APPEAL NO. 030473
FILED APRIL 15, 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 November 6, 2002, and January 28, 2003. The hearing officer resolved the disputed issues by deciding that the respondent/cross-appellant (claimant) sustained a compensable injury on _____________; that the claimant had disability from November 16, 2001, to August 25, 2002; that the appellant/cross-respondent (carrier) is not relieved of liability under Section 409.002, because the claimant timely notified her employer of her claimed injury pursuant to Section 409.001; that the claimant is not barred from pursuing workers' compensation benefits because of an election to receive benefits under a group health insurance policy; and that the carrier waived the right to contest the compensability of the injury by not timely contesting it within seven days after receiving written notice of the claim or beginning to pay benefits as required by the 1989 Act. The carrier appealed the hearing officer's determinations that the claimant sustained a compensable injury, that she gave timely notice of injury to her employer, that she is not barred from pursuing workers' compensation benefits because of an election to receive benefits under a group health insurance policy, and that the carrier waived its right to contest the compensability of the injury. The claimant appealed the hearing officer's determination on the disability issue. Each party filed a response.

DECISION

Affirmed, as reformed.

REFORMATION OF FINDING OF FACT NO. 7

The claimant contends that the hearing officer made a typographical error in Finding of Fact No. 7 by stating that the claimant notified her supervisor of a work-related injury on__________, and asserts that the hearing officer meant to find that notice was given on September 26, 2001. Based on the hearing officer's Statement of the Evidence and Conclusion of Law No. 6 that the claimant timely notified her employer pursuant to Section 409.001, we agree that the date stated in Finding of Fact No. 7 is a typographical error and we hereby reform Finding of Fact No. 7 to substitute "September 26, 2001" for "September 26, 2002."

COMPENSABLE INJURY, NOTICE, AND DISABILITY

The claimant had the burden to prove that she sustained a compensable injury as defined by Section 401.011(10), that she gave timely notice of her injury to her employer as required by Section 409.001, and that she had disability as defined by Section 401.011(16). Conflicting evidence was presented on the issues of compensable injury, timely notice, and disability. The hearing officer is the sole judge of

the weight and credibility of the evidence. Section 410.165(a). As the finder of fact, the hearing officer resolves the conflicts in the evidence and determines what facts have been established. We conclude that the hearing officer's determinations that the claimant sustained a compensable injury, that she timely notified her employer of her injury, and that she had disability from November 16, 2001, to August 25, 2002, 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. Cain v. Bain, 709 S.W.2 175 (Tex. 1986).

ELECTION OF REMEDIES

With regard to the issue of election of remedies, in Valley Forge Insurance Company v. Austin, 65 S.W.3d 371 (Tex. App.-Dallas 2001, pet. denied), the court of appeals interpreted Section 409.009 of the 1989 Act regarding subclaims as an abrogation of the common law election of remedies affirmative defense and held that an employee does not waive his claim to workers' compensation benefits by pursuing group health insurance benefits. In Valley Forge Insurance Company v. Austin, 46 Tex. Sup. J. 423 (Tex. 2003), the Texas Supreme Court in a per curiam opinion denied the petition for review of the court of appeals decision in Valley Forge and agreed with the court of appeals conclusion that Austin's claim for workers' compensation benefits is not barred by the election-of-remedies doctrine, but noted that the court of appeals did not need to reach its holding that Section 409.009 abrogated the election-of-remedies doctrine where group health insurance is also involved. The Texas Supreme Court cited another case where an appeals court had not applied the holding of the court of appeals in Valley Forge, because doing so would not have changed the result on appeal since there was legally and factually sufficient evidence to support the jury's finding that the employee did not make an informed election to reject workers' compensation benefits by accepting group health insurance benefits. Thus, the Texas Supreme Court stated that it did not reach the merits of the court of appeals' holding and left open the question of whether Section 409.009 abrogates the election-of-remedies doctrine.

