

APPEAL NO. 040413
FILED APRIL 19, 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 21, 2004. The hearing officer resolved the disputed issues by deciding that:

1. The respondent/cross-appellant (claimant) did not sustain a compensable occupational disease injury on (alleged date of injury);
2. The claimant suffers from an occupational disease of silicosis;
3. The date of injury is _____;
4. The appellant/cross-respondent (carrier) provided workers' compensation insurance for the employer on the date of injury;
5. The carrier would normally be relieved of liability under Section 409.002 because of the claimant's failure to timely notify his employer (of the claimed injury) pursuant to Section 409.001; however, the carrier waived the right to contest compensability of the claimed injury by not timely contesting the injury in accordance with Sections 409.021 and 409.022;
6. The claimant did not have disability as a result of an occupational disease.

The carrier appeals the hearing officer's determination that it waived its right to contest compensability of the claimed injury. The claimant appeals the hearing officer's determinations that he did not sustain a compensable occupational disease injury on (alleged date of injury); that the date of injury is _____; that he failed to timely notify the employer of the claimed injury; and that he did not have disability as a result of an occupational disease. Each party filed a response.

DECISION

We reverse the hearing officer's determination that the claimant did not sustain a compensable occupational disease and we render a decision that the claimant sustained a compensable occupational disease with a date of injury of _____, because the carrier waived its right to contest the compensability of the claimed injury. We affirm the hearing officer's determinations that the date of injury under Section 408.007 is _____; that the carrier waived its right to contest compensability of the claimed injury; that the claimant failed to timely notify the employer of the claimed injury; and that the claimant has not had disability.

We first address the claimant's appeal. The claimant has been diagnosed with silicosis. The hearing officer's findings of fact reflect that the claimant's silicosis, which

the hearing officer determined was an occupational disease, was not incurred while working for the employer. Whether the claimant sustained an occupational disease while working for the employer presented a fact question for the hearing officer to resolve from the evidence presented at the CCH. The issues of the date of injury, timely notice of injury to the employer, and disability also presented fact questions for the hearing officer to resolve. As to disability, the hearing officer found that as a result of the claimed injury, the claimant was not unable to obtain and retain employment at wages equivalent to the preinjury wage. Although there is conflicting evidence in this case, we conclude that the hearing officer's determinations that the claimant was not exposed to silica while working for the employer; that the date of injury under Section 408.007 is _____; that the claimant failed to timely notify his employer of his injury pursuant to Section 409.001; and that the claimant has not had disability as defined by Section 401.011(16) are supported by sufficient evidence and are not so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175 (Tex. 1986). The determination that the claimant did not timely notify the employer of his claimed injury does not result in the carrier being relieved of liability for the claimed injury under Section 409.002 because the Appeals Panel has held that when a carrier waives its right to contest compensability, that includes 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. Texas Workers' Compensation Commission Appeal No. 022027-s, decided September 30, 2002.

We next address the carrier's appeal. In Continental Casualty Company v. Downs, 81 S.W.3d 803 (Tex. 2002), the Texas Supreme Court concluded that under Sections 409.021 and 409.022, a carrier that fails to begin payments as required by the 1989 Act or send a notice of refusal to pay within seven days after it receives written notice of injury has not met the statutory requisite to later contest compensability. In Texas Workers' Compensation Commission Appeal No. 030380-s, decided April 10, 2003, the Appeals Panel noted that in Downs, the Texas Supreme Court stated "Taking some action within seven days is what entitles the carrier to a sixty-day period to investigate or deny compensability."

The hearing officer found that the carrier "was notified of the injury on May 21, 2003." The carrier contends that it first received written notice of the injury on May 22 or May 23, 2003. It is undisputed that during the morning of Wednesday, May 21, 2003, the claimant's attorney faxed to the carrier a copy of a letter of representation he wrote to the Texas Workers' Compensation Commission (Commission) along with an Employee's Notice of Injury or Occupational Disease (TWCC-41), and that the same morning the carrier faxed that correspondence back to the claimant's attorney with a note stating that the representation letter had identified, as the workers' compensation insurance carrier, a subsequent carrier (the carrier as of January 1, 2003, per the carrier's representation) and not the carrier in this case (it is undisputed that the carrier in this case provided workers' compensation insurance coverage to the employer during 2002). While it is not entirely clear, it appears that at 5:17 p.m. on May 21, 2003, the claimant's attorney refaxed the representation letter and TWCC-41 to the carrier, indicating on the fax cover letter the carrier's name. The carrier asserts that it did not

