APPEAL NO. 031208
FILED JUNE 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 April 21, 2003. The hearing officer determined that the respondent/cross-appellant (carrier) waived the right to contest compensability of the _____, claimed injury by not timely contesting it in accordance with Sections 409.021 and 409.022; that because of the carrier waived the right to contest compensability, the appellant/cross-respondent (claimant) sustained a compensable injury in the form of mild reactive airway disease; and that the claimant did not have disability as a result of the compensable injury. The claimant appeals the disability determination and argues that the hearing officer erred in limiting the injury to mild reactive airway disease and in finding that the claimant sustained no permanent injury to any body part. The carrier appeals the waiver determination. Both parties responded to the opposition's appeal.

DECISION

Affirmed as reformed.

WAIVER

The hearing officer's waiver determination is affirmed. Section 409.021(a) requires that a carrier act to initiate benefits or to dispute compensability within seven days of first receiving written notice of an injury or waive its right to dispute compensability. *See* Continental Casualty Company v. Downs, 81 S.W.3d 803 (Tex. 2002); Texas Workers' Compensation Commission Appeal No. 030380, decided April 10, 2003. The evidence reflects that the carrier received written notice of the claimant's injury on July 19, 2002.[1] The carrier argues that in the absence of controverting evidence, the hearing officer was compelled to accept the testimony of the carrier's adjuster, who stated that a "cert-21" was filed with the Texas Workers' Compensation Commission (Commission) on July 23, 2002. On the contrary, the fact that the cert-21 alleged to have been filed with the Commission on July 23, bore a file stamp indicating that it was received by the Commission on September, 27, 2002, is evidence supporting the hearing officer's determination that the carrier did not act within 7 days of receiving written notice of the claimed injury.

The carrier contends "that the Commission's requirement that [the carrier] file a 'cert-21' represents improper and ad hoc rulemaking." We note that there is no requirement to file a cert-21, however, as explained in Appeal No. 030380, *supra*,

[1] Although the hearing officer notes in the Statement of the Evidence that the carrier first received written notice of the claimed injury on July 19, 2002, and additionally explains that this date is not disputed by the parties, Finding of Fact No. 4 states that the carrier first received written notice on July 18, 2002. As this is an obvious typographical error, Finding of Fact No. 4 is hereby reformed to reflect that the carrier first received written notice of the claimed injury on July 19, 2002.

> The carrier can comply with Downs by submitting a dispute within seven days. In addition, the Commission has provided a method (the "cert 21" procedure) by which the carrier can establish that they have "taken some action within seven days." Since there has not been a legislative change to this section of the 1989 Act nor has there been a Commission rule promulgated to require an insurance carrier to notify the Commission or the claimant of its intent to pay benefits as they accrue, we suggest that a carrier should take advantage of the "cert 21" procedure. A carrier that chooses not to utilize the "cert 21" procedure in instances where no benefits have accrued within seven days of receiving written notice of the injury, and then later tries to assert that they "intended to pay in accordance with the 1989 Act but no benefits were due," does so at its own risk.

In the instant case, the carrier relied on the testimony of the adjuster in establishing the date upon which it disputed the claim at its own risk and the hearing officer was not persuaded by the adjuster's testimony.

The carrier also argues that the hearing officer erred by not determining whether the carrier was entitled to "re-open the issue of compensability" based on newly discovered evidence. A carrier is required to take some action within seven days of receiving written notice of an injury in order to be entitled to reopen the issue of compensability based on newly discovered evidence. Section 409.021(d). *See* Appeal No. 030380. In the present case, the hearing officer determined that the carrier did not take action within seven days after receiving written notice of the injury and, therefore, no further analysis with regard to newly discovered evidence was necessary in order to support the determination that the carrier waived its right to contest compensability of the claimed injury. Nothing in our review of the record indicates that the hearing officer's waiver determination is 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 (Tex. 1986).

INJURY

The hearing officer determined that due to the carrier's waiver of the right to contest compensability, the claimant sustained a compensable injury in the form of a mild reactive airway disease. The hearing officer found that, but for the carrier's waiver, the exposure to the unknown gases on _____, did not result in any *permanent* injury to any body part and that the claimant was not injured in the course and scope of his employment. The claimant argues that the hearing officer erred in limiting the injury to mild reactive airway disease, in finding that the claimant did not sustain a work-related injury, and in finding that he sustained no permanent injury to any body part as a result of the exposure.

