

APPEAL NO. 030270  
FILED MARCH 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 January 10, 2003. The hearing officer resolved the disputed issues by deciding that the respondent (claimant) did sustain a compensable injury on \_\_\_\_\_; that the appellant (carrier) waived its right to contest compensability of the claimed injury by not timely contesting the injury in accordance with Section 409.021; and that the claimant has not had disability resulting from an injury on \_\_\_\_\_. The carrier appealed the hearing officer's determinations that the claimant sustained a compensable injury and that the carrier waived its right to contest compensability of the claimant's injury. There is no appeal of the hearing officer's determination that the claimant has not had disability and that is now final. Section 410.169.

DECISION

Reversed and rendered in part; affirmed in part.

The hearing officer's finding that the carrier waived the right to contest compensability of the claimed injury is against the great weight and preponderance of the evidence. The evidence admitted at the CCH included Carrier's Exhibit No. 4, a Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21), which reflects that the carrier received first written notice of a claimed injury (with a date of injury of May 24, 2002) to the claimant on August 25, 2002. By this TWCC-21, the carrier certified "benefits will be paid as accrued." The TWCC-21 was purportedly prepared on "8-26-02," but, more importantly, bears a date stamp of "Aug 27 2002," indicating receipt at one of the Texas Workers' Compensation Commission (Commission) local offices on that date. According to Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 102.5(c) (Rule 102.5(c)):

Unless otherwise specified by rule, written communications required to be filed with the Commission should be sent to the local Commission field office managing the claim, however, written communications shall also be accepted at any Commission office.

As we noted in footnote 2 in Texas Workers' Compensation Commission Appeal No. 023010-s, decided January 9, 2003, Rule 124.2(j) does not require a carrier to give the Commission notice that benefits will be paid as they accrue, but Commission Advisory 2002-15, dated September 12, 2002, continued the practice by which carriers were permitted to file "cert 21s" agreeing to pay benefits as they accrue. Carrier's Exhibit No. 4 is obviously a "cert 21" as to this claimed injury. The carrier thus fulfilled its obligation to "pay or dispute" the claim as required by Section 409.021. The carrier correctly points out in its appeal that it submitted a timely "cert 21" within seven days of receiving written notice of the injury, that it then had 60 days to contest compensability of the

claim, and that it had done so within 60 days. The carrier also pointed out that it had in fact paid temporary income benefits (TIBs) until it disputed the claim. See Carrier's Exhibit No. 5. See also Texas Workers' Compensation Commission Appeal No. 022375-s, decided October 31, 2002. We note that the facts of this case are somewhat confusing in that there is a subsequent TWCC-21 which relates to a claimed date of injury of \_\_\_\_\_ (the date of injury now asserted by the claimant and also found by the hearing officer to be the date of injury in this case). Carrier's Exhibit No. 7 reflects that the carrier received written notice of a \_\_\_\_\_, claimed injury on September 19, 2002, and filed its TWCC-21 with the Commission on September 20, 2002, again certifying that "benefits will be paid as accrued." Under the circumstances present in this case, the hearing officer erred in finding that the carrier waived its right to contest compensability. The evidence admitted at the CCH clearly establishes that the carrier complied with Sections 409.021 and 409.022, and did not waive its right to contest compensability of the claimed injury, whether it was alleged as occurring on May 24 or \_\_\_\_\_. We reverse the hearing officer's decision that the carrier waived the right to contest compensability of the claimed injury, and render a decision that the carrier did not waive the right to contest compensability.

Whether the claimant sustained a compensable injury is a factual question for the hearing officer to resolve. The hearing officer, as finder of fact, is the sole judge of the relevance and materiality of the evidence, as well as the weight and credibility that is to be given to the evidence. Section 410.165(a). The Appeals Panel will not disturb the challenged factual finding of a hearing officer unless it 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); In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). We have reviewed the injury determination, conclude that the hearing officer's decision is supported by sufficient evidence, and accordingly, we affirm the decision and order of the hearing officer as it pertains to the finding of a compensable injury.

The effect of the finding that the claimant did sustain a compensable injury is to render moot the question of carrier waiver, for purposes of this claim. The carrier is liable for medical benefits for the compensable injury and may be liable for TIBs if the claimant is able to establish disability for any period subsequent to the date of the CCH.

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

**CORPORATION SERVICE COMPANY  
800 BRAZOS, SUITE 750, COMMODORE 1  
AUSTIN, TEXAS 78701.**

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Michael B. McShane  
Appeals Panel  
Manager/Judge

CONCUR:

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Thomas A. Knapp  
Appeals Judge

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Terri Kay Oliver  
Appeals Judge