APPEAL NO. 022711
FILED DECEMBER 12, 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 23, 2002. There are two docket numbers involving two separate alleged incidents. In (Docket No. 1) (the [Date of injury No. 1] injury) the hearing officer determined that the respondent/cross-appellant (claimant) sustained a compensable cervical spine injury on (Date of injury No. 1); that the appellant/cross-respondent (self-insured) "waived the right to dispute the compensability of the (Date of injury No. 1), cervical spine injury"; that the claimant "did not sustain a compensable low back injury on (Date of injury No. 1)"; that, although the claimant failed to give timely notice of her (Date of injury No. 1), cervical injury and her good cause did not continue, "the carrier [self-insured] waived the right to dispute this injury" thereby making the injury compensable; and that the claimant had disability as a result of the (Date of injury No. 1) injury from November 2, 2001, through the date of the CCH.

With regard to (Docket No. 2) (the [Date of injury No. 2] injury) the hearing officer found that the claimant "did not sustain a compensable injury on (Date of injury No. 2)"; that the self-insured "did not file a dispute or initiate workers' compensation benefits for the claimed (Date of injury No. 2), injury by the seventh day after October 11, 2001, the date it received first written notice of the claim"; and that the self-insured "did not waive the right to dispute the compensability of the claimed low back injury of (Date of injury No. 1), or the (Date of injury No. 2), injury." The hearing officer made no findings regarding disability for the (Date of injury No. 2) injury.

The self-insured appealed on a number of grounds but identified the "most critical issue . . . is whether the Hearing Officer erroneously applied the Seven Day dispute standard when an employee of a state institution voluntarily elected to receive accrued leave to keep her full salary." The self-insured cites Texas Workers' Compensation Commission Appeal No. 021153-s, decided June 27, 2002, as being dispositive of this issue. The self-insured also complained that it was limited in time on cross-examination and closing argument, attacked the credibility of certain evidence, and alleged error in the hearing officer's refusal to continue the case a second time.

The claimant appealed the decision on the bases that the hearing officer erred in identifying the extent of injuries as not being an issue before him and in determining that the claimant's injuries did not extend to the low back and shoulders, and further argued that some of the hearing officer's determinations on carrier waiver were "inconsistent." Both parties filed responses to the other's appeal.

DECISION

Affirmed in part and reversed and rendered in part.

The hearing officer discusses the evidence in some detail and it will not be repeated in detail here. To greatly summarize, the claimant was an assistant supervisor of mail services. It is undisputed that the claimant had sustained a prior cervical injury and that her "medical situation" was complicated by her diabetes, possible heart and gall bladder problems, and other medical conditions. The claimant testified that on (Date of injury No. 1), she "felt a pull in her neck" lifting a box above chest level. The claimant continued working and did not see a doctor until March 14, 2001. The hearing officer found that the claimant had good cause for not reporting that injury until July 18, 2001, when she discussed increasing neck pain with another doctor. The hearing officer found the claimant reported the injury on August 16, 2001. The claimant alleged a cervical and "upper back" injury. The claimant alleges another injury on (Date of injury No. 2), moving some postage meters. The claimant alleged injuries to her neck, right shoulder, and back in that event. The first mention of back complaints is in a report dated December 28, 2001, attributing the back pain to the (Date of injury No. 2) injury. The hearing officer made clear in his decision that he did not believe that the claimant sustained any kind of a lumbar back injury.

We first address the carrier or self-insured waiver issue. Section 409.021 provides in pertinent part:

> (a) An insurance carrier shall initiate compensation under this subtitle promptly. No later than the seventh day after the date on which an insurance carrier receives written notice of an injury, the insurance carrier shall:
>
> (1) begin the payment of benefits as required by this subtitle; or
>
> (2) notify the [Texas Workers' Compensation Commission (Commission)] and the employee in writing of its refusal to pay and advise the employee of:
>
> (A) the right to request a benefit review conference[.]

