

APPEAL NO. 030892
FILED JUNE 11, 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 March 17, 2003. The hearing officer decided that the respondent (claimant herein) was not injured in the course and scope of his employment, but that the claimant sustained a compensable injury on _____, because the appellant (carrier herein) waived its right to contest compensability as a matter of law because it failed to pay benefits or dispute compensability within seven days of receiving written notice of injury. The hearing officer also found that the claimant had disability from March 11, 2002, though the date of the CCH. The carrier appeals, contending that it had no duty to dispute compensability when the claimant was not injured in the course and scope of his employment. The carrier also argues that the hearing officer erred in finding a compensable injury, and therefore, also erred in finding disability. The claimant responds that the decision of the hearing officer should be affirmed.

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 claimant testified that he injured his right ankle on _____, while, working as a truck driver, he was in the trailer of his truck tying down his load when he slipped and fell from the trailer to the ground. There was evidence that the claimant had suffered several prior injuries to his right ankle. On _____, the claimant sought treatment with Dr. D who diagnosed the claimant with right ankle pain, right ankle degenerative joint disease, posttraumatic arthritis right ankle from old right ankle fracture with shifted ankle mortis, and old ankle fracture. At the request of the carrier, the claimant was later examined by Dr. O who stated that the _____, incident caused a sprained ankle and aggravated the claimant's degenerative joint disease of the ankle.

The carrier argued at the CCH that the claimant's present right ankle problems are a continuation of his prior problems, while the claimant argued that he had suffered a new compensable injury to his right ankle through the aggravation of his prior right ankle condition. The hearing officer was not persuaded the claimant met his burden to prove that he had suffered a new injury. However, the hearing officer concluded that the carrier had waived its right to dispute the compensability of the claimant's alleged right ankle injury.

In evidence is the carrier's Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21), dated July 25, 2002, in which the carrier disputed that the claimant suffered an injury in the course and scope of employment, stating that the claimant did not suffer a new injury, but is suffering from an old injury. The TWCC-

21 does not reflect the date the carrier first received written notice. However, there is also in evidence a copy of an Employer's First Report of Injury or Illness (TWCC-1), which indicates on its face that it was sent to the carrier by facsimile transmission on July 17, 2002. In the absence of any countervailing evidence, we find that this was sufficient to support the hearing officer's finding that the carrier received written notice of the claimant's injury on July 17, 2002.

Section 409.021 provides that the 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 Texas Workers' Compensation 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) (hereinafter Downs) held that the failure of a carrier to comply with the pay or dispute 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 carrier received notice of the claimant's injury on July 17, 2002. It was undisputed that the carrier did not pay benefits or agree to pay benefits for the claimant's injury. The carrier's TWCC-21 disputing the claimant's injury is dated July 25, 2002, which is more than seven days after the date the carrier received written notice of the claimant's injury.

The carrier argues that Section 409.021 does not apply in the present case because of the holding in Continental Casualty Company v. Williamson, 971 S.W.2d 108 (Tex. App.-Tyler 1998, no pet. h.) (hereinafter Williamson). In Williamson the Tyler Court of Appeals 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. We agree with that proposition; however, we find it is not applicable in this case. We have previously recognized that Williamson is limited to situations where there is a determination that the claimant did not have an injury as defined in Section 401.011(26)¹, as opposed to cases such as this, where there is an injury which was determined by the hearing officer not to be causally related to the employment. Texas Workers' Compensation Commission Appeal No. 020941, decided June 6, 2002; Texas Workers' Compensation Commission Appeal No. 022450, decided November 8, 2002. To interpret Williamson in the way the carrier argues would in essence mean that waiver would only apply to cases in which the claimant would have won absent waiver, which would in effect render Section 409.021 and the Downs decision meaningless. In a long and unbroken line of cases, the Appeals Panel has rejected such an interpretation. We continue to do so.

¹ Which in relevant part defines injury as, "damage or harm to the physical structure of the body and a disease or infection naturally resulting from the damage or harm."

Clearly the claimant had damage or harm to the physical structure of his body in the present case. The carrier itself argues that the claimant suffered from an injury, but argues that it was a prior injury. The carrier's failure to timely dispute the claim has resulted in waiver in the present case. The carrier's waiver is the basis of the hearing officer's finding of compensability, and it is a sufficient basis.

The thrust of the carrier's argument against the hearing officer's finding of disability is that absent a compensable injury the claimant could not have disability. Having affirmed the hearing officer's finding of compensable injury, we must reject this argument. To the degree to which the carrier argues that the hearing officer's finding of disability was not supported by sufficient evidence, we note that disability is a question of fact, and that with conflicting evidence, it was the province of the hearing officer to resolve the issue. We find no legal basis to overturn the hearing officer's resolution of the disability issue.

The decision and order of the hearing officer are affirmed.

The true corporate name of the insurance carrier is **LIBERTY INSURANCE CORPORATION** and the name and address of its registered agent for service of process is

**CT CORPORATION SYSTEMS
350 NORTH ST. PAUL, SUITE 2900
DALLAS, TEXAS 75201.**

Gary L. Kilgore
Appeals Judge

CONCUR:

Michael B. McShane
Appeals Panel
Manager/Judge

Edward Vilano
Appeals Judge