receive written notice of injury until after 5:00 p.m. on May 21, 2003, and therefore under Tex. W.C. Comm', 28 TEX. ADMIN. CODE § 102.3(c) and (d) (Rules 102.3(c) and (d)), and our decision in Texas Workers' Compensation Commission Appeal No. 030105, decided February 21, 2003, it did not receive written notice of injury until the next working day, Thursday, May 22, 2003. Among other things, the TWCC-41 provided the claimant's name; the employer's name; an (alleged date of injury), date of injury; and a statement of "workplace exposure to silicosis" with "lungs" as the affected body part. Since the evidence reflects that the claimant's TWCC-41 was actually received by the carrier the morning of May 21, 2003, and since the TWCC-41 contains all of the information required in Rule 124.1(a)(3) to constitute written notice of injury, we conclude that the carrier received written notice of injury the morning of May 21, 2003. As will be explained later in this decision, even if the carrier first received written notice of injury on May 22, 2003, its Payment of Compensation or Notice of Refused Disputed Claim (TWCC-21) dated May 30, 2003, in which it contested compensability, and which was date-stamped as being received by the Commission on May 30, 2003, was not filed within seven days of the date of first written notice of injury.

In evidence is a TWCC-21 dated May 23, 2003, in which the carrier certified that benefits would be paid as accrued. This is referred to as a "cert 21." See Appeal No. 030380-s, *supra*. The carrier asserts that it filed the cert 21 with the Commission on May 23, 2003. The cert 21 in evidence does not contain a Commission "acknowledgement." In other words, there is nothing to indicate on the cert 21 that it was sent to the Commission. Nor is there a Commission automated electronic acknowledgement of the cert 21 in evidence. The carrier asserts that the Commission's administrative procedure prevents a verification of the filing of the cert 21. We disagree. In Commission Advisory 2002-15, issued September 12, 2002, it was explained that the Commission would continue to provide an acknowledgement of a carrier's cert 21; that the acknowledged cert 21 would be returned to the carrier; and that since the Commission would not retain a copy of the cert 21, the insurance carrier will be responsible for providing the cert 21 acknowledged form at any subsequent dispute. Advisory 2002-15 also explained that as an alternative to filing the paper cert 21, the Commission will also continue to accept electronic submission of cert 21s via e-mail, and that the Commission will provide an automated electronic acknowledgement of the receipt of the carrier's submission of an electronic cert 21. In Appeal No. 030380-s, *supra*, the Appeals Panel noted the acknowledgement process for cert 21's and stated "We read the Advisory as clearly placing the burden on the carrier to prove that it has complied with the decision in the Downs case." Since the carrier presented no Commission-acknowledged cert 21 at the CCH, the hearing officer did not err in failing to find that the carrier filed a cert 21 with the Commission on May 23, 2003, as alleged by the carrier.

We note that in the section of the appeal with subheading "B. Confusion as to correct carrier," the carrier refers to the Commission's Dispute Resolution Information System (DRIS) sequence 9 dated July 10, 2003, which was in evidence. The carrier's only reason for referring to that DRIS entry is for the purpose of showing that there was confusion as to the correct carrier in support of its argument that its first written notice of

injury was on May 22, 2003. The sequence 9 DRIS entry of July 10, 2003, refers to both the carrier in this case and the subsequent carrier who, according to representations made at the CCH, began workers' compensation insurance coverage for the employer on January 1, 2003, and the DRIS note explains that the claimant's claim was "relinked" from the subsequent carrier to the carrier in this case per a TWCC-21 received on May 27, 2003. The DRIS note does not specify who filed the TWCC-21 or what was stated in the TWCC-21. Since the carrier does not assert in its appeal that the TWCC-21 referenced in the DRIS note is either the cert 21 that it alleges it filed on May 23, 2003, or its TWCC-21 dated May 30, 2003, as opposed to a TWCC-21 that may have been filed by the subsequent carrier, we will not, for purposes of this appeal, assume that the TWCC-21 referenced in the DRIS note is either the carrier's cert 21 or the carrier's May 30, 2003, TWCC-21.

