

APPEAL NO. 030841
FILED MAY 22, 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 February 27, 2003. The hearing officer resolved the disputed issues by deciding that the appellant/cross-respondent (claimant) sustained a compensable injury on _____; that the claimant has not had disability; that the claimant's compensable injury of _____, does not extend to and include a low back injury; that the respondent/cross-appellant (self-insured) is not relieved of liability under Section 409.002; that the self-insured is relieved of liability under Section 409.004; and that the self-insured waived the right to contest the claimed injury by not timely contesting the injury in accordance with Section 409.021. The claimant appealed the hearing officer's determinations that are adverse to her, and the self-insured appealed the hearing officer's determinations that are adverse to it. Each party filed a response.

DECISION

Affirmed in part and reversed and rendered in part.

The hearing officer determined that on _____, the claimant sustained injuries in the form of contusions during a self-defense class she took at the request of the self-insured. The hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). As the finder of fact, the hearing officer resolves the conflicts in the evidence and determines what facts have been established. We conclude that the hearing officer's determination that the claimant sustained a compensable injury is supported by sufficient evidence and is not so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175 (Tex. 1986).

We conclude that the hearing officer did not err in determining that the self-insured waived its right to contest compensability of the injury by not timely contesting the injury in accordance with Section 409.021. It is undisputed that the self-insured (the self-insured is an insurance carrier pursuant to Section 401.011(27)(C)) contested compensability more than seven days after it first received written notice of the injury, but within sixty days of such notice (the hearing officer found the notice date to be February 1, 2002, but it appears to be undisputed that written notice of injury was first received by the self-insured on January 7, 2002). There is no evidence that the self-insured took any action indicating that it had accepted the claim or intended to pay benefits within seven days of receiving written notice of the injury. In Texas Workers' Compensation Commission Appeal No. 030380-s, decided April 10, 2003, the Appeals Panel noted that in Continental Casualty Company v. Downs, 81 S.W.3d 803 (Tex. 2002), the Texas Supreme Court stated that "Taking some action within seven days is what entitles the carrier to a sixty-day period to investigate or deny compensability." The Appeals Panel stated that it would decline to follow Texas Workers' Compensation

Commission Appeal No. 023010-s decided January 9, 2003 and held that “to comply with the Supreme Court’s holding in Downs, the carrier has the burden to prove that it ‘took some action within seven days,’ and to present evidence indicating the action taken.” The Appeals Panel went on to state in Appeal No. 030380-s that “Since the carrier in this case presented no evidence that it took any action indicating that it had accepted the claim or intended to pay benefits within seven days of receiving written notice, we conclude that the hearing officer did not err in determining that the carrier waived its right to dispute compensability of the claimed injury.” In Texas Workers’ Compensation Commission Appeal No. 030663-s, decided May 1, 2003, the Appeals Panel cited Appeal No. 030380-s in determining that the carrier in that case had waived its right to contest compensability, and noted that a carrier cannot simply sit back and rely on the fact that benefits did not accrue prior to the date it filed its dispute and argue that it did not waive its right to contest compensability.

We conclude that the hearing officer did not err in determining that the self-insured is not relieved of liability under Section 409.002. Although we agree with the self-insured’s contention there is no evidence to support the hearing officer’s finding that the self-insured had “constructive notice” of the claimant’s injury on _____ (there is no evidence that the claimant reported the injury within 30 days or that the self-insured had actual knowledge of the injury), that does not relieve the self-insured of liability under the facts of the instant case because in Texas Workers’ Compensation Commission Appeal No. 022027-s, decided September 30, 2002, the Appeals Panel held that when a carrier loses its right to contest compensability by not complying with the requirements of Section 409.021(a), it loses its right to assert a defense under Section 409.002 based upon the claimant’s failure to give timely notice of injury to the employer.

We conclude that the hearing officer erred in determining that the self-insured is relieved of liability under Section 409.004 because of the claimant’s failure to timely file a claim for compensation within one year of the injury as required by Section 409.003. Although the claimant did not timely file her claim for compensation (the hearing officer found the filing date of the claim to be December 7, 2001, which appears to be incorrect because the claim is dated December 12, 2002), that does not relieve the self-insured of liability under the facts of this case because in Texas Workers’ Compensation Commission Appeal No. 022091-s, decided October 7, 2002, the Appeals Panel held that when a carrier loses its right to contest compensability, that includes its right to assert a defense under Section 409.004 based upon the claimant’s failure to timely file a claim for compensation.

Whether the compensable injury includes a low back injury presented a question of fact for the hearing officer to resolve from the evidence presented. We conclude that the hearing officer’s determination that the compensable injury does not extend to and include a low back injury is supported by sufficient evidence and is not so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. Cain, supra. Tex. W.C. Comm’n, 28 TEX. ADMIN. CODE § 124.3(c) (Rule 124.3(c)) provides that Section 409.021 does not apply to disputes of extent of injury. We do not

agree with the claimant's assertion that there was a recasting of a primary injury issue as an extent-of-injury issue because the claimant did not object to the addition of the extent-of-injury issue at the CCH and because the record reflects that the claimant made no complaints of back pain until six months after the claimed date of injury. We also cannot conclude that the hearing officer erred as a matter of law in applying the decision in Continental Casualty Company v. Williamson, 971 S.W.2d 108 (Tex. App.-Tyler 1998, no pet.) insofar as that decision would apply to the claimant's alleged low back injury. In essence, the hearing officer determined that the claimant has no low back injury. While there is conflicting evidence regarding whether the claimant has a low back injury, those conflicts in the evidence were for the hearing officer to resolve. We note that one magnetic resonance imaging (MRI) of the lumbar spine was reported to be within normal limits and that an electrodiagnostic study was reported as normal. Contrary diagnostic reports were in evidence. We conclude that the hearing officer's determination on the extent-of-injury issue is not so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. Cain, supra.

The claimant had the burden to prove that she had disability as defined by Section 401.011(16). The hearing officer determined that the claimant did not sustain any disability as a result of her compensable injury of _____. We conclude that the hearing officer's determination on the disability issue is supported by sufficient evidence and that it is not so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. Cain, supra.

We affirm the hearing officer's determinations that the claimant sustained a compensable injury on _____; that the claimant has not had disability as a result of the compensable injury; that the claimant's compensable injury of _____, does not extend to include a low back injury; that the self-insured has waived its right to contest the compensability of the claimed injury by not timely contesting the injury in accordance with Section 409.021; and that the self-insured is not relieved of liability under Section 409.002. We reverse the hearing officer's determination that the self-insured is relieved of liability under Section 409.004 and we render a decision that the self-insured is not relieved of liability under Section 409.004.

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

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

Robert W. Potts
Appeals Judge

CONCUR:

Judy L. S. Barnes
Appeals Judge

Chris Cowan
Appeals Judge