

APPEAL NO. 040136
FILED MARCH 12, 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 16, 2003. The hearing officer determined that: (1) the appellant (carrier) waived its right to dispute the claimed injury by not timely contesting the injury in accordance with Section 409.021; (2) although not injured in the course and scope of employment, the respondent (claimant) has a compensable injury as of _____, due to carrier waiver; and (3) the claimant has disability from _____, through the date of the hearing. The carrier appeals these determinations based on new evidence and asserts legal error, citing Continental Casualty Company v. Williamson, 971 S.W.2d 108 (Tex. App.-Tyler 1998, no pet.). The claimant urges affirmance of the waiver determination and requests that the hearing officer's injury determination "be modified to state the [c]laimant's condition was aggravated in the course and scope of his employment." The claimant's brief was not timely filed as an appeal and, therefore, we will not address the claimant's contention that the hearing officer's injury determination was in error.

DECISION

Affirmed.

As stated above, the carrier appeals the hearing officer's decision based on new evidence. The carrier attached a stamped copy of its initial "cert-21" to its appeal, to show that it timely disputed the claimed injury in accordance with Section 409.021. The carrier argues that the document should be admitted as an "essential [Texas Workers' Compensation Commission (Commission)] record," citing prior Appeals Panel decisions. In Texas Workers' Compensation Commission Appeal No. 032619-s, decided November 13, 2003, we held that a "hearing officer should take official notice of the Commission's acknowledgement of a 'cert-21' offered as an exhibit at the hearing because it is, in effect, a Commission record." (Emphasis added.) See also Commission Advisory 2002-15, dated September 12, 2002 (providing that insurance carriers will be responsible for providing Commission acknowledged forms at any subsequent dispute). The carrier did not offer its file stamped "cert-21" as an exhibit at the hearing. Although the parties requested the hearing officer take official notice of the claim file in this case, a review of the file did not reveal the date upon which the carrier submitted its "cert-21" because the Commission does not retain copies of the "cert-21" forms, pursuant to Advisory 2002-15. Consequently, the carrier must now show that the document satisfies the requirements for newly discovered evidence. See Texas Workers' Compensation Commission Appeal No. 032450, decided November 6, 2003.

In determining whether documentation submitted for the first time on appeal constitutes new evidence, the Appeals Panel considers whether the evidence came to the knowledge of the party after the hearing, whether it is cumulative of other evidence

of record, whether it was not offered at the hearing due to a lack of diligence, and whether it is so material that it would probably result in a different decision. See Texas Workers' Compensation Commission Appeal No. 93536, decided August 12, 1993; Black v. Wills, 758 S.W.2d 809 (Tex. App.-Dallas 1988, no writ). Upon our review, the carrier has not shown that the document could not have been obtained prior to the hearing below. The evidence, therefore, does not meet the standard for newly discovered evidence and will not be considered for the first time on appeal.

The carrier also argues that it did not waive its right to dispute the claimed injury under Section 409.021, citing Williamson. 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 held 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. We decline to reconsider such holding. The hearing officer found that the claimant had a back injury as of _____, and the carrier failed to timely dispute such injury. Nothing in our review of the record indicates that these 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). Accordingly, the hearing officer properly concluded that the claimant sustained a compensable injury due to carrier waiver.

The decision and order of the hearing officer is affirmed.

The true corporate name of the insurance carrier is **DALLAS FIRE INSURANCE COMPANY** and the name and address of its registered agent for service of process is

**MR. DAVE WOODS
14160 DALLAS PARKWAY, SUITE 500
DALLAS, TEXAS 75254.**

Edward Vilano
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Robert W. Potts
Appeals Judge