

APPEAL NO. 040387  
FILED APRIL 9, 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 November 3, 2003, and on January 22, 2004. With respect to the issues before her, the hearing officer determined that the respondent (claimant) did not sustain an injury in the course of scope of his employment on \_\_\_\_\_; that the appellant (carrier) waived its right to contest compensability, thus, the claimant's injury became compensable as a matter of law; and that the claimant had disability from April 23 to September 5, 2002, but that he did not have disability from September 6, 2002, through the date of the hearing. In its appeal, the carrier asserts error in the hearing officer's determinations that it waived its right to contest compensability of the \_\_\_\_\_, injury and that the claimant had disability from April 23 to September 5, 2002. The claimant did not appeal the determination that he did not sustain an injury in the course and scope of his employment and that his disability ended on September 5, 2002, and, as a result, those determinations have become final. Section 410.169.

DECISION

Affirmed, as reformed.

Initially, we note that the hearing officer's decision contains two typographical errors. In her discussion, the hearing officer states that the carrier filed a Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) on May 26, 2002, accepting a pulled muscle injury. That TWCC-21 is date-stamped as having been received by the Texas Workers' Compensation Commission on May 20, 2002; thus, we change the date in the hearing officer's discussion from May 26, 2002, to May 20, 2002. In addition, Finding of Fact No. 7 states that the "inability of Claimant to obtain and retain employment at wages equivalent to the preinjury wage from April 23, 2003, through September 5, 2002, was the result of the injury Claimant claimed occurred while working for Employer." From the hearing officer's discussion and Conclusion of Law No. 5 it is apparent that the beginning date of disability found by the hearing officer was April 23, 2002. Thus, we change the year in Finding of Fact No. 7 from 2003 to 2002.

The carrier argues that the hearing officer erred in determining that it waived its right to contest compensability in this case. This is not a case where the hearing officer determined that the carrier waived its right to contest compensability under Continental Cas. Co. v. Downs, 81 S.W.3d 803 (Tex. 2002). As noted above, the carrier initially accepted a compensable injury in this instance, by filing a TWCC-21 so doing on May 20, 2002, which was within seven days of the date the parties stipulated that the carrier received written notice of the claimed injury on May 14, 2002. Rather, the hearing officer determined that the carrier was not permitted to reopen the issue of compensability because the information upon which its contest was based was not newly discovered evidence. We note that if the hearing officer had determined that the

carrier had waived its right to contest compensability under Downs, she would not have considered the issue of whether the contest was based upon newly discovered evidence. Indeed, we have specifically held that a carrier is required to take some action within seven days of receiving written notice of a claimed injury in order to be entitled to reopen the issue of compensability based on newly discovered evidence. Texas Workers' Compensation Commission Appeal No. 032540, decided November 14, 2003; Texas Workers' Compensation Commission Appeal No. 031208, decided June 18, 2003. In this instance, the carrier filed a TWCC-21 accepting the claimed injury within seven days of having received written notice of the injury; thus, the reopening provision of Section 409.021(d) was still available to the carrier. However, the hearing officer determined that the carrier could not reopen compensability herein because she determined that the evidence upon which the contest was based was not newly discovered. That is, the hearing officer found that “[a] reasonable search and investigation by Carrier would have resulted in an earlier discovery of the different alleged dates of injury and witness statements alleged by carrier to be newly discovered evidence.” Having reviewed the record in this case, we cannot agree that the hearing officer erred in so finding. Accordingly, she did not err in determining that the carrier waived its right to contest compensability and that, as such, the claimant’s \_\_\_\_\_, injury became compensable as a matter of law.

The hearing officer likewise did not err in determining that the claimant had disability from April 23 to September 5, 2002. That issue presented a question of fact for the hearing officer to resolve. Johnson v. Employers Reinsurance Corp., 351 S.W.2d 936 (Tex. Civ. App.-Texarkana 1961, no writ). As the fact finder, the hearing officer resolves the conflicts and inconsistencies in the evidence and decides what facts the evidence has established. Texas Employers Ins. Ass'n v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). In this instance, the hearing officer was persuaded that the claimant sustained his burden of proving that he was unable to obtain and retain employment at wages equivalent to his preinjury wage for the period found because of his neck injury. The hearing officer was acting within her province as the fact finder in so finding. Nothing in our review of the record demonstrates that the challenged determination is so against the great weight of the evidence as to be clearly wrong or manifestly unjust; therefore, no sound basis exists for us to reverse that determination on appeal. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

As reformed, the hearing officer's decision and order are affirmed.

The true corporate name of the insurance carrier is **TRINITY UNIVERSAL INSURANCE COMPANY OF KANSAS, INC.** and the name and address of its registered agent for service of process is

**RONALD I. HENRY  
10000 NORTH CENTRAL EXPRESSWAY  
DALLAS, TEXAS 75230.**

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Elaine M. Chaney  
Appeals Judge

CONCUR:

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Thomas A. Knapp  
Appeals Judge

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Veronica L. Ruberto  
Appeals Judge