In evidence is the carrier's TWCC-21 dated May 30, 2003, in which it contests compensability of the injury. The TWCC-21 notes that the carrier first received written notice of injury on May 23, 2003. As previously explained, the carrier's position at the CCH and its position on appeal is that it first received written notice of the injury on either May 22 or May 23, 2003. The TWCC-21 dated May 30, 2003, is date stamped as having been received by the Commission on May 30, 2003. The carrier asserts that since Monday, May 26, 2003, was Memorial Day, a national holiday listed in Texas Government Code Section 662.003(a), that day is not counted in its seven-day period, and thus its TWCC-21 contesting compensability was timely filed within seven days of its asserted first written notice of injury of May 22, 2003 (in this part of the carrier's appeal it alleges that it "did not receive notice of the alleged injury until May 22, 2003."). The carrier also asserts that since it filed a cert 21 on May 23, 2003, within the seven-day period, its May 30, 2003, TWCC-21 was timely filed within the sixty-day period.

We have already ruled that the hearing officer did not err in failing to find that the carrier filed a cert 21 on May 23, 2003, as alleged by the carrier. Since Section 409.021(a) (prior to its amendment effective September 1, 2003, regarding the "15th day), refers to the "seventh day," and does not refer to "working days," pursuant to Rule 102.3(b) the carrier had seven calendar days after receiving written notice of injury to take some action as described in Appeal No. 030380-s, *supra*. According to Rule 102.3(a)(3), unless otherwise specified, if the last day of any period is not a working day, the period is extended to include the next day that is a working day. Pursuant to Rule 102.3(b), Memorial Day is not a working day because it is a national holiday as defined in Texas Government Code Section 662.003(a). Monday, May 26, 2003, was Memorial Day and was not a working day. However, it was not the last day of the seven-day period for taking action, and thus the seven-day period was not extended under Rule 102.3(a)(3). Pursuant to Rule 102.3(a)(1), in counting a period of time measured by days, the first day is excluded and the last days is included. Using the previously determined date of first written notice of injury of May 21, 2003, the carrier had until Wednesday, May 28, 2003, to file its TWCC-21 contesting compensability (it was not entitled to the sixty-day period because of its failure to prove that it filed its cert 21 within the seven-day period). Pursuant to Rule 102.3(a)(1), the first day, that is May 21, 2003, which was the date of written notice, is excluded from the seven-day period,

and the last day, May 28, 2003, is included in the seven-day period (prior to being amended effective September 1, 2003, Section 409.021(a) provided in part that “not later than the seventh day after the date on which an insurance carrier receives written notice of an injury, the insurance carrier shall . . .”). Since the TWCC-21 dated May 30, 2003, contesting compensability was not filed with the Commission until May 30, 2003, it was not filed within the seven-day period and the carrier may not now contest compensability. *Downs, supra*. We note that even if the carrier did not receive written notice of injury until May 22, 2003, as alleged by the carrier, the May 30, 2003, filing of the TWCC-21 contesting compensability would not have been within the seven-day period for taking action because under that scenario, the seventh day would have been Thursday, May 29, 2003. The claimant’s injury became compensable as a matter of law due to the carrier’s waiver of its right to contest compensability. Appeal No. 022027-s, *supra*.

We reverse the hearing officer’s determination that the claimant did not sustain a compensable occupational disease and we render a decision that the claimant sustained a compensable occupational disease with a date of injury of _____, because of the carrier’s waiver of its right to dispute compensability. We affirm the hearing officer’s determinations that the date of injury under Section 408.007 is _____; that the carrier waived its right to contest compensability of the claimed injury; that the claimant failed to timely notify the employer of the claimed injury; and that the claimant has not had disability. The claimant’s failure to timely notify the employer of the claimed injury under Section 409.001 does not result in relieving the carrier of liability under Section 409.002 because the carrier waived its right to contest compensability. Appeal No. 022027-s, *supra*.

The true corporate name of the insurance carrier is **TRAVELERS INDEMNITY COMPANY** and the name and address of its registered agent for service of process is

**CT CORPORATION SYSTEM
350 NORTH ST. PAUL STREET
DALLAS, TEXAS 75201.**

Robert W. Potts
Appeals Judge

CONCUR:

Elaine M. Chaney
Appeals Judge

Veronica L. Ruberto
Appeals Judge