

APPEAL NO. 030793-s
FILED MAY 16, 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 was held on February 24, 2003. The hearing officer determined that the respondent's (claimant) bilateral carpal tunnel syndrome (BCTS) injury was not sustained while in the course and scope of her employment; that the date of the injury was _____; that the claimant did not give timely notice of the injury to her employer; that the carrier waived its right to contest compensability of the claimed injury and, consequently, the injury is compensable; and that the claimant had disability from January 16, 2002, through the date of the hearing. The appellant (self-insured) appeals the waiver determination and its resulting effects on the compensability, disability, and timely-notice determinations. Additionally, the self-insured asserts that the hearing officer erred by failing to make a determination on the issue which was added by mutual agreement of the parties: whether the claimant is barred from pursuing workers' compensation benefits because of an election to receive benefits under another insurance policy. In her response, the claimant asserts that the self-insured's appeal is untimely and, alternatively, urges affirmance.

DECISION

Affirmed.

Records of the Texas Workers' Compensation Commission (Commission) reflect that a copy of the hearing officer's decision was received by the self-insured's Austin representative on March 17, 2003. Pursuant to Section 410.202(a), for an appeal to be considered timely, it must be filed or mailed within 15 days, excluding Saturdays, Sundays, and holidays listed in the Texas Government Code, of the date of receipt of the hearing officer's decision. The deadline for the self-insured to file an appeal was April 7, 2002, and it was faxed to the Commission on April 4, 2003. The self-insured's appeal was timely filed.

The hearing officer did not err in determining that the self-insured waived the right to contest compensability of the claimed injury by not paying or disputing the claim within seven days in accordance with Sections 409.021 and 409.022. The evidence reflects that the self-insured received written notice of the claimant's injury on November 13, 2001, and disputed the claim on January 11, 2002. In support of its position on the waiver issue, the self-insured relies on our decision in Texas Workers' Compensation Commission Appeal No. 023010-s, decided January 9, 2003. However, in Texas Workers' Compensation Commission Appeal No. 030380-s, decided April 10, 2003, we had occasion to revisit our prior decision and stated that we "hereafter decline to follow Appeal No. 023010-s." In Appeal No. 030380-s, we focused on language in the Supreme Court's decision in Continental Cas. Co. v. Downs, 81 S.W.3d 803 (Tex. 2002) and determined that the carrier is required to take some action within seven days of

receiving written notice of the injury in order to be entitled to the 60-day period to investigate a claim and deny compensability. In the present case, there is no evidence indicating that the self-insured took any action within seven days after receiving written notice of the claimed injury. Accordingly, we perceive no error in the hearing officer's determinations that the self-insured waived the right to contest compensability of the claimed injury and, therefore, the claimant sustained a compensable injury and had disability from January 16, 2002, through the date of the hearing. Additionally, by waiving its right to contest compensability, the self-insured cannot avail itself of the right to assert a timely-notice defense under Section 409.002. Texas Workers' Compensation Commission Appeal No. 022027-s, decided September 30, 2002.

The self-insured urges that Continental Casualty Company v. Williamson, 971 S.W.2d 108 (Tex. App.-Tyler 1998, no pet.) precludes a finding of waiver because the hearing officer "determined that the [c]laimant did not sustain an injury as the result of her work duties." We disagree. The Appeals Panel has stated that Williamson does not apply where there is evidence of injury (i.e. damage or harm to the body), even if the hearing officer ultimately finds that the injury did not arise out of the course and scope of employment. See Texas Workers' Compensation Commission Appeal No. 990432, decided April 16, 1999; Texas Workers' Compensation Commission Appeal No. 992365, decided December 6, 1999. As clearly the claimant has an injury, in the form of BCTS, the Williamson case cannot be relied upon to support the assertion that the self-insured did not waive its right to contest compensability of the claimed injury.

Finally, the self-insured argues that the hearing officer erred by not addressing the issue of whether the claimant is barred from pursuing workers' compensation benefits because of an election to receive benefits under another insurance policy. Irrespective of the waiver issue, the better practice would have been for the hearing officer to have made specific findings and a conclusion with regard to the election-of-remedies issue. Nevertheless, we affirm the decision and order of the hearing officer because, by waiving its right to contest compensability of the injury, the self-insured lost its right to assert the election-of-remedies defense. This determination is consistent with our decisions in Appeal No. 022027-s, *supra*; Texas Workers' Compensation Commission Appeal No. 022091, decided October 7, 2002, where we held that by waiving its right to contest compensability under Section 409.021, the carrier also loses the right to assert a defense under 409.004; and Texas Workers' Compensation Commission Appeal No. 030663-s, decided May 1, 2003, where we held that by waiving its right to contest compensability under Section 409.021, the carrier also loses the right to assert a defense under 406.032(1)(A).

The decision and order of the hearing officer are affirmed.

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

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

Chris Cowan
Appeals Judge

CONCUR:

Judy L. S. Barnes
Appeals Judge

Gary L. Kilgore
Appeals Judge