

APPEAL NO. 030322  
FILED MARCH 27, 2003

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 14, 2003. The hearing officer resolved the disputed issues by deciding that: (1) the appellant (carrier) waived the right to contest compensability; (2) although the respondent (claimant) did not sustain an injury in the course and scope of employment with the employer, it is a compensable injury because the carrier waived the right to contest compensability; (3) although the claimant did not timely report an injury to the employer, she sustained a compensable injury because the carrier waived the right to contest compensability; and (4) the claimant had disability from March 27, 2002, through the date of the CCH. The carrier appealed the hearing officer's carrier waiver determination, arguing that the evidence clearly establishes that the Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) was filed in a timely manner in accordance with Continental Casualty Company v. Downs, 81 S.W.3d 803 (Tex. 2002). The carrier also appeals the hearing officer's disability determination. The claimant responded to the carrier's arguments, urging affirmance of the carrier waiver issue and the disability determination. There is no appeal of the hearing officer's determinations that the claimant did not sustain an injury in the course and scope of employment and did not timely notify the employer of the injury or have good cause for not timely reporting the injury. Those determinations are now final. Section 410.169

DECISION

Affirmed.

**CARRIER WAIVER OF THE RIGHT TO DISPUTE**

This case turns on whether the carrier waived the right to contest compensability of the claimed injury by not timely contesting an injury in accordance with Section 409.021 and the Downs decision. Section 409.021 provides that the insurance carrier is to begin the payment of benefits as required by the 1989 Act or notify the Texas Workers' Compensation Commission (Commission) and the claimant of its refusal to pay benefits within seven days after receiving written notice of the injury (the "pay or dispute" provision). Carrier's Exhibit F is a TWCC-21 which reflects that the carrier received written notice of the claim of injury on \_\_\_\_\_, and forwarded its denial of the claim to the Commission on April 30, 2002, as evidenced by the Commission date stamp, which is clearly not within the seven-day period mandated by Section 409.021. Carrier's Exhibit J is a second TWCC-21 reflecting a carrier written notice date of April 24, 2002, without a Commission date stamp. The employer's representative testified that she received notice of the injury on \_\_\_\_\_, but failed to forward this information to the carrier until April 24, 2002. The carrier's adjuster testified that she mistakenly forwarded the first TWCC-21 with a carrier notification date of \_\_\_\_\_, and subsequently, on April 30, 2002, faxed a second TWCC-21

with the correct date of April 24, 2002, and does not know why the second TWCC-21 has no Commission date stamp. The testimony by the carrier's witnesses was not deemed credible by the hearing officer.

The hearing officer found that the carrier first received written notice of the claimed injury on \_\_\_\_\_, and that the carrier did not begin paying temporary income benefits as required by the 1989 Act or dispute compensability within seven days of receiving written notice. The hearing officer also found that the TWCC-21 was filed on April 30, 2002. The hearing officer concluded that the carrier waived its right to contest the compensability of the claimed injury in accordance with Section 409.021.

The hearing officer, as finder of fact, is the sole judge of the relevance and materiality of the evidence, as well as of the weight and credibility that is to be given the evidence. Section 410.165 (a). The hearing officer found the evidence supporting the carrier's assertion that it filed a second TWCC-21 on April 30, 2002, with a carrier notification date of April 24, 2002, not to be credible. It was for the hearing officer, as trier of fact, to resolve the inconsistencies and conflicts in the evidence. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). The trier of fact may believe all, part, or none of the testimony of any witness. Aetna Insurance Company v. English, 204 S.W.2d 850 (Tex. Civ. App.-Fort Worth 1947, no writ). When reviewing a hearing officer's decision for factual sufficiency of the evidence we should reverse such decision only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986). Applying this standard, we find sufficient evidence to support the hearing officer's determination that the carrier waived the right to contest compensability according to Section 409.021.

## **DISABILITY**

Whether the claimant had disability is a factual question for the hearing officer to resolve. We have reviewed the disability determination and conclude that the hearing officer's decision is supported by sufficient evidence. Cain, *supra*.

We affirm the decision and order of the hearing officer.

The true corporate name of the insurance carrier is **AMERICAN HOME ASSURANCE COMPANY** and the name and address of its registered agent for service of process is

**CORPORATION SERVICE COMPANY  
800 BRAZOS, SUITE 750, COMMODORE 1  
AUSTIN, TEXAS 78701.**

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Michael B. McShane  
Appeals Panel  
Manager/Judge

CONCUR:

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Robert W. Potts  
Appeals Judge

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Edward Vilano  
Appeals Judge