

APPEAL NO. 023123
FILED JANUARY 16, 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 (CCH) was held on November 22, 2002. The hearing officer determined that the respondent (claimant) sustained a compensable (left shoulder and back) injury on _____; that the claimant had disability from September 6, 2001, and continuing to the date of the CCH; and that the appellant (self-insured) waived the right to contest compensability by not timely beginning payment of benefits or disputing liability pursuant to Section 409.021 (the "pay or dispute" provision).

The self-insured appeals, contending that the claimant had failed in his burden of proof that he had sustained a compensable injury or had disability and that the carrier waiver to contest compensability does not apply. The file does not contain a response from the claimant.

DECISION

Affirmed.

The claimant, a brush truck driver for the self-insured, testified that he injured his left shoulder and back on _____, when he fell attempting to hook a chain to a truck to pull it out of the mud. There is evidence which might lead to a different conclusion. Whether the claimant sustained an injury as he alleges and whether the claimant had disability as defined in Section 401.011(16) presented questions of fact for the hearing officer to resolve. The hearing officer did so and his decision is supported by sufficient evidence.

Regarding carrier waiver, the hearing officer found that the self-insured received its first written notice of the claimed injury "[o]n or before September 15, 2001." The parties stipulated that on October 1, 2001, the self-insured filed its Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) contesting compensability of the claimed injury. We note that the TWCC-21 recites that the carrier's first written notice of injury was received on "9/5/01." The self-insured asserts that was a "typo."

Section 409.021(a) provides that an insurance carrier shall initiate compensation under this subtitle promptly, and that not 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 and the employee in writing if its refusal to pay (the "pay or dispute" provision). In Continental Casualty Company v. Downs, 81 S.W.3d 803 (Tex. 2002), the court held that a carrier waives its right to deny compensability 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 written notice of an injury.

The hearing officer, in his Statement of the Evidence, commented that:

[Ms. T, the self-insured's risk analyst] admitted in her testimony that the Self-Insured certainly had written notice of the claimed injury by September 15, 2001. She conducted an investigation on September 16, 2001 and, according to her, on that day learned the information upon which the denial of the claim was based.

The self-insured, on appeal, disagrees with that statement and the hearing officer's "recollection of the testimony." We note that on Page 57 of the transcript the hearing officer summarizes Ms. T's testimony on this point, found on Page 53, saying:

THE HEARING OFFICER: And before we get off way into this, let me point out that I'm satisfied from the evidence that the [self-insured] certainly knew about this claim on the 15th; and that on the 16th the [self-insured] knew the facts that caused them to deny the claim.

[SELF-INSURED'S ATTORNEY]: Okay

THE HEARING OFFICER: All right. Go ahead

[SELF-INSURED'S ATTORNEY] Okay. I guess you -- that's what I was going to ask her, if the [self-insured] knew by 9-15.

THE HEARING OFFICER: Yeah, she already said they did.

The self-insured, on appeal, also contends that it is "fundamentally unfair . . . to retroactively apply the holding of the Downs decision." We only note that Section 409.021, the pay or dispute provision, has remained relatively unchanged since 1991 and the Supreme Court only said that it was being incorrectly applied. We cannot justify continuing to incorrectly apply the law after the Texas Supreme Court has told us how to correctly apply that law.

After review of the record before us and the complained-of determinations, we have concluded that there is sufficient legal and factual support for the hearing officer's decision. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

Accordingly the hearing officers 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

**SA
(ADDRESS)
(CITY), TEXAS (ZIP CODE).**

Thomas A. Knapp
Appeals Judge

CONCUR:

Elaine M. Chaney
Appeals Judge

Chris Cowan
Appeals Judge