

APPEAL NO. 031263
FILED JULY 8, 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 April 17, 2003. The hearing officer resolved the disputed issues by deciding: (1) that the respondent (claimant) sustained a compensable injury on _____; (2) that the claimant had disability from November 21, 2002, through February 21, 2003, but not from October 31 through November 20, 2002, or from February 22 through April 17, 2003; and (3) that the appellant (carrier) has waived the right to contest the compensability of the claimed injury by not timely contesting the injury in accordance with the Sections 409.021 and 409.022. The carrier has appealed and argues that the hearing officer erred by relying on Continental Casualty Co. v. Downs, 81 S.W.3d 803 (Tex. 2002), to determine that the carrier had waived the right to contest the compensability of the claimed injury. The carrier alternatively argues that it did dispute compensability of the claim within seven days from the date it first received written notice and argues that the hearing officer erred in excluding evidence that proved it did so and, further, that the hearing officer erred in deciding a witness was "unavailable." The claimant has responded and asserts that there was no good cause for the untimely exchange of the excluded evidence and therefore such exclusion was not reversible error. The claimant additionally argues that the hearing officer properly applied the Downs, *supra*, decision, and thus the claimant urges affirmance of the hearing officer's Decision and Order.

DECISION

Affirmed.

We first address the carrier's evidentiary objections. The carrier contends that the hearing officer erred in deciding a witness was "unavailable" after twice being directed to her voice mail when trying to reach her to testify by telephone. We note that the carrier made no objection at the CCH. Without objection below, no error has been preserved for our review, as we generally do not consider matters raised for the first time on appeal. We next address the carrier's complaint that the hearing officer erred in excluding Carrier's Exhibit No. 2, a fax transmission report. The hearing officer determined that the document was not timely exchanged, and that no good cause existed for the untimely exchange. To obtain a reversal on the basis of the admission or exclusion of evidence, it must be shown that the ruling admitting or excluding the evidence was error and that that error was reasonably calculated to cause and probably did cause the rendition of an improper judgment. Hernandez v. Hernandez, 611 S.W.2d 732 (Tex. Civ. App.-San Antonio 1981, no writ). It has also been stated that reversible error is not ordinarily shown in connection with rulings on questions of evidence unless the whole case turns on the particular evidence admitted or excluded. Atlantic Mutual Insurance Company v. Middleman, 661 S.W.2d 182 (Tex. App.-San Antonio 1983, writ ref'd n.r.e.). We conclude that the hearing officer properly excluded the complained-of

fax transmission report on the grounds of no timely exchange and no good cause shown.

The hearing officer found that the carrier received its first written notice of the claimed injury on November 21, 2002. The carrier asserts that it timely filed its "cert 21," a Payment of Compensation or Notice of Refused or Disputed Claim (TWCC-21), used to indicate that the carrier intends to pay benefits, within seven days of its receipt of written notice of the injury, citing the fax date of December 2, 2002, which appears on the masthead of the document as proof. However the hearing officer specifically found and the evidence reflects that the Texas Workers' Compensation Commission (Commission) did not stamp acknowledgment of receipt of the document until December 5, 2002. The carrier did not file its TWCC-21 disputing compensability of the injury until December 9, 2002, according to the TWCC stamp on that document. Both of those dates are beyond the seven-day period required under Sections 409.021 and 409.022. The hearing officer found that the carrier failed to contest compensability within seven days once it received written notice of the injury.

In Texas Workers' Compensation Commission Appeal No. 030380-s, decided April 10, 2003, we focused on language in the Supreme Court's decision in Downs, *supra*, and determined that the carrier is required to take some action within seven days of receiving written notice of the injury in order to be entitled to the 60-day period to investigate a claim and deny compensability. In the present case, there is no evidence indicating that the carrier took any action within seven days after receiving written notice of the claimed injury. Accordingly, we perceive no error in the hearing officer's determinations that the carrier waived the right to contest compensability of the claimed injury and, therefore, the claimant sustained a compensable injury and had disability from November 21, 2002, through February 21, 2003.

The carrier asserts that it is inappropriate to retroactively apply the Downs decision. In Texas Workers' Compensation Commission Appeal No. 021944-s, decided September 11, 2002, the Appeals Panel applied the decision in Downs and noted 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 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.

The carrier's appeal cites Continental Casualty Company v. Williamson, 971 S.W.2d 108 (Tex. App.-Tyler 1998, no pet.), in support of its position that the hearing officer erred in determining that the claimant does have a compensable injury. In Williamson, 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 previously recognized 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 Texas Workers' Compensation Appeal No. 000604, decided May 10, 2000, the Appeals Panel stated:

We have interpreted Williamson to mean that a carrier's failure to timely dispute does not create an injury only when there is no injury. If the claimant has established a condition that meets the definition of injury under Section 401.011(26), it does not matter that the cause of the injury may be outside the course and scope of employment because causation is no longer in dispute when a TWCC-21 has not been timely and properly filed.

In the instant case, the claimant claimed a lower back injury from performing a work activity. The hearing officer found that the claimant was not injured in the course and scope of his employment; she did not find that the claimant has no injury. In fact, the hearing officer made findings of fact that the claimant did suffer a herniated disc at L5-S1 and that the claimant was unable to obtain and retain employment at wages equivalent to his preinjury wage from November 21, 2002, through February 21, 2003, as a result of the herniated disc at L5-S1. Thus, we conclude that Williamson does not apply to the facts of this case because the claimant has physical harm or damage to his low back.

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 from the evidence presented. Nothing in our review of the record indicates that the hearing officer's decision 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, 176 (Tex. 1986).

The decision and order of the hearing officer are affirmed.

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

**TREVA DURHAM
1000 HERITAGE CENTER CIRCLE
ROUND ROCK, TEXAS 78664.**

Margaret L. Turner
Appeals Judge

CONCUR:

Gary L. Kilgore
Appeals Judge

Michael B. McShane
Appeals Panel
Manager/Judge