

APPEAL NO. 030983
FILED JUNE 13, 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 24, 2003, with (hearing officer 2) presiding as the hearing officer. Hearing officer 2 resolved the disputed issues by deciding: (1) the respondent (claimant) sustained a compensable injury on _____; (2) the claimant had disability from July 5 through December 31, 2001; (3) the appellant (carrier) provided workers' compensation insurance for the employer on _____; (4) the Texas Workers' Compensation Commission (Commission) has jurisdiction to determine the disputed issues; (5) the principles of *res judicata*, laches, and collateral estoppel do not act as a bar to the claimant on the disputed issues; and (6) the carrier waived its right to dispute compensability of the claim. The carrier appealed, and the claimant responded. We note that the cover letter to the carrier's request for review correctly identifies the carrier as Federal Insurance Company, but that the first page of the request for appeal incorrectly identifies the employer as being self-insured. It is undisputed that the carrier provided workers' compensation insurance to the employer on the date of the claimed injury, _____.

DECISION

Affirmed.

BACKGROUND

On November 19, 2001, with (hearing officer 1) presiding as the hearing officer. The issues at the CCH were whether the claimant sustained a compensable injury on _____, and whether he had disability. The employer represented at the CCH that it was self-insured for purposes of workers' compensation insurance. Hearing officer 1 issued a decision determining that the claimant did not sustain a compensable injury and that he did not have disability. The claimant appealed hearing officer 1's decision. In Texas Workers' Compensation Commission Appeal No. 020071, decided February 28, 2002, the Appeals Panel reversed hearing officer 1's decision and remanded the case to hearing officer 1 because Commission records did not show that the employer was approved for self-insurance by the Commission. The Appeals Panel stated that if the proper carrier was not before the Commission as a party in the claim, then hearing officer 1 should take appropriate action.

On remand, hearing officer 1 obtained a corrected carrier information form, which showed that the carrier was the workers' compensation insurance carrier for the employer. Hearing officer 1 did not hold a CCH on remand, but instead, when identifying the carrier in his decision on remand, substituted the carrier's name for the employer's name. In the decision on remand, hearing officer 1 again determined that the claimant did not sustain a compensable injury and that he did not have disability.

The claimant appealed hearing officer 1's decision on remand. In Texas Workers' Compensation Commission Appeal No. 020940, decided June 10, 2002, the Appeals Panel held that it was clear that the dispute had not been litigated with the correct party, and that a new proceeding must be initiated by the parties to resolve the compensability issue in the absence of an agreement. The Appeals Panel decided that:

Because of harmful error in failing to join the insurance carrier as a party in a reconvened CCH, and our inability to remand a second time (Section 410.203(c)) the Appeals Panel reverses and renders a new decision that there has been no binding adjudication of the dispute with the proper carrier present, and the decision and order is null and void, and has no precedential effect.

On July 12, 2002, the carrier filed a petition in district court seeking to set aside the decision in Appeal No. 020940, and requesting the court to affirm hearing officer 1's decision on remand. Apparently, that suit is still pending as there is no information in the CCH record of March 24, 2003, to indicate otherwise.

A benefit review conference was held on November 26, 2002, and a CCH was held on March 24, 2003 on the disputed issues of compensable injury, disability, carrier coverage, carrier waiver, Commission jurisdiction, and *res judicata*. The claimant and the carrier appeared at the March 24, 2003, CCH. Hearing officer 2 found in favor of the claimant on the disputed issues and the carrier has appealed those determinations. It is undisputed that the carrier provided workers' compensation insurance for the employer on _____, the date of the claimed injury.

CARRIER'S APPEAL

Venue. The carrier appeals hearing officer 2's determination that venue was proper in the (city) Field Office. Since the parties stipulated that venue was proper in the (city) Field Office, we find no merit in the carrier's dispute of that determination.

Jurisdiction. The carrier appeals the hearing officer's determination that the Commission has jurisdiction to determine the disputed issues. The carrier asserts that the Commission had no authority to proceed with a second CCH because the Appeals Panel is not authorized to void a decision. We disagree. Section 410.203(b) provides that the Appeals Panel may: (1) affirm the decision of the hearing officer; (2) reverse that decision and render a new decision; or (3) reverse that decision and remand the case to the hearing officer for further consideration and development of evidence. Section 410.203(c) provides that the Appeals Panel may not remand a case under subsection (b)(3) more than once. In Appeal No. 020940, the Appeals Panel reversed hearing officer 1's decision and rendered a new decision that there had been no binding adjudication of the dispute with the proper carrier present, and that hearing officer 1's decision and order was null and void. Thus, the Appeals Panel reversed hearing officer 1's decision and rendered a new decision as authorized by Section 410.203(b)(2).

Although not mentioned in the carrier's appeal as a basis for disputing the Commission's jurisdiction, as noted in the background section of this decision, the carrier filed a petition in district court to set aside the decision in Appeal No. 020940. We do not find the carrier's suit in district court to be an impediment to the Commission's jurisdiction to determine the disputed issues of compensability and disability because Section 410.205(b) provides that "[t]he decision of the appeals panel regarding benefits is binding during the pendency of an appeal under Subchapter F or G." In Appeal No. 020940, the Appeals Panel reversed hearing officer 1's decision that the claimant did not sustain a compensable injury and that he did not have disability and rendered a decision that that decision was null and void, and in doing so the Appeals Panel determined that since the dispute had not been litigated with the correct party, a new proceeding must be initiated by the parties to resolve the compensability issue. A new proceeding was initiated in accordance with the decision in Appeal No. 020940. Thus, although the carrier appealed the decision in Appeal No. 020940 to the district court, the decision in Appeal No. 020940 that hearing officer 1's decision was null and void remains binding during the pendency of the appeal. Section 410.205(b).

