

APPEAL NO. 031677
FILED AUGUST 14, 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 May 15, 2003. The hearing officer resolved the disputed issues by deciding that the respondent (claimant) sustained a compensable injury on _____; that the claimant has had disability from _____, through the date of the CCH; that the appellant (carrier) waived the right to dispute compensability of the injury; and that the carrier is not relieved of liability for the injury because the claimant was not in a state of intoxication at the time of the injury. The carrier appeals the hearing officer's decision, contending that the hearing officer erred in determining that it waived its right to dispute compensability of the claimant's injury and in determining that the claimant was not intoxicated at the time of the injury. The claimant responded, requesting affirmance.

DECISION

Affirmed.

The hearing officer did not err in determining that the carrier waived its right to dispute compensability of the claimant's injury under Section 409.021. The evidence reflects that the carrier first received written notice of the claimant's injury on January 22, 2002, and that its first Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) is dated January 31, 2002, in which it indicated that temporary income benefits would begin on February 1, 2002. The Carrier's second TWCC-21 is dated February 25, 2002, and it disputes the claimant's claim based on an intoxication defense. In Continental Casualty Company v. Downs, 81 S.W.2d 803 (Tex. 2002), the court concluded that under Section 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. In Texas Workers' Compensation Commission Appeal No. 030380-s, decided April 10, 2003, the Appeals Panel noted that in Downs, the Texas Supreme Court stated "Taking some action within seven days is what entitles the carrier to a sixty-day period to investigate or deny compensability." In Appeal No. 030380-s, the Appeals Panel held that "to comply with the Supreme Court's holding in Downs, the carrier has the burden to prove that it 'took some action within seven days,' and to present evidence indicating the action taken." The Appeals Panel went on to state that "Since the carrier in this case presented no evidence that it took any action indicating that it had accepted the claim or intended to pay benefits within seven days of receiving written notice, we conclude that the hearing officer did not err in determining that the carrier waived its right to dispute compensability of the claimed injury." In accordance with our decision in Appeal No. 030380-s, we conclude that the hearing officer did not err in determining that the carrier waived its right to contest compensability of the claimant's injury.

By waiving the right to dispute compensability of the injury, the carrier lost its right to assert an intoxication defense under Section 406.032(1)(A). Texas Workers'

Compensation Commission Appeal No. 030663-s, decided May 1, 2003. The Downs decision, and not the recent legislative changes to Section 409.021, which are set out in the carrier's appeal, applies to the waiver issue in this case with a date of injury of _____. We do not agree that our decision in Texas Workers' Compensation Commission Appeal No. 000784, decided May 30, 2000, which applied Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 124.3(c) (Rule 124.3(c)) to a CCH that occurred prior to the effective date of the rule based on the Texas Workers' Compensation Commission's construction of Section 409.021, provides a basis for not applying the Downs decision to the facts of the instant case.

With regard to the intoxication issue, we conclude that the hearing officer's determination that the claimant was not intoxicated at the time of his injury 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 weight to be given to the toxicologist's retrograde extrapolation was for the hearing officer to determine as the finder of fact. Texas Workers' Compensation Commission Appeal No. 030090, decided March 5, 2003. The carrier's contentions regarding error on the part of the hearing officer in not shifting the burden of proof to the claimant on the intoxication issue and in overruling its objections to certain questions on direct examination of the claimant with regard to whether coworkers indicated to him that he was intoxicated do not present grounds for reversal of the hearing officer's determination on the intoxication issue, because we are affirming the hearing officer's determination that the carrier waived its right to dispute compensability of the injury, which includes its intoxication defense. Appeal No. 030663-s, *supra*.

We affirm the hearing officer's decision and order.

The true corporate name of the insurance carrier is **THE TRAVELERS INDEMNITY COMPANY OF AMERICA** and the name and address of its registered agent for service of process is

**CT CORPORATION SYSTEM
350 NORTH ST. PAUL STREET
DALLAS, TEXAS 75201.**

Robert W. Potts
Appeals Judge

CONCUR:

Elaine M. Chaney
Appeals Judge

Thomas A. Knapp
Appeals Judge