

APPEAL NO. 040077
FILED MARCH 4, 2004

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 December 9, 2003. The hearing officer determined that the respondent (claimant) sustained a compensable, but not work related, repetitive trauma injury in the nature of right carpal tunnel and cubital tunnel syndrome, right shoulder bursitis, and bulging at C4-5 and C5-6; that these injuries became compensable as a matter of law because the appellant (self-insured) failed to timely dispute the compensability of the claimed injuries; that the date of injury pursuant to Section 408.007 is _____; that the claimant failed, without good cause, to give her employer timely notice of her claimed injuries, but that the self-insured waived the timely notice defense by failing to timely assert that defense; and that the claimant had disability beginning March 26, 2003, and continuing through the date of the hearing. The self-insured appeals the findings of fact that pertain to the dates on which the self-insured first received written notice of the claim and filed its dispute of the compensability of the claimed injuries with the Texas Workers' Compensation Commission (Commission). The self-insured also appeals the conclusions of law that the injuries became compensable as a matter of law, that the self-insured waived the timely notice defense, and that the claimant had disability. There is no response in the appeal file from the claimant.

DECISION

Affirmed.

Section 409.021(a) requires that a carrier (the self-insured in this case) act to initiate benefits or to dispute compensability within seven days of first receiving written notice of an injury or waive its right to dispute compensability. See Continental Casualty Company v. Downs, 81 S.W.3d 803 (Tex. 2002); Texas Workers' Compensation Commission Appeal No. 030380-s, decided April 10, 2003. The hearing officer found that the self-insured waived its right to dispute due to the fact that the self-insured received written notice of injury on March 26, 2003, but did not file any dispute with the Commission until April 10, 2003. The self-insured argued that the time to initiate benefits or to dispute did not begin until its third party administrator first received notice of the claimed injury via the Employer's First Report of Injury or Illness (TWCC-1) on April 8, 2003. As the hearing officer noted, the Appeals Panel has previously rejected the argument that the time for waiver begins to run from the time an adjusting company, as opposed to the self-insured, first receives written notice. See *also* Texas Workers' Compensation Commission Appeal No. 951741, decided December 6, 1995; Texas Workers' Compensation Commission Appeal No. 941387, decided December 2, 1994; and Texas Workers' Compensation Commission Appeal No. 950522, decided May 11, 1995.

While the self-insured argues that this interpretation of Section 409.021 is incorrect, as shown by the “legislative intent” of the last Legislature in amending Section 409.021 to clarify that notice must be given to the third-party administrator rather than to the self-insured employer in order to constitute written notice to the insurance carrier, we note first that amended Section 409.021 applies to injuries that occur on or after September 1, 2003, and second, that Appeals Panel decisions have consistently rejected the self-insured’s proffered interpretation of Section 409.021. We decline to apply the amended provision to a claim with a date of injury prior to September 1, 2003. We perceive no error in the hearing officer’s determination that the self-insured waived its right to dispute compensability of the claimed injuries.

The self-insured asserts that it did not waive its rights under Section 409.021, because the claimant did not sustain an injury in the course and scope of employment, since her conditions are ordinary diseases of life. The self-insured cites Continental Casualty Company v. Williamson, 971 S.W.2d 108 (Tex. App.-Tyler 1998, no pet.). In Williamson, the court held that “if a hearing officer determines that there is no injury, and that finding is not against the great weight and preponderance of the evidence, the carrier’s failure to contest compensability cannot create an injury as a matter of law.” The Appeals Panel has recognized that Williamson is limited to situations where there is a determination that the claimant had no injury, as opposed to cases where there is an injury which was determined by the hearing officer not to be causally related to the claimant’s employment. Texas Workers’ Compensation Commission Appeal No. 020941, decided June 6, 2002. In this case, the hearing officer determined and the evidence shows that the claimant did have the conditions listed above, and such conditions meet the definition of injury found in Section 401.011(26). Because the self-insured waived its right to contest the claimed injury under Section 409.021, the hearing officer did not err in determining that the claimant’s conditions are compensable.

The self-insured appealed the conclusion of law relating to the claimant’s failure to timely notify the employer of the claimed injuries pursuant to Section 409.001. We held in Texas Workers’ Compensation Commission Appeal No. 022027-s, decided September 30, 2002, and numerous cases since then, that when a carrier (the self-insured in this case) loses its right to contest compensability by not complying with the requirements of Section 409.021(a), it loses its right to assert a defense under Section 409.002 based upon the claimant’s failure to give timely notice of injury to the employer.

The hearing officer did not err in applying the law or in making his factual determinations. The factual determinations involved questions 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)) and, as the trier of fact, resolves the conflicts and inconsistencies in the evidence, including the medical evidence (Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ)). In view of the evidence presented, we cannot conclude that the hearing officer’s determinations are so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

We affirm the decision and order of the hearing officer.

The true corporate name of the insurance carrier is **(a certified self-insured)** and the name and address of its registered agent for service of process is

**CT CORPORATION SYSTEM
1021 MAIN STREET
HOUSTON, TEXAS 77002.**

Michael B. McShane
Appeals Panel
Manager/Judge

CONCUR:

Gary L. Kilgore
Appeals Judge

Edward Vilano
Appeals Judge