury pursuant to Section 409.001; and that the claimant has not had disability resulting from an injury sustained on or about _____. The claimant appealed the hearing officer's determinations that he did not sustain a compensable injury; that the carrier is relieved of liability under Section 409.002 because the claimant failed to timely notify his employer of his injury pursuant to Section 409.001; and that he has not had disability. The carrier responded. There is no appeal of the hearing officer's determination that the carrier waived its right to contest compensability of the claimed injury by not timely contesting the injury in accordance with Section 409.001.

DECISION

The hearing officer's decision is reversed and a decision is rendered that the claimant sustained a compensable injury on _____; that the carrier is not relieved of liability under Section 409.002; and that the claimant has had disability from February 8, 2002, through the date of the CCH.

The hearing officer found that the claimant's lower back condition does not result from an event that occurred in the course and scope of his employment on _____, or thereabout, and that the claimant did not notify anyone in a supervisory or management position with the employer within 30 days of _____, that he had sustained an injury in the course and scope of his employment on _____. Whether the claimant sustained an injury in the course and scope of his employment and whether the claimant gave timely notice of his injury to the employer within 30 days of the injury were fact questions for the hearing officer to determine from the evidence presented. The hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). As the finder 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 findings that the claimant did not sustain an injury in the course and scope of his employment on or about _____, and that he did not timely notify his employer of his injury 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). Accordingly, the findings of no injury in the course and scope of employment and no timely notice of injury are affirmed. However, because the carrier has waived its right to contest compensability of the

injury, the claimant has a compensable injury, and the carrier is not relieved of liability under Section 409.002 as set forth in the remainder of this decision.

With regard to the waiver issue, the Payment of Compensation or Notice of Refused or Disputed Claim (TWCC-21) reflects that the carrier first received written notice of the claimant's claimed back injury on March 22, 2002. The TWCC-21 is dated April 3, 2002, and in it the carrier disputes that the claimant sustained an injury in the course and scope of employment, gave timely notice of injury, or has disability, and asserts that the claimant suffers from an ordinary disease of life and did not sustain a compensable injury. The TWCC-21 does not have a Texas Workers' Compensation Commission (Commission) date-received stamp on it. The hearing officer found that the carrier first received written notice of the claimed injury on March 22, 2002, and that the carrier failed to prove that it disputed the claimed injury within 60 days of March 22, 2002. The hearing officer concluded that the carrier waived its right to contest the compensability of the claimed injury by not timely contesting an injury in accordance with Section 409.021. However, the hearing officer also determined that the Appeals Panel has held that where there is no injury, the carrier's failure to contest compensability cannot create an injury as a matter of law, citing Texas Workers' Compensation Commission Appeal No. 000604, decided May 10, 2000. The hearing officer also determined that the carrier is relieved of liability under Section 409.002 because the claimant failed to timely notify his employer pursuant to Section 409.001. Thus, despite the determination that the carrier waived its right to contest compensability of the claimed injury, the hearing officer determined that the claimant did not sustain a compensable injury.

The claimant's appeal cites Continental Casualty Company v. Downs, 81 S.W.3d 803 (Tex. 2002), in support of his contention that the hearing officer erred in determining that he does not have a compensable injury. The carrier's response cites Continental Casualty Company v. Williamson, 971 S.W.2d 108 (Tex. App.-Tyler 1998, no pet.), in support of its position that the hearing officer did not err in determining that the claimant does not have a compensable injury.

Since the carrier received written notice of the claimed injury on March 22, 2002, and its TWCC-21 disputing compensability is dated April 3, 2002, it did not contest compensability within seven days of its first receipt of written notice of injury. Also, there is no evidence that the carrier agreed to initiate benefits, or that it initiated benefits, within seven days of March 22, 2002.

In the Downs case, the Texas Supreme Court determined that under Sections 409.021 and 409.022, a carrier that fails to begin benefit payments as required by the 1989 Act or send a notice of refusal to pay within seven days after it receives written notice of injury has not met the statutory requisite to later contest compensability. On August 30, 2002, the Texas Supreme Court denied the motion for rehearing in the Downs case. Thus, the Downs decision, along with the requirement to adhere to the seven day "pay or dispute" provision of Section 409.021(a), became final. Texas

Workers' Compensation Commission Appeal No. 021944-s, decided September 11, 2002.

