

APPEAL NO. 031437
FILED JULY 28, 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 May 7, 2003. The hearing officer resolved the disputed issues by deciding that: (1) the respondent (claimant) sustained a compensable injury in the form of an occupational disease, with a date of injury (DOI) of _____, because the appellant (carrier) waived the right to contest compensability of the claimed injury; (2) the carrier is not relieved from liability under Section 409.002, because the claimant did timely notify the employer pursuant to Section 409.001, and, in any event, the carrier waived the right to contest compensability of the claimed injury; (3) the claimant did not have disability resulting from the compensable injury with a DOI of _____, or from any injury to, or problem with, her right shoulder; and (4) the carrier waived the right to contest compensability of the claimed injury by not timely contesting the injury in accordance with Sections 409.021 and 409.022. The carrier appealed the hearing officer's injury and notice determinations on sufficiency of the evidence grounds, and asserted that the carrier did not waive its right to contest compensability because Continental Casualty Company v. Downs, 81 S.W.3d 803 (Tex. 2002), did not apply to the facts of this case. The appeal file does not contain a response from the claimant.

DECISION

Affirmed.

In evidence, is the carrier's Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) in which the carrier disputed the compensability of the alleged injury. The TWCC-21, dated April 2, 2002, states on its face, that the carrier's first written notice of injury was received on February 15, 2002, and is also stamped as received by the Texas Workers' Compensation Commission (Commission) on April 2, 2002. The evidence sufficiently supports the hearing officer's determination that the carrier failed to dispute the claimant's injury within seven days of receiving written notice of injury.

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 as required by the 1989 Act or notify the Commission and the injured employee in writing of its refusal to pay. The Supreme Court of Texas in 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, *supra*, decision became final.

The hearing officer commented that Continental Casualty Co. v. Williamson, 971 S.W.2d 108 (Tex. App.-Tyler 1998, no pet. h.) applies only where there is no underlying injury. Since he determined that the claimant “had some damage to her right shoulder,” the hearing officer went on to determine that the claimant sustained a compensable injury because the carrier waived the right to contest compensability. Based on the determination that the DOI is _____, the hearing officer determined that the claimant had timely notified her employer of the claimed injury, and that the carrier is not relieved of liability under Section 409.002. DOI is a question of fact for the hearing officer to resolve. 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. We conclude that the hearing officer’s decision 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 v. Bain, 709 S.W.2d 175 (Tex. 1986).

The decision and order of the hearing officer are affirmed.

The true corporate name of the insurance carrier is **LIBERTY MUTUAL FIRE INSURANCE COMPANY** 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.**

Veronica Lopez-Ruberto
Appeals Judge

CONCUR:

Elaine M. Chaney
Appeals Judge

Edward Vilano
Appeals Judge