

APPEAL NO. 030141
FILED MARCH 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 December 30, 2002. The hearing officer determined that (1) the appellant (carrier) waived the right to contest the claimed injury by not timely disputing the injury in accordance with Section 409.021; (2) the date of injury (DOI) is _____; (3) the respondent (claimant) sustained a compensable injury on _____, due to the carrier's waiver under Section 409.021; and (4) the carrier is not relieved from liability under Section 409.002, because the claimant timely notified his employer of an injury pursuant to Section 409.001. The carrier appeals the waiver and injury determinations, asserting that Continental Casualty Company v. Downs, 81 S.W.3d 803 (Tex. 2002), does not apply to this proceeding. The carrier also appeals the DOI determination on sufficiency of the evidence grounds. The carrier further asserts that it is relieved from liability for the claimed injury under Section 409.002, notwithstanding the effects of Downs. The claimant urges affirmance.

DECISION

Affirmed.

WAIVER AND COMPENSABLE INJURY

The hearing officer did not err in making the complained-of waiver and injury determinations. The carrier asserts that the hearing officer erred in applying Downs to this proceeding because the claimant's injury arose prior to the Supreme Court's decision. It is the carrier's position that it had 60 days to contest compensability of the claimed injury, under Texas Workers' Compensation Commission (Commission) Advisories in effect at the time the claim was processed. See Texas Workers' Compensation Commission Advisory 2001-02, effective February 20, 2001; Texas Workers' Compensation Commission Advisory 2000-07, effective August 28, 2000. We note that Downs, which requires adherence to the 7-day dispute provisions of Section 409.021, became final on August 30, 2002. Effective September 12, 2002, the Commission updated its previous advisories, to require compliance with Downs. Texas Workers' Compensation Commission Advisory 2002-15, effective September 12, 2002. The advisory provided, "All previous Advisories issued by the Commission regarding this issue are superseded by this Advisory and the Supreme Court decision." The Appeals Panel has since applied Downs when the issue of carrier waiver is raised on appeal. See, e.g., Texas Workers' Compensation Commission Appeal No. 022274, decided October 17, 2002 (rejecting the carrier's argument that Downs should not be applied retroactively); Texas Workers' Compensation Commission Appeal No. 022230, decided October 21, 2002; Texas Workers' Compensation Commission Appeal No. 021944-s, decided September 11, 2002. In view of our prior decisions, we cannot conclude that the hearing officer erred in determining that the carrier waived its right to

contest compensability of the claimant's bilateral wrist injuries and that such injuries are compensable.

DOI

The hearing officer did not err in determining that the date of injury is _____. The determination involved a question 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)). In view of the evidence presented, we cannot conclude that the hearing officer's 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).

NOTICE

The hearing officer did not err in determining that the carrier is not relieved from liability under Section 409.002, because the claimant timely notified his employer of an injury pursuant to Section 409.001. As stated above, the carrier contends that it is relieved from liability for the claimed injury under Section 409.002, notwithstanding the effects of Downs. The carrier's challenge is premised upon the success of its appeal of the DOI determination. Given our affirmance of the DOI determination, we likewise affirm the hearing officer's notice determination. Additionally, we have held that a carrier loses its right to contest compensability, which includes its right to assert a defense under Section 409.002, due to the carrier's failure to contest the claim in accordance with Section 409.021. Texas Workers' Compensation Commission Appeal No. 022027-s, decided September 30, 2002.

The decision and order of the hearing officer are affirmed.

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

**PARKER W. RUSH
1445 ROSS AVENUE, SUITE 4200
DALLAS, TEXAS 75202-2812.**

Edward Vilano
Appeals Judge

CONCUR:

Daniel R. Barry
Appeals Judge

Thomas A. Knapp
Appeals Judge