

APPEAL NO. 023124
FILED FEBRUARY 6, 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 was held on November 13, 2002. The hearing officer determined that on _____, during the course and scope of his employment, the respondent (claimant) did not cause damage or harm to the physical structure of his body; that due to the claimed injury, the claimant was unable to obtain and retain employment at wages equivalent to his preinjury wages, beginning on August 7, 2002, and continuing through the date of the hearing; and that because the appellant (carrier) waived the right to contest compensability of the claimed injury by not timely contesting the injury in accordance with Section 409.021, the claimant did sustain a compensable injury on _____, and did have disability from August 7, 2002, through the date of the hearing. The carrier appealed. The file does not contain a response from the claimant.

DECISION

Affirmed.

The carrier first asserts that the hearing officer erred in failing to admit Carrier's Exhibit Nos. 7 and 9. The claimant had objected on the grounds that the documents had not been timely exchanged. The carrier essentially argues that the hearing officer should not have believed the claimant when he said that he did not timely receive the documents. Parties must exchange documentary evidence with each other not later than 15 days after the benefit review conference and thereafter, as it becomes available. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 142.13(c) (Rule 142.13(c)). Our standard of review regarding the hearing officer's evidentiary rulings is one of abuse of discretion. Texas Workers' Compensation Commission Appeal No. 92165, decided June 5, 1992. To obtain reversal of a judgment based upon the hearing officer's abuse of discretion in the admission or exclusion of evidence, an appellant must first show that the admission or exclusion was in fact an abuse of discretion, and also that the error was reasonably calculated to cause and probably did cause the rendition of an improper judgment. Texas Workers' Compensation Commission Appeal No. 92241, decided July 24, 1992; see *also Hernandez v. Hernandez*, 611 S.W.2d 732 (Tex. Civ. App.-San Antonio 1981, no writ). In determining whether there has been an abuse of discretion, the Appeals Panel looks to see whether the hearing officer acted without reference to any guiding rules or principles. Texas Workers' Compensation Commission Appeal No. 951943, decided January 2, 1996; *Morrow v. H.E.B., Inc.*, 714 S.W.2d 297 (Tex. 1986). It was a factual issue for the hearing officer to determine whether or not the excluded documents were in fact timely exchanged. We do not find the hearing officer's ruling to be an abuse of discretion, nor can we say that the hearing officer acted without reference to guiding rules and principles.

The carrier next asserts that the hearing officer erred in determining that it waived the right to contest compensability of the claimed injury by not timely contesting the injury in accordance with Section 409.021. It is undisputed that the carrier received written notice of the claim on August 7, 2002. In evidence was a copy of the carrier's Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) file stamped as being received by the Texas Workers' Compensation Commission (Commission) on August 15, 2002.

Section 409.021(a) provides that the insurance carrier is to begin the payment of benefits as required by the 1989 Act or notify the Commission and the claimant of its refusal to pay benefits within seven days after receiving written notice of the injury (the "pay or dispute" provision). On August 30, 2002, the Texas Supreme Court denied a carrier's motion for rehearing in Continental Casualty Company v. Downs, 81 S.W.3d 803 (Tex. 2002), and as such, the Downs decision, along with the requirement to strictly adhere to the seven-day "pay or dispute" provision is final. In this case, the carrier does not dispute that the TWCC-21 was received by the Commission on the 8th day after receiving its first written notice of the claimed injury. However, the carrier argues that based upon the instruction form for the TWCC-21, the form is considered filed when personally delivered or postmarked. It is the carrier's position that since the Commission received the TWCC-21 on August 15, 2002, it must have been mailed prior to that date making it timely pursuant to the instructions. The carrier asserts that the Commission should be estopped from finding waiver due to its inability to produce the original envelope.

Rule 124.2 contains the carrier reporting and notification requirements. Rule 124.2(d) requires the carrier to notify the Commission and the claimant of a denial of a claim based on noncompensability "in accordance with this section." Rule 124.2(g) provides that notification to the Commission as required by subsections (c), (d), and (e) of this section requires the carrier to use electronic filing, as that term is used in Section 102.5(e) of this title. Rule 124.2(g) further provides that notification to the Commission as required by subsection (d) of this section is not considered complete until a written copy of the notice provided to the claimant under subsection (f) of this section is received by the Commission.

Rule 102.5(e) provides in pertinent part that:

Electronically filed records or communications shall be filed in the format, form, and manner prescribed by the Commission. A record is considered filed when submitted electronically if on the date received, the record meets the required edit checks to insure data quality. Electronic filing is different than "electronic transmission" as described in subsection (h) of this section, § 102.4(m) of this chapter (relating to General Rules for Non-Commission Communications), and § 134.802 of this title (relating to Insurance Carrier's Submission of Medical Bills to the Commission). Electronic Data Interchange records filed pursuant to § 124.2 of this title (relating to Carrier Reporting and Notification Requirements):

- (1) which do not pass the required edit checks in accordance with the International Association of Industrial Accident Boards and Commissions (IAIABC) and Texas EDI Implementation Guides shall be rejected back to the trading partner. Rejected records are not considered received by the Commission and must be corrected and re-submitted. Rejected records must be re-submitted by the original due date to be considered timely filed.

Based upon the above rule provisions, we cannot agree that the hearing officer erred in determining that the carrier waived the right to contest compensability of the claimed injury pursuant to Section 409.021(a). The carrier presented no evidence to indicate compliance with Rule 124.2 or 102.5. The presence or absence of a postmarked envelope is not dispositive to the issue of whether the electronic filing requirement set out in the Commission Rules was complied with. No Commission Dispute Resolution Information System notes were placed in the record. We find that the hearing officer did not err in determining that the carrier did not comply with the requirements of Section 409.021(a) by either initiating benefits or filing a dispute. The carrier thus lost its right to contest the compensability of the claimed injury. See Texas Workers' Compensation Commission Appeal No. 022027-s, decided September 30, 2002.

Finally, the carrier asserts that there was no injury, therefore its failure to contest compensability cannot create one as a matter of law. The carrier cites Continental Casualty Company v. Williamson, 971 S.W.2d 108 (Tex. App.-Tyler 1998, no pet.), in support of its position in this regard.

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 Texas Workers' Compensation Commission Appeal No. 000604, decided May 10, 2000, 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. There is sufficient evidence in the record to support a determination that the claimant had sustained damage or harm to the physical structure of his body. 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. We further find that the hearing officer's disability determination is sufficiently supported by the evidence in the record. Finding no reversible factual or legal error, the hearing officer's decision and order are affirmed.

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

**TREVA DURHAM
1000 HERITAGE CENTER DRIVE
ROUND ROCK, TEXAS 78664.**

Daniel R. Barry
Appeals Judge

CONCUR:

Chris Cowan
Appeals Judge

CONCUR IN RESULT:

Robert W. Potts
Appeals Judge