In the instant case, there is evidence that the claimant did not know that the employer had workers' compensation coverage until December 2001, and the hearing officer made a finding of fact to that effect. The Appeals Panel has held that the carrier has the burden of proving an effective election of remedies, and that critical to a finding of an election of remedies is a determination that the election of nonworkers' compensation remedies was an informed choice. Texas Workers' Compensation Commission Appeal No. 001471, decided August 7, 2000, citing Bocanegra v. Aetna Life Insurance Company, 605 S.W.2d 848 (Tex. 1980). In the instant case, there is ample evidence that the claimant did not exercise an informed choice between her husband's group health insurance and workers' compensation benefits, and thus the hearing officer could conclude as he did that the claimant is not barred from pursuing workers' compensation benefits due to an election to receive benefits under a group health insurance policy.

WAIVER

With regard to the waiver issue, the carrier's Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) dated February 5, 2002, reflects that the carrier first received written notice of the claimant's injury on January 21, 2002. The TWCC-21 is date-stamped as having been received by the Texas Workers' Compensation Commission (Commission) on February 27, 2002. In the TWCC-21, the carrier denied that the claimant sustained an injury in the course and scope of her employment, that she gave timely notice of injury, and that she had disability. The carrier also asserted that the claimant made an election of remedies.

In Continental Caualty Company v. Downs, 81 S.W.2d 803 (Tex. 2002), the court concluded that under Sections 409.021 and 409.022, a carrier that fails to begin 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. In the instant case, the carrier's TWCC-21 denying compensability was not filed within seven days after it received written notice of the injury.

The carrier asserts that as of the date the TWCC-21 was filed, no benefits were owed to the claimant because her lost time was the result of a noncompensable injury and cites Texas Workers' Compensation Commission Appeal No. 023010-s, decided January 9, 2003, in support of its contention that it preserved its right to dispute the claim. There is no indication in the record that the carrier filed a TWCC-21 within seven days of its first written notice of injury agreeing to pay benefits as they accrued nor is there any indication that the carrier actually paid benefits. Furthermore, in a recent decision, Texas Workers' Compensation Commission Appeal No. 030380-s, decided April 10, 2003, the Appeals Panel noted that in Downs, the Texas Supreme Court stated "Taking some action within seven days is what entitles the carrier to a sixty-day period to investigate or deny compensability." In Appeal 030380-s, the Appeals Panel stated that it would decline to follow Appeal No. 023010-s and held 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." The Appeals Panel went on to state that "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." In accordance with our decision in Appeal No. 030380-s, we conclude that the hearing officer did not err in determining that the carrier waived its right to contest compensability of the injury.

The carrier contends that the Downs case should be given prospective application only and that it relied on prior Appeals Panel decisions authorizing a 60-day period to dispute compensability and on Commission Advisory 96-05, (April 5, 1996), which advised that carriers shall not file a TWCC-21 when the carrier certifies benefits will be paid as they accrue. In Texas Workers' Compensation Commission Appeal No.

021944-s, decided September 11, 2002, the Appeals Panel applied the Texas Supreme Court's decision in Downs, noting that "On August 30, 2002, the Texas Supreme Court denied the carrier's motion for rehearing, and the Downs decision, along with the requirement to adhere to a seven-day 'pay or dispute' provision, is now final." In subsequent decisions, the Appeals Panel has rejected the contention that the Texas Supreme Court's decision in Downs should not be applied retroactively, noting that Commission Advisory 2002-15 (September 12, 2002) provides that "All previous Advisories issued by the Commission regarding this issue are superceded by this Advisory and the Supreme Court decision." Texas Workers' Compensation Commission Appeal No. 022274, decided October 17, 2002, Texas Workers' Compensation Commission Appeal No. 022582, decided November 25, 2002.

As reformed herein, we affirm the hearing officer's decision and order.

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

CT CORPORATION SYSTEM
350 NORTH ST PAUL STREET
DALLAS, TEXAS 75201.

Robert W. Potts
Appeals Judge

CONCUR:

Elaine M. Chaney
Appeals Judge

Michael B. McShane
Appeals Panel
Manager/Judge