

APPEAL NO. 031877  
FILED AUGUST 27, 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 June 17, 2003. The hearing officer resolved the disputed issues by deciding that: (1) the respondent (claimant) sustained a compensable repetitive trauma injury in the form of bilateral carpal tunnel syndrome on \_\_\_\_\_; (2) that appellant (carrier) is not relieved from liability under Section 409.002 because the claimant timely notified her employer pursuant to Section 409.001; (3) that the carrier waived the right to contest compensability of the claimant's claimed injury by not timely contesting in accordance with Section 409.021; (4) that the carrier's failure to dispute the claimant's claim in accordance with Continental Casualty Company v. Downs, 81 S.W.3d 803 (Tex. 2002) precludes the carrier from raising the defense of timely notice to employer; and (5) that the claimant sustained disability beginning on September 5, 2002, and continuing through the date of the CCH. The carrier appealed, arguing that the determinations of the hearing officer are supported by insufficient evidence or alternatively are contrary to the great weight and preponderance of the evidence. The carrier additionally argues that the determinations constitute legal error and should be reversed. The claimant responded, urging affirmance.

DECISION

Affirmed.

**CARRIER WAIVER**

The evidence reflected that the Texas Workers' Compensation Commission (Commission) approved a Employee's Request to Change Treating Doctors (TWCC-53) on August 19, 2002, and mailed a copy of the TWCC-53 to the carrier. The carrier asserts that it did not receive written notice of the claim until October 23, 2002. Section 409.021(a) and Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 124.1(a) (Rule 124.1(a)) require receipt of written notice of an injury to trigger the 7-day pay or dispute period. Rule 124.1(a)(3) indicates that any communication regardless of source may serve as written notice of injury if it fairly informs the carrier of the name of the injured employee, the identity of the employer, the approximate date of the injury, and information which asserts that the injury is work-related. See Texas Workers' Compensation Commission Appeal No. 021558, decided August 7, 2002. The hearing officer's finding that the TWCC-53 indicated that the claimant had a bilateral arm and hand injury while working for the employer on \_\_\_\_\_, and listed the carrier as the insurance carrier for workers' compensation purposes was not appealed. The TWCC-53 reflects that a copy was sent to the carrier and the Dispute Resolution Information System notes in this case indicate that the approved TWCC-53 form was mailed out on August 19, 2002. The carrier cites Texas Workers' Compensation Commission Appeal No. 001443, decided August 4, 2000, as support for its argument that the waiver determination was

in error. However, the cited case dealt with whether the carrier timely waived its right to contest supplemental income benefits for a particular quarter. Deemed receipt of a document could not be applied in that case because the communication at issue was from the claimant rather than the carrier. In the instant case, there is sufficient evidence to support the hearing officer's finding that the carrier first received written notice of the claimant's claim in the form of the TWCC-53 on August 26, 2002, which was the next business day following the expiration of five business days from August 19, 2002. Rule 102.5(d) provides that for purposes of determining the date of receipt of written communications sent by the Commission, the Commission shall deem the received date to be five days after it was mailed. As to the written notice from the Commission, public officials are presumed to have performed their duties. Sanchez v. Texas Industries, Inc., 485 S.W.2d 385 (Tex. Civ. App.-Waco 1972, writ ref'd, n.r.e.). The hearing officer was not persuaded that the affidavit from the adjuster in evidence, alleging that no correspondence from the Commission was received prior to October 23, 2002, overcame the presumption of deemed receipt established by the rule and the hearing officer was within his province as a fact finder in so deciding. Because we affirm the finding that the carrier received first written notice of the injury on August 26, 2002, we affirm the determination that the carrier waived the right to contest compensability of claimant's claimed injury by not timely contesting the claimed injury in accordance with Section 409.021. It is undisputed that the carrier did not dispute compensability prior to October 28, 2002.

Due to our affirmance of the hearing officer's waiver determination, we likewise affirm his determination that the claimant sustained a compensable injury because the injury became compensable as a matter of law due to the carrier's waiver of its right to dispute compensability. In addition, by waiving its right to contest compensability, the carrier also lost its right to assert a defense that the claimant failed to timely notify his employer of the injury under Sections 409.001 and 409.002. Texas Workers' Compensation Commission Appeal No. 022027-s, decided September 30, 2002.

The carrier contends that the hearing officer erred in determining that the carrier is precluded from raising the defense of timely notice to employer arguing that the issue of the carrier's relief from liability of an otherwise compensable injury is not an issue of "compensability" and the carrier's failure to notify the Commission and the claimant of this fact does not create waiver of the right to raise the issue. We disagree. We have specifically held that a carrier loses its right to contest compensability, which includes its right to assert a defense under Section 409.002, due to the carrier's failure to contest the claim in accordance with Section 409.021. Texas Workers' Compensation Commission Appeal No. 022027-s supra.

## **DISABILITY**

The claimant had the burden to prove that she sustained disability as defined by Section 401.011(16). Conflicting evidence was presented at the CCH. The evidence reflects that the claimant was taken off work by her then-treating doctor on September 5, 2002. 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). As the finder of fact, the hearing officer resolves the conflicts in the evidence and determines what facts have been established. Although there is conflicting evidence in this case, the claimant's testimony and medical evidence support the hearing officer's determinations on the disability issue. 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).

We affirm the decision and order of the hearing officer.

The true corporate name of the insurance carrier is **NORTH AMERICAN SPECIALTY INSURANCE COMPANY** 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.**

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Margaret L. Turner  
Appeals Judge

CONCUR:

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Judy L. S. Barnes  
Appeals Judge

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Thomas A. Knapp  
Appeals Judge