

APPEAL NO. 030318  
FILED APRIL 3, 2003

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). This case is back before us after our remand in Texas Workers' Compensation Commission Appeal No. 022466, decided October 31, 2002. We had remanded the case for reconstruction of the record and had asked the hearing officer to reconsider her decision in light of Texas Workers' Compensation Commission (Commission) Advisory 2002-15, dated September 12, 2002, and our decision in Texas Workers' Compensation Commission Appeal No. 022027-s, decided September 30, 2002. A contested case hearing (CCH) on remand was held on January 14, 2003. The hearing officer determined that the respondent's (claimant herein) injury arose out of the act of a third person intending to injure the claimant for personal reasons, relieving the appellant (carrier herein) of liability; that the claimant therefore did not sustain a compensable injury on \_\_\_\_\_; that the carrier waived its right to contest the compensability of the claimant's injury because it failed to timely dispute compensability of the claimed injury in accordance with Section 409.021; and that the claimant had disability commencing from May 28 and ending on July 16, 2002. The carrier appeals, contending that it timely disputed the claimant's injury and the hearing officer erred in refusing to admit evidence permitting it to establish this.

DECISION

Finding sufficient evidence to support the decision of the hearing officer and no reversible error in the record, we affirm the decision and order of the hearing officer.

The only issue before us on appeal is the question of carrier waiver, and this is the only issue we shall address. Section 409.021 provides that an insurance carrier shall not later than the seventh day after the date on which the insurance carrier receives written notice of an injury begin the payment of benefits or notify the Commission and the injured employee in writing of its refusal to pay. The Supreme Court of Texas in Continental Casualty Company v. Downs, 81 S.W.3d 803 (Tex. 2002) held that the failure of a carrier to comply with this provision resulted in the carrier waiving its right to contest compensability. In Texas Workers' Compensation Commission Appeal No. 021944-s, decided September 11, 2002, the Appeals Panel held that the Downs decision applied to cases where carrier waiver was in issue and which came to the Appeals Panel after August 30, 2002, the date the Downs decision became final. The Commission issued Advisory 2002-15 on September 12, 2002, providing that the Downs decision had become final and describing how it would be implemented by the Commission. In Appeal No. 022027-s, *supra*, 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.

In the present case, the parties stipulated that the carrier received written notice of the claimant's injury on May 31, 2002, and that the carrier disputed compensability on June 10, 2002. This stipulation supports the finding of the hearing officer that the carrier did not dispute the claimant's injury within seven days of receiving written notice and her legal conclusion that the carrier waived its right to contest compensability. On appeal, the carrier argues that it did file a notification of certification of benefits with the Commission within seven days of receiving written notice of injury. The carrier proffered evidence of this notification of certification at the CCH on remand, but the hearing officer refused to admit this evidence as she limited both parties at the CCH on remand to reconstructing the evidence at the original CCH. Clearly, the carrier had possession of this evidence and should have offered this evidence at the first hearing. We do not find that the hearing officer abused her discretion by refusing to admit this evidence. We do note that the evidence offered by the carrier at the second hearing was not a record of the Commission that would have been admitted on remand based on our holdings in Texas Workers' Compensation Commission Appeal No. 941171, decided October 17, 1994, and Texas Workers' Compensation Commission Appeal No. 012101-s, decided October 22, 2001. It was merely a computer record from the carrier and the carrier should have ensured that it was offered at the first hearing.

The decision and order of the hearing officer are affirmed.

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

**MR. RUSSELL R. OLIVER, PRESIDENT  
221 WEST 6TH STREET  
AUSTIN, TEXAS 78701.**

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Gary L. Kilgore  
Appeals Judge

CONCUR:

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Judy L. S. Barnes  
Appeals Judge

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Elaine M. Chaney  
Appeals Judge