

APPEAL NO. 030280
FILED MARCH 27, 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 7, 2003. The disputed issues at the CCH were: (1) whether appellant 1 (claimant) sustained a compensable injury on _____; (2) whether the respondent (carrier) is relieved of liability under Section 409.002 because of the claimant's failure to timely notify the employer of the injury pursuant to Section 409.001; and (3) whether the carrier waived the right to contest compensability of the claimant's claimed injury by not timely contesting the claimed injury in accordance with Sections 409.021 and 409.022. The claimant and appellant 2 (subclaimant) appeal the hearing officer's determinations that: (1) the claimant did not sustain an injury, including a low back injury, for any period beginning on January 1, 2001, and continuing through March 17, 2001; (2) the claimant did not sustain a compensable injury, including a compensable low back injury, in the course and scope of his employment with the employer on _____, or on any other date; (3) the carrier is relieved of liability under Section 409.002 because of the claimant's failure to timely notify the employer of his injury pursuant to Section 409.001; (4) the claimant did not have good cause for failing to timely report his claimed injury of _____, or any other date; and (5) the carrier did not waive its right to dispute compensability of the claimant's claimed injury by not timely contesting the injury in accordance with Section 409.021, because there was no injury, including a compensable injury, on the dates in question, including _____, or any other date. The claimant and subclaimant appealed the hearing officer's determinations on all of the disputed issues. The carrier responded, requesting affirmance.

DECISION

Reversed and rendered.

The claimant testified that he injured his lower back on _____, while performing his job duties for the employer and that he immediately informed his supervisor of his injury. Conflicting evidence was presented at the CCH. The hearing officer found that the claimant did not sustain an injury in the course and scope of his employment, that the claimant did not notify his employer of his injury within 30 days of the injury as required by Section 409.001, and that the claimant did not have good cause for failing to timely report his injury to his employer. While these findings of no injury in the course and scope of employment, no timely notice of injury to the employer, and no good cause for failing to timely report the injury to the employer are supported by sufficient evidence and are not so against the great weight and preponderance of the evidence as to be clearly wrong and unjust, they are not determinative of the issues of whether the claimant sustained a compensable injury and whether the carrier is relieved of liability under Section 409.002, because we conclude that the hearing officer erred in

determining that the carrier did not waive its right to contest compensability under Section 409.021.

In Continental Casualty Company v. Downs, 81 S.W.3d 803 (Tex. 2002), 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 became final. See Texas Workers' Compensation Commission Appeal No. 021944-s, decided September 11, 2002.

In Continental Casualty Company v. Williamson, 971 S.W.2d 108 (Tex. App.-Tyler 1998, no pet.), 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. When a carrier waives its right to contest compensability of the injury, the injury becomes compensable as a matter of law, provided that there is physical harm or damage to the body, and the carrier is liable for workers' compensation benefits. Texas Workers' Compensation Commission Appeal No. 023017, decided January 27, 2003.

In the instant case, the claimant claimed a lower back injury from performing his work activities. The hearing officer determined that the claimant has no lower back injury. We conclude that the determination that the claimant has no lower back injury is so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175 (Tex. 1986). The evidence reflects that after the claimed lower back injury of _____, the first doctor to examine the claimant diagnosed the claimant as having a lumbar sprain. The claimant then had a lumbar MRI performed, which was interpreted as showing a L5-S1 disc protrusion that possibly compresses the S1 nerve root and a disc protrusion at L4-5. The claimant's current treating doctor diagnosed the claimant as having a displacement of a lumbar intervertebral disc and myofascial pain syndrome. There is no report from a doctor that states that the claimant has no physical harm or damage to his lower back.

The carrier does not dispute the hearing officer's findings that it was first notified in writing on April 17, 2001, that the claimant was claiming he suffered a low back injury in _____ while working for the employer, and that the carrier contested the compensability of the claimant's claim by filing with the Texas Workers' Compensation Commission (Commission) on May 2, 2001, its initial Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) dated May 2, 2001. Those findings are

supported by the record. The May 2, 2001, contest of compensability was more than seven days after the date the carrier received written notice of the injury, even if an April 23, 2001, date of written notice of injury is used, as is stated on the TWCC-21. There is no contention or evidence that the carrier agreed to initiate benefits within seven days of receiving written notice of injury or that it paid benefits as required by the 1989 Act. The carrier did not meet the statutory requisite of Section 409.021(a) to later contest compensability. *Downs, supra*. The claimant's injury has thus become compensable as a matter of law, and the hearing officer erred in determining that the claimant did not sustain a compensable injury. Appeal No. 021944-s, *supra*.

The hearing officer also erred in determining that the carrier is relieved of liability under Section 409.002 because the claimant failed to timely notify his employer of his injury under Section 409.001. In Texas Workers' Compensation Commission Appeal No. 022027-s, decided September 30, 2002, the Appeals Panel held that, when a carrier loses its right to contest compensability by not complying with the requirements of Section 409.021(a), it loses its right to assert a defense under Section 409.002 based upon the claimant's failure to give timely notice of injury to the employer.

The hearing officer's decision that the claimant did not sustain a compensable low back injury on _____; that the carrier is relieved of liability under Section 409.002 because of the claimant's failure to timely notify the employer of his injury pursuant to Section 409.001; and that the carrier has not waived its right to contest compensability of the claimed injury by not timely contesting the injury in accordance with Section 409.021, because there was no injury on _____, or on any other date are reversed. We render a decision that the claimant has a low back injury; that the carrier did not meet the statutory requisite of Section 409.021(a) to later contest compensability; and that as a result of the carrier's failure to meet the statutory requisite of Section 409.021(a) to later contest compensability, the claimant has a compensable low back injury and the carrier is not relieved of liability under Section 409.002. The hearing officer's order that the carrier is not liable to either the claimant or the subclaimant is reversed. The carrier is liable for workers' compensation benefits in accordance with this decision, the rules of the Commission, and the 1989 Act.

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

**GARY SUDOL
9330 LBJ FREEWAY, SUITE 1200
DALLAS, TEXAS 75243.**

Robert W. Potts
Appeals Judge

CONCUR:

Daniel R. Barry
Appeals Judge

Thomas A. Knapp
Appeals Judge