

APPEAL NO. 030446
FILED APRIL 10, 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 January 21, 2003. The hearing officer determined that the appellant (claimant) did not sustain a compensable injury on _____; that the claimant did not have disability; and that the respondent (self-insured) did not waive the right to contest compensability of the claimed injury in accordance with Sections 409.021 and 409.022. The claimant appealed and the self-insured responded, urging affirmance.

DECISION

Reversed and rendered.

The claimant testified that she injured her neck, lower back, and left shoulder while performing her duties as a bus driver for the self-insured on _____. At the hearing, she asserted disability as a result of these injuries from March 20 to June 18, 2002, and from July 25 to August 13, 2002. In support of her injury and disability assertions, the claimant submitted into evidence a cervical MRI report dated September 26, 2002, which indicates on its face, among other things, the existence of a small posterior central contained disc protrusion at C2-3; small contained posterior central disc protrusion at C3-4; posterior bulging of the disc at C4-5 compressing the anterior thecal sac effacing the cord but no evidence of displacement or compression of the cord; and postural alterations of the cervical spine possibly associated with muscle spasms in acute injuries and myofibrositis. Also in evidence was a report from a NCV done on August 28, 2002, which concludes that there is "evidence suggestive of mild right L5 radiculopathy, manifested only by a decrease seen in right peroneal F-wave frequency." The claimant's treating doctor testified and submitted medical records. Both his testimony and records were to the effect that the claimant has documented areas of tenderness, pain, and muscle spasms or hypertency, and that he has taken the claimant off work for certain periods of time during the course of treatment. Several Texas Workers' Compensation Commission (Commission) Work Status Reports (TWCC-73) were in evidence to support the claimant's claimed periods of disability.

The hearing officer relied on Continental Casualty Company v. Williamson, 971 S.W.2d 108 (Tex. App.-Tyler 1998, no pet.) in reaching her determination that the claimant did not sustain a compensable injury and that the self-insured did not waive the right to contest compensability. The hearing officer determined that "the Claimant did not have damage or harm to the physical structure of her left shoulder, lower back or neck prior to or on _____," therefore she determined there can be no waiver. 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. 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 left shoulder, lower back, and neck injury from performing her work activities. Evidence was presented as to her periods of disability through testimony and TWCC-73s. The hearing officer determined that the claimant has no damage or harm to the physical structure of those body parts and that she did not have disability. We conclude that the determinations that the claimant has no injury and did not have disability are 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 claimant presented medical evidence in the form of records and testimony from her treating doctor, as well as diagnostic reports, which indicate that she does have damage or harm to the physical structure of her body, and that it resulted in disability. There is no report from a doctor that states that the claimant has no physical harm or damage to the complained-of body parts.

Because we have determined that the hearing officer erred in her application of Williamson to the facts of this case, we must now determine whether or not the self-insured waived its right to contest compensability under Continental Casualty Company v. Downs, 81 S.W.3d 803 (Tex. 2002). The self-insured does not dispute the hearing officer's findings that it received written notice of the claimed injury on _____, and that it did not file a dispute of compensability with the Commission until April 2, 2002. It is the self-insured's position that even if Downs does apply, it did not waive the right to contest compensability because it paid the claimant benefits in accordance with the 1989 Act and our decision in Texas Workers' Compensation Commission Appeal No. 023010-s, decided January 9, 2003.

The Appeals Panel has had occasion to review and write on several cases involving the application of the Downs case to the issue of carrier waiver. In Texas Workers' Compensation Commission Appeal No. 030380-s, decided April 10, 2003, the decision in Appeal No. 023010-s was overruled. In discussing the application of Downs, Appeal No. 030380-s states:

The Supreme Court said: "**Taking some action within seven days** is what entitles the carrier to a sixty-day period to investigate or deny compensability." [Emphasis in original.] In Appeal No. 023010-s, *supra*, we found that the self-insured initiated income benefits as required by the 1989 Act, and concluded that, based upon the language contained in the 1989 Act and the rules, the self-insured had not waived the right to contest

compensability of the claimed injury. However, we realize from subsequent CCHs, and from appeals being brought after those CCHs, that our opinion in Appeal No. 023010-s did not serve the purpose of clarifying the law after the Downs case. We hereafter decline to follow Appeal No. 023010-s. In the case before us, the carrier presented no evidence, nor does it argue on appeal, that it took any action on this claim within seven days of receiving its first written notice of the claimed injury as required by the Downs decision. As noted earlier, in Appeal No. 023010-s, our emphasis was on the term “as required by the 1989 Act,” instead of emphasizing the requirement to “take some action within seven days.” We hold that to comply with the Supreme Court’s holding in Downs, the carrier has the burden to prove that it “took some action within seven days,” and to present evidence indicating the action taken. This avoids the “perverse effect” described in Downs. Since the carrier in this case presented no evidence that it took any action indicating that it had accepted the claim or intended to pay benefits within seven days of receiving written notice, we conclude that the hearing officer did not err in determining that the carrier waived its right to dispute compensability of the claimed injury.

As in Appeal No. 030380-s, no evidence was presented regarding any action taken by the self-insured within seven days of receiving written notice of the claim. Based upon our decision in Appeal No. 030380-s, we find that the self-insured waived the right to contest compensability of the claimed injury by failing to either dispute or take “some action” on the claim within seven days of receiving written notice.

The hearing officer’s decision that the claimant did not sustain a compensable injury on _____; that she did not have disability; and that the self-insured did not waive the right to contest compensability of the claimed injury is reversed and a new decision is rendered that the claimant did sustain a compensable injury on _____; that she did have disability from March 20 through June 18, 2002, and from July 25 through August 13, 2002; and that the self-insured has waived the right to contest the compensability of the claimed injury.

The true corporate name of the insurance carrier is **(a self-insured governmental entity)** and the name and address of its registered agent for service of process is

**GENERAL MANAGER
(ADDRESS)
(CITY), TEXAS (ZIP CODE)**

Daniel R. Barry
Appeals Judge

CONCUR:

Chris Cowan
Appeals Judge

Thomas A. Knapp
Appeals Judge