It is undisputed that the self-insured did not dispute either of the claimed injuries within seven days of receiving notice of the claimed injury. (For the [Date of injury No. 1] injury the self-insured received written notice on August 22, 2001, and filed its Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) on September 29, 2001. For the [Date of injury No. 2] injury, the self-insured received written notice on October 11, 2001, and filed its TWCC-21 on October 31, 2001.) The self-insured's position is that under Section 503.041 an employee of the self-insured may elect to remain on the payroll until the employee's annual and sick leave is exhausted and it is undisputed that the claimant did so in this case. The self-insured contends that Section 503.041(b) provides that income benefits do not begin to accrue after such an election until the leave is exhausted. The self-insured cites Appeal No. 021153-s, *supra*, involving the self-insured in this case in similar circumstances, as holding "that the use of leave under § 503.041, determined that the [self-insured] preserves the 60 day right

to dispute a claim by payment of salary under § 503.041." We agree that is what that case held, however the distinguishing feature of Appeal No. 021153-s is that in that case the self-insured filed its first TWCC-21, within seven days of receiving written notice of the claimed injury noting in block 23 of the TWCC-21 "CLAIMANT ELECTED TO USE ACCRUED LEAVE 4-10-01 TO REMAIN ON PAYROLL. WAGE STATEMENT REQUESTED FROM EMPLOYER." The Appeals Panel held that notation on the TWCC-21 clearly indicated the self-insured's agreement and intent to pay benefits for the claim as they accrue and are due thereby preserving the right to later deny the claim within 60 days after it received written notice pursuant to the ruling in Continental Casualty Co. v. Downs, 81 S.W.3d 803 (Tex. 2002).

The Appeals Panel in Appeal No. 021153-s recognized that income benefits do not accrue until the eighth day of disability (Section 408.082) and it is practically unrealistic for a carrier to receive, process, and make payment for medical care, if any, within the first seven days as required. The only alternative is to agree to make such payments as they accrue and are due. In Appeal No. 021153-s the self-insured did so by the filing of the TWCC-21 with its notation within seven days. In the instant case the self-insured did nothing other than noting on a Supplemental Report of Injury that the claimant was continuing to receive her preinjury wages. We do not regard that as an agreement and intent to pay benefits for the claim as they accrue and are due, nor is there any indication if or when that form was filed with the Commission and the claimant as required by Section 409.021(a). In essence the self-insured neither paid nor agreed to pay nor disputed within seven days of written notice and therefore, under Downs the self-insured waived the right to contest compensability. We affirm the hearing officer's decision on the issue of the self-insured's waiver of the (Date of injury No. 1) injury.

The hearing officer also determined:

FINDING OF FACT

13. The Self-insured did not file a dispute or initiate workers' compensation benefits for the claimed (Date of injury No. 1), injury by the seventh day after August 22, 2001, the date it received first written notice of the claimed injury.

15. The Self-insured did not file a dispute or initiate workers' compensation benefits for the claimed (Date of injury No. 2), injury by the seventh day after October 11, 2001, the date it received first written notice of the claim.

CONCLUSION OF LAW

7. The Self-insured did not waive the right to dispute the compensability of the claimed low back injury of (Date of injury No.1), or the (Date of injury No. 2), injury.

The claimant contends that the hearing officer's Findings of Fact are inconsistent with the Conclusion of Law. We agree. The hearing officer made clear that he did not believe that the claimant sustained a lumbar injury due to either the (Date of injury No. 1) or the (Date of injury No. 2) incidents or a right shoulder injury due to the (Date of injury No. 2) claimed injury. The hearing officer further commented:

> There being no lumbar spine or right shoulder injury or pathology, such waiver did not create a compensable lumbar spine injury on (Date of injury No. 1), or a right shoulder injury on (Date of injury No. 2).
>
> There remains the question of whether or not failure to timely dispute a cervical spine surgery injury of (Date of injury No. 2), rendered a cervical spine injury on that date compensable even though the claimed injury on (Date of injury No. 2), is the same injury sustained on (Date of injury No. 1). It is unreasonable and not contemplated by the 1989 Act or the *Downs* decision to allow a Claimant to keep claiming new dates of injury for the same injury, thus creating multiple claims out of one. The problem can be somewhat managed by provisions for contribution and allowance of only one set of income benefits during any given period of time. Still, I find that a carrier [is] obligated to dispute or waive dispute of the same injury only once and that failure to do so on later allegations that the old injury is a new injury does not turn one injury into two, or more. Thus, in this case, no legal consequences flowed from the Self-insured's failure to pay or dispute the claimed (Date of injury No. 2), injury within seven days of receiving first written notice of the injury.

