

APPEAL NO. 030004
FILED FEBRUARY 20, 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 26, 2002. The hearing officer determined that the evidence does not support a determination that the respondent (claimant) suffered a new low back injury in the course and scope of his employment on _____; and that due to the back injury, the claimant was not able to obtain and retain employment at his preinjury wage from May 31 through June 17, 2002, and from August 21, 2002, and continuing through the date of the CCH. The hearing officer further determined that because the appellant (carrier) did not timely contest compensability of the claimed injury in accordance with Section 409.021, the claimant sustained a compensable injury on _____, and had disability from May 31 through June 17, 2002, and from August 21, 2002, continuing through the date of the CCH. The carrier appealed, and the claimant responded, urging affirmance.

DECISION

Affirmed.

With regard to the waiver issue, the Payment of Compensation or Notice of Refused or Disputed Claim (TWCC-21) reflects that the carrier first received written notice of the claimant's claimed back injury on June 3, 2002. The TWCC-21 is dated June 11, 2002, and was file stamped as being received by the Texas Workers' Compensation Commission (Commission) on June 20, 2002. In it, the carrier disputes that the claimant sustained a new injury in the course and scope of employment, stating that the claimant was already under active medical treatment for a "significant protruding disc," that he does not have disability, and raises the defense of retaliation. The hearing officer concluded that the carrier waived its right to contest the compensability of the claimed injury by not timely contesting an injury in accordance with Section 409.021.

The carrier's appeal asserts that the seven-day "pay or dispute" provision contained in Continental Casualty Company v. Downs, 81 S.W.3d 803 (Tex. 2002), does not apply to the facts of this case. In support of its position, the carrier asserts 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 carrier's appeal cites Continental Casualty Company v. Williamson, 971 S.W.2d 108 (Tex. App.-Tyler 1998, no pet.), in support of its position that the hearing officer erred in determining that the claimant does have a compensable injury.

Since the carrier received written notice of the claimed injury on June 3, 2002, and its TWCC-21 disputing compensability is dated June 11, 2002, and it was received

by the Commission on June 20, 2002, it did not contest compensability within seven days of its first receipt of written notice of injury. Also, there is no evidence that the carrier agreed to initiate benefits, or that it initiated benefits, within seven days of June 3, 2002.

In the Downs case, the Texas Supreme Court determined that under Sections 409.021 and 409.022, a carrier that fails to begin benefit payments as required by the 1989 Act or send a 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. On August 30, 2002, the Texas Supreme Court denied the motion for rehearing in the Downs case. Thus, the Downs decision, along with the requirement to adhere to the seven-day “pay or dispute” provision of Section 409.021(a), became final. Texas Workers’ Compensation Commission Appeal No. 021944-s, decided September 11, 2002.

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 Appeal No. 000604, decided May 10, 2000, 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. In fact, the hearing officer made findings of fact that the claimant did suffer a low back injury, and that as a result of the claimant’s low back injury, he has been unable to obtain and retain employment at wages equivalent to his preinjury wage from May 31 through June 17, 2002, and from August 21, 2002, through the present. Thus, we conclude that Williamson does not apply to the facts of this case because the claimant has physical harm or damage to his low back.

Since the carrier did not agree to initiate benefits, or dispute compensability within seven days after it received written notice of injury, it did not meet the statutory requisite of Section 409.021(a) to later contest compensability. The claimant’s injury

has thus become compensable as a matter of law, and the hearing officer did not err in determining that the claimant did sustain a compensable injury. Appeal No. 021944-s, *supra*.

As to the issue of disability, this presented a question of fact for the hearing officer to resolve. Nothing in our review of the record indicates that the hearing officer's disability determination is so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Company, 715 S.W.2d 629, 635 (Tex. 1986).

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

**CORPORATION SERVICE COMPANY
800 BRAZOS
AUSTIN, TEXAS 78701.**

Daniel R. Barry
Appeals Judge

CONCUR:

Judy L. S. Barnes
Appeals Judge

Thomas A. Knapp
Appeals Judge