Res Judicata. The carrier appeals hearing officer 2's determination that the principles of *res judicata*, laches, and collateral estoppel do not act as a bar to the claimant on the disputed issues in this case. Since the Appeals Panel determined in Appeal No. 020940 that hearing officer 1's decision was null and void, the hearing officer did not err in making the complained-of determination.

Compensable Injury and Disability. The carrier appeals hearing officer 2's determinations in favor of the claimant on the issues of compensable injury and disability. The claimant had the burden to prove that he sustained a compensable injury as defined by Section 401.011(10) and that he had disability as defined by Section 401.011(16). Conflicting evidence was presented at the CCH. The hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). Hearing officer 2 found that the claimant was injured at work on _____, when a 50-pound box of nails fell on his head; that the incident of _____, caused harm or damage to the claimant's head, neck, and back; and that as a result of the injury of _____, the claimant was unable to work from July 5 through December 31, 2001. Although there is conflicting evidence on the disputed issues of compensable injury and disability, we conclude that hearing officer's 2's determinations in favor of the claimant on those issues 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.2d 175 (Tex. 1986).

Carrier Waiver. The carrier appeals hearing officer 2's determination that the carrier waived its right to dispute compensability. In Continental Casualty Company v. Downs, 81 S.W.3d 803 (Tex. 2002), the Texas Supreme 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. Hearing officer 2 found that the carrier first received written notice of the claim on July 6,

2001, and did not file a Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) disputing the claim until November 26, 2002, and that the carrier did not file a TWCC-21 disputing the claim within seven days after receiving written notice of the injury or begin to pay benefits as required. Hearing officer 2 concluded that the carrier waived its right to dispute compensability of the injury. We conclude that hearing officer 2's determination on the carrier waiver issue is supported by sufficient evidence and that it is not so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. Cain, supra.

The carrier contends that it had no obligation to dispute the injury because the claimant had no injury. We disagree. In Continental Casualty Company v. Williamson, 971 S.W.2d 108 (Tex. App.-Tyler 1998, no pet.), 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 held 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. In the instant case, hearing officer 2 determined that the claimant has an injury, thus the Williamson case does not apply. Since the Appeals Panel in Appeal No. 020940 reversed hearing officer 1's decision against the claimant and rendered a decision that hearing officer 1's decision was null and void because the carrier was not joined as a party, hearing officer 1's decision is not *res judicata* as asserted by the carrier. We note that even if it were to be determined that the carrier did not waive its right to contest compensability of the injury, the claimant would still be entitled to benefits because we are affirming hearing officer 2's determination that the claimant was injured at work when the box of nails fell on him and thus had a compensable injury and resulting disability.

Denial of Request to Add an Issue. The carrier contends that the hearing officer erred in denying its request to add an issue as to whether the claimant waived his right to assert that the carrier waived its right to dispute compensability of the injury. The claimant did not consent to the addition of the requested issue and hearing officer 2 did not find good cause for adding the requested issue. See Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 142.7(d) and (e) (Rule 142.7(d) and (e)). Under the circumstances of this case, where the employer represented it was self-insured at the November 19, 2001, CCH, and it was later determined that that was not correct and that the employer had workers' compensation insurance with the carrier on the date of injury, we cannot conclude that hearing officer 2 abused his discretion in denying the carrier's request to add the issue of the claimant's waiver of his right to assert that the carrier waived its right to dispute compensability.

Excluded Exhibits. The carrier contends that hearing officer 2 erred in excluding from evidence Carrier's Exhibit Nos. U, W, X, AA, and BB. The excluded exhibits are, respectively, hearing officer 1's original decision, hearing officer 1's letter regarding the

remand, hearing officer 1's decision on remand, the response to the claimant's appeal of hearing officer 1's original decision, and the response to the claimant's appeal of hearing officer 1's decision on remand. To obtain reversal of a decision based upon error in the admission or exclusion of evidence, it must be shown that the ruling was in fact error and that the error was reasonably calculated to cause and probably did cause the rendition of an improper decision. Texas Workers' Compensation Commission Appeal No. 91003, decided August 14, 1991. We conclude that the carrier has not shown that hearing officer 2 committed reversible error in excluding the aforementioned exhibits. In so determining, we note that in Appeal No. 020940, the Appeals Panel determined that hearing officer 1's decision on remand was null and void because the proper carrier was not present at the CCH, and that the record of the March 24, 2003, CCH contains, among other things, copies of Appeal No. 020940 and Appeal No. 020071, and the transcript of the November 19, 2001, CCH.

We affirm hearing officer 2's decision and order.

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

**PARKER W. RUSH
2001 BRYAN STREET, SUITE 3400
DALLAS, TEXAS 75201-3068.**

Robert W. Potts
Appeals Judge

CONCUR:

Gary L. Kilgore
Appeals Judge

Thomas A. Knapp
Appeals Judge