

APPEAL NO. 032634
FILED NOVEMBER 24, 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 September 9, 2003. The hearing officer resolved the disputed issues by deciding that the respondent (claimant) sustained a compensable injury on _____; that the claimant had disability beginning July 2, 2002, and continuing through September 7, 2003; and that the appellant (carrier) waived the right to contest compensability of the claimed injury by not timely contesting it under Section 409.021. The carrier appealed, arguing that the record overwhelmingly establishes that the claimant did not sustain an injury in the course and scope of employment and that the hearing officer exceeded his authority when he decided that the claimant did not receive a copy of the carrier's August 27, 2002, Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) contesting compensability until more than 60 days after the carrier first received written notice of the claimed injury. The claimant responded, urging affirmance and contending that it was proper for the hearing officer to decide the issue pursuant to Section 409.021 and Section 409.022.

DECISION

Affirmed.

The hearing officer did not err in determining that the carrier waived the right to dispute compensability of the claimed injury. A TWCC-21 in evidence reflects that the carrier first received written notice of the claimed injury on August 12, 2002, and agreed to pay benefits as they accrued on August 14, 2002, in accordance with Section 409.021. A second TWCC-21 in evidence dated August 27, 2002, reflects in part that the "[c]arrier denies entire claim as claimant was not in course and scope of employment at the time of the alleged injury," in accordance with Section 409.021(c). The carrier contends that the hearing officer exceeded his authority in finding that the claimant did not receive a copy of the August 27, 2002, TWCC-21 contesting compensability until more than 60 days after August 12, 2002. It was undisputed that whether the carrier waived the right to contest compensability of the claimed injury by not timely contesting it under Section 409.021 and Section 409.022 was an issue at the CCH.

In Texas Workers' Compensation Commission Appeal No. 030768-s, decided May 8, 2003, the carrier initially agreed to pay benefits and filed a TWCC-21 within 7 days as required and subsequently filed a second TWCC-21 within 60 days disputing the claim. The Appeals Panel noted in that case that the plain language of Section 409.021(a)(2) requires that a notice of refusal to pay benefits be sent to the claimant as well as the Texas Workers' Compensation Commission (Commission) and that likewise, Rule 124.3(a) provides in part that "if the carrier believes that it is not liable for the injury or that the injury was not compensable, the carrier shall file the notice of denial of

a claim (notice of denial) in the form and manner prescribed by § 124.2 of this title (relating to Carrier Reporting and Notification Requirement).” Rule 124.2(d) provides that the carrier “shall notify the Commission and the claimant of a denial of the claim (Denial) based on non-compensability or lack of coverage. . . .” Thus, it is apparent that the carrier is required to provide notice to the claimant of its contest of compensability.

Since the carrier’s notification requirements are not considered completed until the copy of the denial provided to the claimant is received by the Commission, it follows that the notice to the claimant must be provided within the 60-day period provided for contesting compensability. In Appeal No. 030768-s the Appeals Panel held that if it is true that the claimant did not timely receive notice of the denial of the claim, then the carrier has waived the right to contest compensability in this case. See, e.g., Texas Workers' Compensation Commission Appeal No. 023262, decided February 19, 2003 (where we rendered a determination that the carrier had waived the right to contest compensability because the record did not reflect that the carrier had timely sent notice to the claimant of the contest of compensability it filed with the Commission within the 7-day period following written notice of the claimed injury).

In the instant case the hearing officer noted in his Statement of the Evidence that the claimant credibly testified that on the date of his injury his address was in Grand Prairie, Texas (city 2), rather than the address in Richardson, Texas (city 3), which appears on the TWCC-21s in evidence. The same address in Grand Prarire was shown on a notice of injury in evidence dated August 5, 2002. The hearing officer noted that the claimant credibly testified that he did not receive a copy of the TWCC-21 dated August 27, 2002, contesting the compensability of the claim and the Request for Benefit Review Conference (TWCC-45) in evidence states that the carrier was being noncompliant by refusing to send the TWCC-21 and requested a BRC because the claimant was not being paid despite the fact that he had no TWCC-21. There is sufficient evidence in the record to support the carrier waiver determination.

The claimant claimed that he sustained an injury from performing his work activities while lifting a bucket of sand and that he had disability as a result of his injury. The claimant had the burden to prove that he sustained a compensable injury as defined by Section 401.011(10) and that he had disability as defined by Section 401.011(16). Conflicting evidence was presented on these issues. The hearing officer is the sole judge of the weight and credibility of the evidence. 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, we conclude that the hearing officer’s determinations on the appealed issues are supported by sufficient evidence and are 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, 176 (Tex. 1986).

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

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

Margaret L. Turner
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Edward Vilano
Appeals Judge