

APPEAL NO. 040256
FILED MARCH 29, 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 (CCH) was held on January 12, 2004. The hearing officer resolved the disputed issues by deciding that: (1) the appellant (carrier) waived the right to dispute the compensability of the claimed injury by not timely contesting the injury in accordance with Sections 409.021 and 409.022; (2) that the date of injury was _____; (3) that the respondent (claimant) sustained a compensable injury because the carrier waived the right to dispute compensability of the claimed injury by not timely contesting the injury; (4) that the injury extends to and includes right carpal tunnel syndrome, right de Quervain's, left carpal tunnel syndrome, left trigger finger, and left ulnar nerve entrapment but not the left shoulder; (5) that the carrier is not relieved from liability under Section 409.002 because of the claimant's timely notification to her employer pursuant to Section 409.001; and (6) that the claimant has disability beginning September 29, 2002, and continuing through the date of the CCH. The carrier appealed, disputing the determinations of waiver, date of injury, timely notice, compensable injury, and disability. The claimant responded, urging affirmance of the disputed determinations.

DECISION

Affirmed.

DATE OF INJURY AND TIMELY NOTIFICATION TO EMPLOYER

Section 408.007 provides that the date of injury for an occupational disease is the date on which the employee knew or should have known that the disease may be related to the employment. Section 409.001 provides that an employee shall notify the employer of an injury that is an occupational disease not later than the 30th day after the date on which the employee knew or should have known that the injury may be related to the employment.

The fact that a claimant has pain while working has not automatically meant that the date of injury for a claimed occupational disease injury is the day the claimant knew that work activities caused pain. See Texas Workers' Compensation Commission Appeal No. 002012, decided October 16, 2000. The claimant testified at the CCH that on _____, she had a problem that was bothering her enough that she knew she had to go and have something done about it.

Conflicting evidence was presented on the issues of date of injury and timely reporting. The hearing officer is the trier of fact and is the sole judge of the relevance and materiality of the evidence and of the weight and credibility to be given to the evidence. Section 410.165(a). The trier of fact may believe all, part, or none of any witness's testimony because the finder of fact judges the credibility of each and every

witness, determines the weight to assign to each witness's testimony, and resolves conflicts and inconsistencies in the testimony. Taylor v. Lewis, 553 S.W.2d 153 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.); Texas Workers' Compensation Commission Appeal No. 93426, decided July 5, 1993. This is equally true regarding medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). There is sufficient evidence to support the hearing officer's determination of the date of injury and the claimant's timely notification to the employer.

CARRIER WAIVER AND COMPENSABLE INJURY

The hearing officer found that the carrier received written notice of the claimed injury on March 1, 2002, and that the carrier filed its Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) disputing the claim on March 13, 2002. The carrier does not dispute these findings but rather argues that it is inappropriate to retroactively apply Continental Cas. Co. v. Downs, 81 S.W.3d 803 (Tex. 2002). In Texas Workers' Compensation Commission Appeal No. 021944-s, decided September 11, 2002, the Appeals Panel applied the decision in Downs and noted that "On August 30, 2002, the Texas Supreme Court denied the carrier's motion for rehearing, and the Downs decision, along with the requirement to adhere to a seven-day 'pay or dispute' provision, is now final." In subsequent decisions, the Appeals Panel has rejected the contention that the decision in Downs should not be applied retroactively, noting that Texas Workers' Compensation Commission (Commission) Advisory 2002-15 (September 12, 2002), provides that "All previous Advisories issued by the Commission regarding this issue are superceded by this Advisory and the Supreme Court decision." Texas Workers' Compensation Commission Appeal No. 022274, decided October 17, 2002; Texas Workers' Compensation Commission Appeal No. 022582, decided November 25, 2002; see Texas Workers' Compensation Commission Appeal No. 030739, decided May 13, 2003. Thus, we find no merit in the carrier's argument that the hearing officer erred in applying Downs in this case.

The carrier also asserts that the decision in Continental Cas. Co. v. Williamson, 971 S.W.2d 108 (Tex. App.-Tyler 1998, no pet.), controls here. 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 did not have an injury, that is, no damage or harm to the physical structure of the body, as opposed to cases where there is an injury, which was determined not to be causally related to the claimant's employment. Texas Workers' Compensation Commission Appeal No. 020941, decided June 6, 2002; Appeal No. 030739, *supra*. In the instant case, although the hearing officer was not persuaded that the claimant sustained an injury while in the course and scope of her employment as a result of repetitious, physically traumatic activities, the hearing officer found that the claimant had an injury within the meaning of the 1989 Act and that finding is supported by the evidence. Thus, the Williamson decision is inapplicable.

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 her 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 the employer, arguing that the issue of the carrier's relief from liability of an otherwise compensable injury is not an issue of "compensability" and that Downs does not apply to statutory defenses such as timely notice to the employer. 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. Appeal No. 022027-s, *supra*.

DISABILITY

The record reflects that the claimant has already undergone two surgeries and may need additional surgical procedures. There is sufficient evidence to support the hearing officer's determination that the claimant has had disability from September 29, 2002, through the date of the CCH.

We affirm the decision and order of the hearing officer.

The true corporate name of the insurance carrier is **UNITED STATES FIDELITY & GUARANTY COMPANY** and the name and address of its registered agent for service of process is

**CORPORATION SERVICE COMPANY
800 BRAZOS
AUSTIN, TEXAS 78701.**

Margaret L. Turner
Appeals Judge

CONCUR:

Judy L. S. Barnes
Appeals Judge

Thomas A. Knapp
Appeals Judge