

APPEAL NO. 041570  
FILED AUGUST 26, 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 May 27, 2004. The hearing officer determined that the respondent/cross-appellant (carrier herein) waived its right to contest compensability by not timely contesting compensability in accordance with Sections 409.021 and 409.022; that the appellant/cross-respondent (claimant herein) is barred from pursuing a workers' compensation claim because of an election to receive benefits under his contract and collective bargaining agreement; that if the claimant were not barred from pursuing workers' compensation benefits, he would have disability from August 27, 2003, through May 27, 2004; and that if the claimant were not barred from pursuing workers' compensation benefits the carrier would be entitled to a credit against income benefits paid by the employer. The claimant appeals, contending that the hearing officer erred in determining that the claimant was barred from pursuing a workers' compensation claim due to an election of remedies in light of his finding of carrier waiver and in finding that the carrier would be entitled to a credit if the claimant were not barred from receiving workers' compensation benefits. There is no response from the carrier to the claimant's request for review in the appeal file. The carrier does file a request for review in which it argues that the hearing officer erred in finding carrier waiver. The claimant responds that the same arguments made by the carrier regarding carrier waiver were made and rejected by the Appeals Panel in Texas Workers' Compensation Commission Appeal No. 040347, decided April 1, 2004.

DECISION

Affirmed in part; reversed and rendered in part.

The claimant was a professional football player who was injured on \_\_\_\_\_, playing in a preseason football game. On August 27, 2003, the employer terminated the claimant's contract. The claimant filed a grievance for wrongful termination of his contract and the employer settled this grievance for \$450,000.

The carrier received written notice of the injury on September 23, 2003, and disputed compensability on February 4, 2004.

The carrier makes the same argument in regard to election of remedies made by the carrier in Appeal No. 040347, *supra*. The carrier argues that somehow the election provided for under Section 406.095 is not subject to carrier waiver. We rejected this argument in Appeal No. 040347 and reject it for the same reasons in the present case. We affirm the hearing officer's determination that the carrier waived the right to contest compensability.

However, as we made abundantly clear in Appeal No. 040347 and cases cited therein, a waiver of compensability is also a waiver of the affirmative defense of election of remedies. We note that a copy of our decision in Appeal No. 040347 was in evidence in the present case. Inexplicably, the hearing officer neither mentions nor follows Appeal No. 040347 in finding that the claimant is barred from pursuing workers' compensation benefits because of an election of remedies. We reverse the hearing officer's determination that the claimant is barred from pursuing workers' compensation benefits and render a new decision that the claimant is entitled to these benefits.

The hearing officer finds that if the claimant were not barred by election of remedies from pursuing workers' compensation benefits, he would have had disability from August 27, 2003, through May 27, 2004. Having reversed the hearing officer's determination that the claimant was barred from pursuing workers' compensation benefits, we render a decision based upon the hearing officer's finding that the claimant had disability from August 27, 2003, through May 27, 2004. We order the carrier to pay all accrued unpaid income benefits with applicable interest.

Finally, the hearing officer, without stating any basis whatsoever for doing so, determined that the claimant's settlement of his employment contract under his collective bargaining agreement entitled the carrier to a credit should the claimant not be barred from pursuing workers' compensation benefits. Finding no basis for this determination, we reverse it and render a decision that the carrier is not entitled to a credit. See Texas Workers' Compensation Commission Appeal No. 022707, decided December 10, 2002.<sup>1</sup>

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<sup>1</sup> We note that our decision in Appeal No. 022707, although not addressed by the hearing officer in his decision, was also in evidence in the present case.

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

**CT CORPORATION SYSTEMS  
350 NORTH ST. PAUL STREET  
DALLAS, TEXAS 75202.**

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Gary L. Kilgore  
Appeals Judge

CONCUR:

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Daniel R. Barry  
Appeals Judge

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Elaine M. Chaney  
Appeals Judge