

APPEAL NO. 030601
FILED APRIL 18, 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 February 13, 2003. The hearing officer determined that the respondent (claimant) sustained a compensable (tinnitus) injury on _____, and that the appellant (carrier) waived the right to contest compensability by not timely contesting the injury pursuant to Sections 409.021 and 409.022.

The carrier appeals, contending that there is insufficient medical evidence to support the determination of a compensable tinnitus injury and that it received the first written notice of a claim that requires dispute on May 22, 2001. The claimant responds, urging affirmance.

DECISION

Affirmed in part and reversed and rendered in part.

It is undisputed that there was an explosion at the plant where the claimant was working on _____. The claimant testified that the employees all ran to the gate and a supervisor arrived a short time later. The claimant also testified, and the evidence supports, that he and some other employees were called into the employer's office on December 8, 1998, and an adjuster took telephonic statements from the claimant and the others. The claimant's statement, which was subsequently transcribed, indicates that the claimant, when asked if he had any injuries, stated "just my ears ringing." (It is not entirely clear who the adjuster taking the statements worked for because in a handwritten statement the claimant said "three days later I talk[ed] to [an insurance carrier other than the listed workers' compensation carrier] about [the] blast.") It is undisputed that the claimant missed no time from work and only sought treatment for the ear ringing condition over two years later in March 2001. The claimant filed an Employee's Notice of Injury or Occupational Disease and Claim for Compensation (TWCC-41) dated March 1, 2001, claiming an injury of "ringing in the ears." It appears relatively undisputed that the carrier received the TWCC-41 on May 22, 2001, and filed a Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) disputing injury, disability, notice, and election of remedies on May 29, 2001. The carrier's position is that it received first written notice on May 22, 2001, and timely disputed on May 29, 2001.

Regarding the issue of whether the claimant sustained a compensable injury, in addition to his testimony, in evidence are reports from two audiologists, which arguably establish that the 1998 explosion was a cause of the claimant's tinnitus. The hearing officer's determination on this issue is supported by the evidence and the determinations are not 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).

On the carrier waiver issue, the hearing officer noted the recorded statement of December 8, 1998, as showing that the carrier had knowledge of the claimed injury (that the claimant said his ears were ringing). The hearing officer then commented:

It is the 60 day provision of Tex. Labor Code Ann. § 409.021, not the 7-day, that is dispositive here; that 60-day period is triggered by notice of the injury, and has nothing to do with accrual of benefits. Although the carrier met its "7 day" deadline, it failed to meet its "60 day" requirement by quite a large margin.

Section 409.021 provides in part:

- (a) An insurance carrier shall initiate compensation under this subtitle promptly. Not later than the seventh day after the date on which an insurance carrier receives written notice of an injury, the insurance carrier shall:
 - (1) begin the payment of benefits as required by this subtitle; or
 - (2) notify the commission and the employee in writing of its refusal to pay and advise the employee of:
 - (A) the right to request a benefit review conference; and
 - (B) the means to obtain additional information from the commission.
- (b) An insurance carrier shall notify the commission in writing of the initiation of income or death benefit payments in the manner prescribed by commission rules.
- (c) If an insurance carrier does not contest the compensability of an injury on or before the 60th day after the date on which the insurance carrier is notified of the injury, the insurance carrier waives its right to contest compensability. The initiation of payments by an insurance carrier does not affect the right of the insurance carrier to continue to investigate or deny the compensability of an injury during the 60-day period.

Although the hearing officer does not indicate which part of Section 409.021 he was referencing, we presume that it was Section 409.021(c). What the requirements of Section 409.021 are has resulted in a good deal of litigation culminating in the Supreme Court decision of Continental Casualty Company v. Downs, 81 S.W.3d 803 (Tex. 2002).

All of those cases have required written notice to the carrier. Generally we have applied Downs to mean that within seven days of receiving written notice of the injury the carrier is required to "pay or dispute" the claimed injury. Texas Workers' Compensation Commission Appeal No 030380-s, decided April 10, 2003. If a carrier has agreed to pay, not the case here, then the carrier may still dispute within 60 days under the provision of Section 409.021(c), (*i.e.* by paying the carrier buys 60 days to investigate and dispute). We hold that Section 409.021(c) does not raise a whole new scenario of the carrier receiving verbal notice on one date and the first written notice at some later date. Section 409.021(c) must be read within the context of Section 409.021(a). Consequently we hold that the same notice (*i.e.* the first written notice to the carrier) triggers both the "7 day" and "60 day" provisions. The hearing officer erred in stating some other notice triggered the "60 day" requirement."

This issue thus becomes whether the claimant's telephonic statement to an adjuster on December 8, 1998, which was transcribed at some unknown date constitutes "written notice of an injury." Under the circumstances of this case we hold that it does not. Clearly the statement was verbal, given on the telephone to an adjuster. There is even room for some doubt that it was the workers' compensation carrier, but even if it was, it was still a verbal statement. The claimant admits that he has "no idea" when the telephonic statement was transcribed, only that he got a copy from the carrier, and this was most likely in the exchange materials, at or shortly after the benefit review conference.

Normally a claimant, or someone on his behalf, gives notice, usually verbal, to the employer in accordance with Section 409.001. The employer then files an Employer's First Report of Injury or Illness (TWCC-1), which becomes the first written notice to the carrier. In some cases such as this, a claimant may file a TWCC-41 which would also give written notice to the employer. In this case, since there is no evidence when the claimant's verbal telephonic statement was transcribed, the first proven written notice was the claimant's TWCC-41 which was received by the carrier on May 22, 2001, and timely disputed on May 29, 2001.

We reverse the hearing officer's determination that the carrier waived the right to contest the compensability of the claimed injury by not timely contesting in accordance with Section 409.021 and render a new decision that the carrier did not waive the right to contest compensability by timely filing its TWCC-21.

We affirm the hearing officer's decision and order on the compensability issue and we reverse and render a new decision on the carrier waiver issue.

The true corporate name of the insurance carrier is **CONTINENTAL CASUALTY COMPANY** and the name and address of its registered agent for service of process is

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

Thomas A. Knapp
Appeals Judge

CONCUR:

Elaine M. Chaney
Appeals Judge

Terri Kay Oliver
Appeals Judge