It appears to us that, without specifically mentioning Continental Casualty Co. v. Williamson, 971 S.W.2d 108 (Tex. App.-Tyler 1998, no pet. h.), the hearing officer was applying a Williamson rationale. 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." We have 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. *See* also Texas Workers' Compensation Commission Appeal No. 022450, decided November 12, 2002. We disagree with the hearing officer's rationale. In this case, there are documented back and right shoulder complaints and diagnoses and the question is whether they are related to the claimed events of (Date of injury No. 1) and (Date of injury No. 2). The hearing officer, in a parenthetical remark, even comments "It is interesting to note complaints of right shoulder pain to Dr. . . . in the spring of 2001, well before the incident on (Date of injury No. 2)." The self-insured, pursuant to Downs, *supra*, had an obligation to pay (or agree to pay) or dispute within seven days or lose the right to contest compensability. We reverse the hearing officer's decision that the self-insured

did not waive the right to dispute the compensability of the claimed injury of (Date of injury No. 1), or the (Date of injury No. 2), injury and render a new decision that the self-insured has waived the right to contest compensability of both claimed injuries by failing to comply with Section 409.021 as interpreted by Downs.

Regarding the self-insured's contention that it was limited in cross-examination (the self-insured called no witnesses of its own) and closing argument, we note that the CCH was almost three hours long, much of it due to cross-examination of the claimant's prior medical history. Further it is not unusual for a hearing officer to limit the time for closing and rebuttal argument, which is not evidence anyway. The hearing officer did not err in his rulings on limiting cross-examination and closing argument due to time constraints.

Regarding the self-insured's attack on the credibility of the evidence that the hearing officer relied on, we can only note that Section 410.165(a) provides that the hearing officer, as a finder of fact, is the sole judge of the relevance and materiality of the evidence as well as of the weight and credibility that is to be given the evidence. An appeals-level body is not a fact finder, and does not normally pass upon the credibility of witnesses or substitute its own judgment for that of the trier of fact.

The hearing officer did not err in denying the self-insured's request for a continuance. We note that the self-insured had already been granted one continuance for further discovery in this case.

Regarding the claimant's contention that the hearing officer erred in identifying the specific injuries about which he was making findings, we perceive no error. Had the hearing officer merely found a compensable injury on a certain date, no doubt the parties would immediately return to the dispute resolution process to identify the extent of injury. The hearing officer did not err in identifying the various claimed injuries. Regarding the sufficiency of the evidence in finding no low back and shoulder injury, that is a fact question for the hearing officer to resolve. *See* Section 410.165(a).

The hearing officer's decision that the self-insured waived its right to contest compensability of the (Date of injury No. 1) cervical injury is affirmed, the hearing officer's decision that the self-insured had not waived the right to contest compensability of a claimed low back injury and right shoulder injury is reversed and we render a new decision that the self-insured had failed to pay or dispute as interpreted by Downs, *supra*, either of the two claimed injuries of (Date of injury No. 1) and (Date of injury No. 2), thereby making both injuries compensable by operation of law.

The true corporate name of the insurance carrier is **(a self-insured governmental entity)** and the name and address of its registered agent for service of process is

JG
(ADDRESS)
(CITY), TEXAS (ZIP CODE).

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Thomas A. Knapp
Appeals Judge

CONCUR:

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Gary L. Kilgore
Appeals Judge

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Margaret L. Turner
Appeals Judge