APPEAL NO. 023010-s
FILED JANUARY 9, 2003

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A contested case hearing, combining two claims, was held on October 31, 2002. In (Docket No. 1), the hearing officer determined that the appellant's (claimant) _____, compensable injury does not include the current condition to the low back, cervical spine, and right shoulder tear, and that the claimant did not have disability resulting from an injury sustained on _____. In (Docket No. 2), the hearing officer determined that the claimant did not sustain an injury in the course and scope of his employment on (alleged injury); that he did not have disability resulting from an injury sustained on (alleged injury)[1]; and that the respondent (self-insured) did not waive the right to contest the compensability of the claimed (alleged injury), injury by timely paying or disputing the claim in accordance with Section 409.021. The claimant appealed and the self-insured responded, urging affirmance.

DECISION

Affirmed.

As to Docket No. 1, the hearing officer did not err in determining that the _____, compensable injury does not include the current condition to the low back, cervical spine, and right shoulder tear, and that the claimant did not have disability. These issues involved questions of fact for the hearing officer to resolve. The hearing officer is the sole judge of the weight and credibility of the evidence (Section 410.165(a)) and, as the trier of fact, resolves the conflicts and inconsistencies in the evidence, including the medical evidence (Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ)). It was the hearing officer's prerogative to believe all, part, or none of the testimony of any witness, including that of the claimant. Aetna Insurance Company v. English, 204 S.W.2d 850 (Tex. Civ. App.-Fort Worth 1947, no writ). In view of the evidence presented, we cannot conclude that the hearing officer's determinations are 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).

We likewise find that the hearing officer's determination in Docket No. 2, that the claimant did not sustain an injury in the course and scope of his employment on (alleged injury), and that he did not have resulting disability, is supported by sufficient evidence to be affirmed. These determinations also involved questions of fact for the hearing officer to resolve. Cain, *supra*.

[1] Although the hearing officer did not list a disability issue for the injury allegedly sustained on (alleged injury), in the Decision and Order, there was such an issue certified from the benefit review conference, it was litigated at the hearing, and the hearing officer did decide the issue as set forth in the Findings of Fact, Conclusions of Law, Decision, and Order sections of the Decision and Order.

Finally, we turn to the issue of whether the self-insured waived its right to contest the compensability of the claimed (alleged injury), injury pursuant to Section 409.021 and the Texas Supreme Court's decision in Continental Casualty Company v. Downs, 81 S.W.3d 803 (Tex. 2002). Our review of the record indicates that the claimant began losing time from work due to his claimed injury on March 25, 2002; that the self-insured received its first written notice of the injury on March 25, 2002; that the self-insured mailed its first temporary income benefits (TIBs) payment to the claimant on April 5, 2002; that the claimant received the first TIBs payment no later than April 8, 2002; that the self-insured continued to pay the claimant TIBs, with the last check being issued on May 17, 2002; and that the self-insured disputed the compensability of the claim on May 16, 2002.

The claimant asserts that because the self-insured did not file a Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) with the Texas Workers' Compensation Commission (Commission) by April 1, 2002, which was the seventh day after it received written notice of the claim, it waived the right to contest compensability. The claimant relies on the Texas Supreme Court's decision in Downs to support his position that since the self-insured took no action within 7 days of written notice of the injury, it is not entitled to a 60-day period to investigate or deny compensability. The self-insured asserts that there is no waiver because it initiated benefits in accordance with the 1989 Act. The holding in Downs is contained in the first paragraph of the majority decision and it states:

> We conclude that under Texas Labor Code §§ 409.021 and 409.022, a carrier that fails to begin benefit payments as required by the Act or send 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.

The Supreme Court recognized that it was the Legislature's express intent that injured workers receive either prompt payment or notice of denial of compensation claims.

In the instant case, we find that the self-insured did in fact initiate benefit payments as required by the 1989 Act. Section 409.021(a) requires an insurance carrier to initiate compensation under this subtitle promptly. It provides that not later than the seventh day after receiving written notice of the injury, the insurance carrier shall begin the payment of benefits as required by this subtitle or notify the Commission and the employee of its refusal to pay. Section 408.081 provides that income benefits shall be paid weekly as and when they accrue. Section 408.082 provides that income benefits begin to accrue on the eighth day after the date on which disability began. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 124.7(c) (Rule 124.7(c)) requires the carrier to initiate income benefits no later than the seventh day after the accrual date. Rule 124.2(j) provides that carriers shall not provide notices to the Commission that explain

that benefits will be paid as they accrue.[2] In the case before us, the claimed income benefits began to accrue on April 1, 2002, and the self-insured initiated benefits on April 5, 2002, and continued to pay benefits up until the date it disputed the claim. Because the self-insured promptly initiated benefits in accordance with the 1989 Act, they were entitled to the 60-day time period to investigate and dispute the claim. Additionally, because the carrier disputed the claim within 60 days of receiving its first written notice of the claim, it did not waive its right to do so.

We note that this case is distinguishable on its facts from Texas Workers' Compensation Commission Appeal No. 022375-s, decided October 31, 2002. That case involved a situation where the carrier filed a TWCC-21 within seven days of first written notice indicating that it would pay benefits when they accrue and then subsequently filed a dispute of compensability without ever having paid benefits. The Appeals Panel determined that because the carrier agreed to pay benefits within seven days of receiving written notice of the injury, it did not waive its right to later contest compensability. The carrier was held to be liable for any medical and income benefits which accrued from the date of injury up until the date they disputed the claim. In the case before us, the self-insured actually did timely initiate payment of benefits in accordance with the 1989 Act; therefore we find no waiver.

[2] On appeal, the claimant states that "the self-insured never filed a 'cert. TWCC-21' with the [C]ommission within 7 days of first notice, and even argued at the hearing that the 'cert. TWCC-21' mechanism for preserving the right to dispute compensability is not required in an accidental injury case where the carrier initiates TIBs payments per the [1989] Act." We note that while Rule 124.2(j) does not require a carrier to give the Commission notice that benefits will be paid as they accrue, Advisory 2002-15, dated September 12, 2002, provides a mechanism through which the carrier can establish that it agreed to pay benefits as they accrue in the event there is a subsequent dispute. While the Commission will not keep a copy of the "cert. TWCC-21," it will provide the carrier with an acknowledgement of its agreement to pay benefits as they accrue. The "cert. TWCC-21" procedure was a suggestion, not a requirement, and we do not view the existence or nonexistence of such a document as dispositive of the question presented in this case.

The hearing officer's decision and order are affirmed.

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

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

_____
Daniel R. Barry
Appeals Judge

CONCUR:

_____
Susan M. Kelley
Appeals Judge

_____
Thomas A. Knapp
Appeals Judge