In Williamson, the court held that "if a hearing officer determines that there is no injury, and that finding is not against the great weight and preponderance of the evidence, the carrier's failure to contest compensability cannot create an injury as a matter of law." The Appeals Panel has previously recognized that Williamson is limited to situations where there is a determination that the claimant did not have an injury, that is, no damage or harm to the physical structure of the body, as opposed to cases where there is an injury which was determined by the hearing officer not to be causally related to the claimant's employment. Texas Workers' Compensation Commission Appeal No. 020941, decided June 6, 2002. In Appeal No. 000604, *supra*, which the hearing officer cites, the Appeals Panel stated:

We have interpreted Williamson to mean that a carrier's failure to timely dispute does not create an injury only when there is no injury. If the claimant has established a condition that meets the definition of injury under Section 401.011(26), it does not matter that the cause of the injury may be outside the course and scope of employment because causation is no longer in dispute when a TWCC-21 has not been timely and properly filed.

In the instant case, the claimant claimed a lower back injury from performing a work activity. The hearing officer found that the claimant was not injured in the course and scope of his employment; she did not find that the claimant has no injury. In fact, the hearing officer made findings of fact, which are not appealed, that the claimant has been diagnosed as having several lower back conditions, and that as a result of the claimant's lower back condition, he has been unable to obtain and retain employment at wages equivalent to his preinjury wage from February 8, 2002, through the date of the CCH. Thus, we conclude that Williamson does not apply to the facts of this case because the claimant has physical harm or damage to his lower back.

Since the carrier did not agree to initiate benefits, or dispute compensability within seven days after its received written notice of injury, it did not meet the statutory requisite of Section 409.021(a) to later contest compensability. The claimant's injury has thus become compensable as a matter of law, and the hearing officer erred in determining that the claimant did not sustain a compensable injury. Appeal No. 021944-s, *supra*.

The hearing officer also erred in determining that the carrier is relieved of liability under Section 409.002 because the claimant failed to timely notify his employer of his injury under Section 409.001. In Texas Workers' Compensation Commission Appeal No. 022027-s, decided September 30, 2002, the Appeals Panel held that, when a carrier loses its right to contest compensability by not complying with the requirements of Section 409.021(a) (failing to initiate benefits or filing a notice of refusal within seven days of receipt of written notice of injury), it loses its right to assert a defense under

Section 409.002 based upon the claimant's failure to give timely notice of injury to the employer.

In addition, we hold that the hearing officer erred in determining that the claimant has not had disability. Section 401.011(16) defines "disability" as "the inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage." In the instant case, the claimant has a compensable back injury due to the carrier's failure to timely pay or dispute. Downs, *supra*. The hearing officer found that, as a result of his lower back condition, the claimant was unable to obtain and retain employment at wages equivalent to the preinjury wage from February 8, 2002, through the date of the CCH, and that finding is not appealed. Accordingly, we hold that the claimant had disability from February 8, 2002, through the date of the CCH.

The hearing officer's decision that the claimant did not sustain a compensable injury on or about _____; that the carrier is relieved of liability under Section 409.002 because of the claimant's failure to give timely notice of injury to the employer under Section 409.001; and that the claimant has not had disability is reversed and a decision is rendered that the claimant sustained a compensable injury on _____; that the carrier is not relieved of liability under Section 409.002 because of the claimant's failure to timely notify his employer of his injury under Section 409.001; and that the claimant had disability from February 8, 2002, through the date of the CCH. The hearing officer's order that the carrier is not liable for benefits is reversed. The carrier is liable to the claimant for workers' compensation benefits in accordance with this decision, the rules of the Commission, and the 1989 Act.

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

**JAVIER GONZALEZ
3421 WEST WILLIAM CANNON DRIVE
SUITE 131, PMB NO. 113
AUSTIN, TEXAS 78745.**

Robert W. Potts
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Veronica Lopez
Appeals Judge