

APPEAL NO. 041515  
FILED AUGUST 2, 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 May 20, 2004. The hearing officer determined that: (1) the appellant (claimant) was the employee of (employer) at the time of his injury; (2) neither respondent 1 (carrier) nor respondent 2 (self-insured) provided workers' compensation coverage for the claimant's employer on \_\_\_\_\_; (3) neither the carrier nor the self-insured are liable under the 1989 Act or rules due to failure of their insureds to assure that the claimant's employer secured a replacement policy of workers' compensation coverage after November 19, 2002 [date the claimant's employer's workers' compensation policy lapsed]; (4) the claimant did not sustain a compensable injury on \_\_\_\_\_; (5) because the claimant did not sustain a compensable injury, the claimant did not have disability; (6) the claimant is not barred from pursuing workers' compensation benefits because of an election to receive benefits under an Occupational Injury Benefits Plan; and (7) the carrier and the self-insured have not waived the right to contest compensability of the claimed injury because they timely contested the injury in accordance with Sections 409.021 and 409.022. The claimant appealed the adverse determinations based on sufficiency of the evidence grounds and argues that as a matter of public policy the claimant should prevail. The carrier responded, urging affirmance of the hearing officer's determinations. The appeal file does not contain a response from the self-insured.

DECISION

Affirmed, as reformed.

It is undisputed that the claimant sustained an injury on \_\_\_\_\_, while in the course and scope of his employment. There was conflicting evidence on the disputed issues. We have reviewed the complained-of determinations and conclude that the issues in dispute 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). The hearing officer reviewed the record and resolved what facts were established. The claimant emphasized the same factors at the CCH that he emphasizes on appeal; however, the significance, or lack thereof, of those factors were a matter for the hearing officer to resolve. We conclude that the hearing officer's determinations are sufficiently supported by the record and are not 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).

With regard to carrier waiver, the hearing officer's Finding of Fact No. 12 states that both the carrier and the self-insured filed a dispute within 15 days of being notified in writing of the claimant's claim. It is undisputed that the claimant claimed a \_\_\_\_\_, injury. Section 409.021 provides, in pertinent part, that for injuries

occurring prior to September 1, 2003, an insurance carrier shall, not later than the seventh day after the receipt of written notice of an injury, begin the payment of benefits as required by the 1989 Act or notify the Texas Workers' Compensation Commission and the employee in writing of its refusal to pay benefits. See Continental Casualty Company v. Downs, 81 S.W.3d 803 (Tex. 2002). In evidence is the carrier's Payment of Compensation or Notice of Refused Disputed Claim (TWCC-21) dated January 6, 2004, that reflects it first received written notice of injury on December 29, 2003, and that it disputed the claim on January 6, 2004, more than seven days after receiving written notice. The self-insured's TWCC-21 dated February 6, 2004, states on an attached sheet that the self-insured received notice of the claimed injury on January 30, 2004, and that it disputed the claim on February 6, 2004, within seven days of receiving notice. The hearing officer erred in applying the provision of Section 409.021 which is effective for injuries occurring prior to September 1, 2003.

The hearing officer's Conclusion of Law No. 9, as it pertains to the carrier, that it did not waive the right to contest compensability of the claimed injury because it timely contested the injury in accordance with Sections 409.021 and 409.022 is wrong as a matter of law. The carrier did not timely contest compensability of the claimed injury within seven days. However, we have affirmed the hearing officer's determination that the carrier did not provide workers' compensation coverage for the employer on \_\_\_\_\_, and we have held that coverage is a threshold requirement for establishing liability of a carrier. In Texas Workers' Compensation Commission Appeal No. 022268-s, decided October 30, 2002, the Appeals Panel observed that in the case of Houston General Insurance Co. v. Association Casualty Insurance Co., 977 S.W.2d 634 (Tex. App.-Tyler 1998, no pet. h.), a carrier cannot waive into "coverage" for a person not employed by its insured on the date of injury by failing to observe the timely defense provisions of Section 409.021. Accordingly, the hearing officer's determination of the waiver issue is not reversible error.

We note that the hearing officer's Finding of Fact No. 9 states that the claimant timely notified his employer of his injury on \_\_\_\_\_, however, the hearing officer did not include this determination in his conclusions of law or decision. The timely notice was a certified issue in dispute. Accordingly, we reform the hearing officer's decision and order by adding a conclusion of law that conforms to Finding of Fact No. 9, that the claimant timely notified his employer of his injury on \_\_\_\_\_.

The hearing officer's decision and order are affirmed, as reformed.

The true corporate name of insurance carrier 1 is **EMPLOYERS MUTUAL CASUALTY COMPANY** and the name and address of its registered agent for service of process is

**HOWARD ORLA DUGGER  
2505 NORTH PLANO ROAD, SUITE 2000  
RICHARDSON, TEXAS 75082.**

The true corporate name of insurance carrier 2 is **(a self-insured governmental entity)** and the name and address of its registered agent for service of process is

**SUPERINTENDENT  
(ADDRESS)  
(CITY), TEXAS (ZIP CODE).**

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Veronica L. Ruberto  
Appeals Judge

CONCUR:

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Gary L. Kilgore  
Appeals Judge

CONCUR IN THE RESULT:

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Edward Vilano  
Appeals Judge