

APPEAL NO. 033180
FILED FEBRUARY 2, 2004

This case returns following our remand in Texas Workers' Compensation Commission Appeal No. 032331, decided October 22, 2003, where we remanded the case for the hearing officer to consider and resolve an issue of whether the appellant/cross-respondent (carrier) waived its right to contest compensability pursuant to Section 409.021 and Continental Cas. Co. v. Downs, 81 S.W.3d 803 (Tex. 2002). A hearing on remand was held on November 13, 2003, in San Antonio, Texas, with Alan C. Ernst presiding as the hearing officer. The hearing officer determined that the carrier waived its right to contest compensability; thus, he further determined that the respondent/cross-appellant (claimant) sustained a compensable injury as a matter of law on _____, and that he had disability from January 27 through July 10, 2003. In its appeal, the carrier argues that the hearing officer erred in determining that the carrier waived its right to contest compensability in this case. In his cross-appeal, the claimant asserts error in an evidentiary ruling of the hearing officer's and otherwise urges affirmance.

DECISION

Reversed and a new decision rendered.

Initially we will consider the timeliness of the claimant's purported cross-appeal. The claimant's attorney maintains that the appeal is timely because it was filed within 15 days of the date the claimant received the carrier's appeal. While that is true, that only makes the document a timely filed response. In order to appeal the hearing officer's evidentiary ruling, the claimant was required to satisfy the time requirements for filing an appeal. In this instance, Texas Workers' Compensation Commission (Commission) records reflect that the hearing officer's decision and order was distributed to the parties on November 21, 2003. Pursuant to Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 102.5(d) (Rule 102.5(d)), the claimant was deemed to have received the hearing officer's decision five days later, or on November 26, 2003. Thus, the last day for the claimant to timely file his appeal was 15 days later, not including Saturdays, Sundays, and holidays listed in Section 662.003(a) of the Texas Government Code, or on December 19, 2003. The claimant's appeal was mailed on January 2, 2004, and thus, is untimely to serve as an appeal. However, it was timely filed to serve as a response and it will be considered as such in that it ultimately requests affirmance.

The hearing officer determined that the document that provided first written notice of the injury to the carrier was a letter of representation and an Employee's Notice of Injury or Occupational Disease and Claim for Compensation (TWCC-41) that was faxed by the claimant's attorney to the carrier on March 6, 2003. The fax confirmation report reflects a date of March 6, 2003, and a time of 4:38 p.m. That same document states that the "start time" of the fax was 5:43 p.m. and the "end time" of the fax was 5:50 p.m. The hearing officer determined that "the first written notice was

received by the Carrier at 4:38 pm on March 6 by application of the mailbox rule by analogy and under liberal construction of Rule 102.3.” Rule 102.3(c) provides that “[n]ormal business hours in the Texas workers’ compensation system are 8:00 a.m. to 5:00 p.m. Central Standard Time with the exception of the Commission’s El Paso field office whose normal business hours are 8:00 a.m. to 5:00 p.m. Mountain Standard Time.” Rule 102.3(d) provides that “[a]ny written or telephonic communications received other than during normal business hours on working days are considered received at the beginning of normal business hours on the next working day.” In Texas Workers’ Compensation Commission Appeal No. 030105, decided February 21, 2003, we noted that Rule 102.3(d) applies to communication among all participants in the Texas workers’ compensation system, noting language in the preamble to that effect and the plain language in Rule 102.3(c) that defines normal business hours for the “Texas workers’ compensation system.” Much of the argument on remand was devoted to whether the claimant or the carrier was at “fault” for the fact that it appears that the claimant’s attorney started the process of sending the fax to the carrier at 4:38 p.m., and yet the transmission was not completed until after 5:00 p.m. It is in deciding which party “should bear the burden and consequences of delay” that we believe that the hearing officer erred in this case. It is receipt of written notice that is required to trigger the carrier’s obligation to contest compensability; thus, the critical determination is not when the claimant attempted to send the documents that comprise written notice in this case, it is when the carrier received those documents. The doctrine of liberal construction does not serve to change the term received to sent. The fax confirmation report demonstrates that actual transmission of the documents began at 5:43 p.m. and was completed at 5:50 p.m. Accordingly, under the plain language of Rule 102.3(d), since the carrier received its first written notice of injury after normal business hours on March 6, 2003, written notice was considered received on March 7, 2003, and the carrier timely contested compensability as evidenced by its Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21), which is date-stamped as having been received by the Commission on March 14, 2003.

The hearing officer’s determination that the carrier waived its right to contest compensability in this case is reversed and a new decision rendered that the carrier timely contested compensability in this case. Accordingly, the determinations that the claimant sustained a compensable injury and that he had disability are likewise reversed and a new decision rendered that the claimant did not sustain a compensable injury and did not have disability.

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.**

Elaine M. Chaney
Appeals Judge

CONCUR:

Chris Cowan
Appeals Judge

Gary L. Kilgore
Appeals Judge