

APPEAL NO. 022027-s
FILED SEPTEMBER 30, 2002

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 July 19, 2002. With respect to the issues before him, the hearing officer determined that the respondent (claimant) did not sustain an occupational disease injury in the course and scope of her employment; that the appellant (self-insured) waived the right to contest compensability by not contesting in accordance with Section 409.021; that the date of the alleged injury is _____; that if the self-insured had not waived its right to contest compensability, it would be relieved from liability for benefits in accordance with Section 409.002 because the claimant failed to timely report her alleged injury; and that the claimant is not barred from pursuing Texas workers' compensation benefits because of an election to receive benefits under a group health insurance policy. In its appeal, the self-insured argues that the hearing officer erred in determining that it waived the right to contest compensability, in determining that the claimant did not make an election of remedies, and in determining that the date of injury is _____. The appeal file does not contain a response from the claimant.

DECISION

Affirmed, as modified, on other grounds.

Initially, we will consider the self-insured's assertion that the hearing officer erred in determining that it waived its right to contest compensability. At the outset of the hearing, the attorney for the self-insured asked the hearing officer to take official notice of the existence of a date-stamped copy of the Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21). The hearing officer denied that request. During a recess of the hearing, the attorney for the self-insured contacted someone and had a date-stamped copy of the TWCC-21 faxed to the field office. The hearing officer admitted the date-stamped copy of the TWCC-21, which reflects receipt of the TWCC-21 in the central office of the Texas Workers' Compensation Commission on May 10, 2001, in evidence over the claimant's objection and that ruling has not been appealed. However, the hearing officer determined that "[t]he validity of the TWCC-21 form stamped May 10, 2001 appears to be doubtful because it seems odd that, if such a form were in existence, it was not produced at the benefit review conference, it was not exchanged with Claimant, and it was not produced at the beginning of the [hearing]." We find no evidence in the record to support the hearing officer's determination that the date-stamped copy of the TWCC-21 is invalid. Accordingly, we strike Finding of Fact No. 5 as being without evidentiary support in the record. Nevertheless, the hearing officer's determination that the self-insured waived its right to contest compensability is affirmed, albeit on other grounds.

The TWCC-21 reveals that the self-insured received its first written notice of the claimed injury on April 19, 2001. Accepting that the self-insured filed its contest of

compensability on May 10, 2001, that contest was not timely under Section 409.021(a). On August 30, 2002, the Texas Supreme Court denied the carrier's motion for rehearing in Continental Cas. Co. v. Downs, Case No. 00-1309, decided June 6, 2002, and, as such, the Downs decision, along with the requirement to adhere to the seven-day "pay or dispute" provision, is final. Texas Workers' Compensation Commission Appeal No. 021944, decided September 11, 2002; see also TWCC Advisory 2002-15 (September 12, 2002). In this case, the May 10, 2001, contest of compensability was filed more than seven days after April 19, 2001, and there was no evidence that the self-insured initiated benefits within seven days of April 19, 2001. As a result, the determination that the carrier waived its right to contest compensability is affirmed. The self-insured appealed Finding of Fact No. 10 and Conclusion of Law No. 6 both of which state "[I]f [self-insured] had not waived the right to dispute compensability of the claimed injury by not contesting the injury in accordance with [Section] 409.021, [self-insured] would be relieved from liability under [Section] 409.002." We cannot agree that the hearing officer erred in making that determination. As noted above, the carrier did not comply with the requirements of Section 409.021(a) by either initiating benefits or filing a notice of refusal. Thus, it has lost its right to contest compensability, which includes its right to assert a defense under Section 409.002 based upon the claimant's failure to give timely notice of her injury to her employer. Downs, *supra*.

In its appeal, the self-insured argues, in the alternative, that it did not waive the right to contest compensability in accordance with Continental Cas. Co. v. Williamson, 971 S.W.2d 108 (Tex. App.-Tyler 1998, no pet. h.). The self-insured's reliance on Williamson is misplaced. We have previously recognized 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 or disease, which was determined by the hearing officer not to have been causally related to the employment. See Texas Workers' Compensation Commission Appeal No. 990223, decided March 22, 1999, and Texas Workers' Compensation Commission Appeal No. 990135, decided March 10, 1999, and the cases cited therein. In this instance, there is damage or harm to the physical structure of the claimant's cervical spine. As such, the self-insured was not relieved of its duty to contest compensability of the cervical injury under Williamson and it became compensable as a matter of law pursuant to Section 409.021(a), because the self-insured's May 10, 2001, TWCC-21 was filed beyond the seven-day period following April 19, 2001, the undisputed date it received written notice of an alleged injury.

The self-insured also asserts error in the hearing officer's determination that the date of injury is _____, arguing that there can be no date of injury because the claimant did not sustain an injury in the course and scope. We find no merit in this assertion. There was a date of injury issue before the hearing officer and, as such, we cannot agree that the hearing officer erred in resolving that issue. In addition, there was a notice issue before the hearing officer and the resolution of that issue also required the hearing officer to determine a date of the alleged injury. We perceive no error.

Lastly, the self-insured argues that the hearing officer erred in determining that the claimant is not barred from pursuing workers' compensation benefits due to an election to receive group health benefits. The carrier's argument is without merit. In Valley Forge Ins. Co. v. Austin, 65 S.W.3d 371 (Tex. App.-Dallas 2001 no pet. h.), the Court of Appeals determined that election of remedies is no longer a viable defense under the 1989 Act. See *also* Texas Workers' Compensation Commission Appeal No. 021356, decided July 3, 2002, and Texas Workers' Compensation Commission Appeal No. 021487, decided July 24, 2002, applying the Austin decision. The hearing officer did not err in not finding an election.

Conclusion of Law No. 5 is inconsistent with Conclusion of Law No. 3. Conclusion of Law No. 5 states that the "Claimant did not sustain a compensable injury in the form of an occupational disease or in any other form." That determination is inconsistent with Conclusion of Law No. 3 which states that the "Carrier [self-insured] waived the right to dispute compensability of the claimed injury by not contesting the injury in accordance with Tex. Labor Code Ann. Sec. 409.021." Accordingly, we modify Conclusion of Law No. 5 to state that the "Claimant did not sustain an occupational disease injury in the course and scope of her employment." However, she did sustain a compensable injury, as her injury became compensable, as a matter of law, due to the self-insured's waiver of its right to contest compensability.

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

The true corporate name of the self-insured is **(SELF-INSURED)** and the name and address of its registered agent for service of process is

LJ
(ADDRESS)
(CITY), TEXAS (ZIP CODE).

Elaine M. Chaney
Appeals Judge

CONCUR:

Gary L. Kilgore
Appeals Judge

Michael B. McShane
Appeals Judge