A "compensable injury" means "an injury that arises out of and in the course and scope of employment for which compensation is payable under this subtitle." Section 401.011(10). The claimant had the burden to prove he was injured in the course and

scope of his employment. Reed v. Aetna Casualty & Surety Co., 535 S.W.2d 377 (Tex. Civ. App.-Beaumont 1976, writ ref'd n.r.e.). In the present case, the hearing officer determined that the claimant was not injured in the course and scope of his employment and that determination is supported by the evidence. We note, however, that the hearing officer was able to determine that, as a result of the carrier's waiver, the claimant sustained a compensable injury because the hearing officer additionally found that the claimant sustained damage or harm to the physical structure of his body and that finding is supported by the evidence.

With regard to the "permanent injury" argument, we are unaware of any authority requiring that a compensable injury result in a permanent injury. Although Finding of Fact No. 2 is effectively negated by the waiver determination, we nevertheless reform the finding to strike the word "permanent" as there is no requirement that an injury be permanent and because the documentary evidence reflects that the claimant has been diagnosed with "chronic respiratory conditions due to fumes and vapors." Accordingly, we reform Finding of Fact No. 2 to reflect the following:

> During the course and scope of his employment on _____, the Claimant was exposed to unknown gases, which did not result in an injury.

The claimant argues that the hearing officer erred in limiting the compensable injury to mild airway reactive disease. We agree. As explained in Texas Workers' Compensation Commission Appeal No. 990164, decided March 15, 1999,

> We have stated many times that when determining whether or not there was a compensable injury that it is useful and desirable for a hearing officer to indicate the nature of the injury. However, there is a balance to be struck here. It generally does not seem appropriate for a hearing officer to forever set in stone the parameters of an injury in determining whether or not there was a compensable injury. First, such a determination smacks of a general verdict, which was abandoned by design when the 1989 Act under which specific issues concerning a case as decided rather than determining all the issues in a claim at one time. This is what is meant by our the statement we have made many times that the 1989 Act created an "issue-driven" system of dispute resolution. The hearing officer is generally limited to the issues before him or her. To broadly determine the issue of extent of injury when the stated issue is whether or not there is an injury can lead to a dispute resolution that goes beyond the issues before the hearing officer. Second, we must be cognizant of the fact that the nature of an injury and the diagnoses involved may evolve over time. This is certainly one of the primary bases of the oft-stated doctrine that a claimant may go in and out of disability. Third, setting the parameters of an injury in stone when determining the issue of injury raises the specter of a hearing officer exceeding his or her jurisdiction by prejudging what medical care may be reasonable and necessary for an injury. This raises thorny jurisdictional issues. *See*

Texas Workers' Compensation Commission Appeal No. 971871, decided October 29, 1997.

We note that there was no extent-of–injury issue before the hearing officer and, furthermore, the evidence reflects that the claimant has been diagnosed with chronic respiratory conditions resulting from the exposure in question. As the issue presented to the hearing officer was whether the claimant sustained a compensable injury and, as a result of the carrier waiving the right to contest compensability, the hearing officer answered that question in the affirmative, the hearing officer erred in limiting the compensable injury to mild reactive airway disease. For these reasons, Conclusion of Law No. 3 is reformed to reflect the following:

> Because the carrier waived the right to contest compensability of the claimed injury by not timely contesting it in accordance with Texas Labor Code Ann, Sections 409.021 and 409.022, the claimant sustained a compensable injury on _____.

DISABILITY

"Disability" is defined as "the inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage." Section 401.011(16). Disability is likewise a question of fact to be determined by the hearing officer. Texas Workers' Compensation Commission Appeal No. 93560, decided August 19, 1993. The hearing officer explained why she was not persuaded by the evidence, including the evidence from the doctor who diagnosed the claimant with chronic respiratory conditions due to the fume/vapor and opined that the claimant could not return to work, that the claimant established that he had disability resulting from the compensable injury. Under the facts of this case, we perceive no error in the hearing officer's resolution of the disability issue.

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

LEO F. MALO
12222 MERIT DRIVE, SUITE 700
DALLAS, TEXAS 75251.

_____
Chris Cowan
Appeals Judge

CONCUR:

_____
Margaret L. Turner
Appeals Judge

_____
Edward Vilano
Appeals Judge