

APPEAL NO. 023247
FILED FEBRUARY 4, 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 21, 2002. The hearing officer resolved the disputed issues by deciding that (1) the appellant (carrier) waived the right to contest compensability; (2) that although the respondent (claimant) did not sustain an injury in the course and scope of employment with the employer, it is a compensable injury because the carrier waived the right to contest compensability; (3) that although the claimant did not timely report an injury to the employer, he sustained a compensable injury because the carrier waived the right to contest compensability; and (4) that the claimant had disability from June 8, 2001, through the date of the hearing. The carrier appealed the hearing officer's carrier waiver determination citing Continental Casualty Co. v. Williamson, 971 S.W.2d 108 (Tex. App.-Tyler 1998, no pet. h.) to support its argument that, where there is no injury, the failure to timely dispute compensability does not create a compensable injury; and, citing Continental Casualty Company v. Downs, 81 S.W.3d 803 (Tex. 2002), to argue that this case does not apply to affirmative defenses. The carrier also appeals the hearing officer's disability determination arguing that the inability to work was due to other circumstances that were not related to the claimed injury. The claimant responded to the carrier's arguments, urging affirmance.

DECISION

Affirmed.

FACTUAL STATEMENT

The claimant testified that he was injured at work while aligning the front wheels of a vehicle on _____, and that he reported his injury to his supervisor that same day. An MRI of the cervical spine dated April 23, 2001, shows a "C4-5 central herniated nucleus pulposus flattening the spinal cord and producing central spinal stenosis." The claimant testified that he continued to work with pain until June 8, 2001. The carrier's Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) reflects that it first received written notice of the claimed injury on August 8, 2001, and that the TWCC-21 was filed with the Texas Workers' Compensation Commission (Commission) on August 20, 2001. The TWCC-21 reflects that the carrier disputed the claimed injury because it needed "time for investigation and to gather medical records."

WILLIAMSON

The carrier appeals the hearing officer's carrier waiver determination citing Williamson, and arguing that because there was no injury, the claimant did not have a compensable injury. We have previously recognized that Williamson is limited to situations where there is a determination that the claimant did not have an injury as

defined in Section 401.011(26), as opposed to cases such as this, where there is an injury which was determined by the hearing officer not to be causally related to the employment. Texas Workers' Compensation Commission Appeal No. 020941, decided June 6, 2002; Texas Workers' Compensation Commission Appeal No. 022450, decided November 12, 2002. In this case the hearing officer specifically commented that an MRI indicated that the claimant had a central herniated nucleus pulposus at C4-5. Additionally, we have held that 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. Texas Workers' Compensation Commission Appeal No. 022608, decided November 25, 2002. The carrier, in citing the hearing officer's determination of no injury, fails to include the phrase "while loosening a bolt or a tire rod of a vehicle while working for Employer" from Finding of Fact No. 2. The Williamson case is not applicable to this case because the medical evidence supports the claimant's contention that he sustained an injury to his cervical spine.

DOWNNS

This case turns on whether the carrier waived the right to contest compensability of the claimed injury by not timely contesting an injury in accordance with Section 409.021 and Downns. Section 409.021(a) provides that the insurance carrier is to begin the payment of benefits 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). The hearing officer found that the carrier first received written notice of the claimed injury on August 8, 2001, and that the carrier did not begin paying temporary income benefits or dispute compensability within seven days of receiving written notice. The hearing officer found that the TWCC-21 was filed on August 20, 2001. The hearing officer concluded that the carrier waived its right to contest the compensability of the claimed injury in accordance with Section 409.021.

Regarding the carrier's argument that the Downns case does not apply to a timely notice defense, we disagree. We have held that the carrier's loss of the right to contest compensability includes the loss of its right to assert a defense under Section 409.002 based upon the claimant's failure to give timely notice of injury to his employer. Downns, supra; see *also* Texas Workers' Compensation Commission Appeal No. 021944-s, decided September 11, 2002; and Texas Workers' Compensation Commission Appeal No. 022027-s, decided September 30, 2002.

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 on this issue. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

DISABILITY

Whether the claimant had disability is a fact question for the hearing officer to determine from the evidence presented. Disability means the "inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage." Section 401.011(16). The hearing officer could believe that the claimant's inability to obtain and retain employment was due to the compensable injury, by operation of law, rather than the expiration of the claimant's driver's license, which precluded the claimant from working. The hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). As the trier of fact, the hearing officer resolves the conflicts in the evidence and determines what facts have been established. The trier of fact may believe all, part, or none of the testimony of any witness. Aetna Insurance Company v. English, 204 S.W.2d 850 (Tex. Civ. App.-Fort Worth 1947, no writ). We conclude that the hearing officer's decision is supported by sufficient evidence and is not so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. Cain, *supra*.

The decision and order of the hearing officer is affirmed.

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

**RON JOHNSON
101 EAST PARK BOULEVARD, SUITE 200
PLANO, TEXAS 75074.**

Thomas A. Knapp
Appeals Judge

CONCUR:

Daniel R. Barry
Appeals Judge

Susan M. Kelley
Appeals Judge