

APPEAL NO. 032540  
FILED NOVEMBER 14, 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 August 18, 2003. The hearing officer determined that: (1) the respondent (claimant) sustained a compensable injury on \_\_\_\_\_; (2) the claimant had disability beginning January 4, 2003, through the date of the hearing; (3) the appellant (carrier) waived the right to dispute compensability of the injury by not timely contesting the injury in accordance with Section 409.021; (4) the carrier could raise the compensability defense of intoxication based on evidence that could not reasonably have been discovered earlier; and (5) the injury did not occur while the claimant was in a state of intoxication, as defined in Section 401.013, from the introduction of a controlled substance. The carrier appeals the hearing officer's injury, disability, waiver, and intoxication determinations. The carrier did not appeal the hearing officer's determination that it could raise the compensability defense of intoxication based on newly discovered evidence. The claimant urges affirmance.

DECISION

Affirmed.

**CARRIER WAIVER**

The hearing officer did not err in determining that the carrier waived the right to dispute compensability of the injury by not timely contesting the injury in accordance with Section 409.021. Section 409.021 provides, in pertinent part, that an insurance carrier shall, not later than the seventh day after the receipt of written notice of an injury, begin the payment of benefits as required by the 1989 Act or notify the Texas Workers' Compensation Commission and the employee in writing of its refusal to pay benefits. In Texas Workers' Compensation Commission Appeal No. 030380-s, decided April 10, 2003, citing Continental Cas. Co. v. Downs, 81 S.W.3d 803 (Tex. 2002), we interpreted this requirement to mean that a carrier must take some action within seven days after receiving written notice of an injury, and we admonished that a carrier which does nothing and later asserts that it "intended to pay in accordance with the 1989 Act [when benefits accrued]," does so at its own risk. The parties, in the present case, stipulated that the carrier received written notice of the claimed injury on January 7, 2003, and submitted a "cert-21" on January 16, 2003, more than seven days after receipt of written notice. Accordingly, the hearing officer properly concluded that the carrier waived its right to dispute compensability of the injury.

The carrier argues that any waiver of compensability is "only effective for the time period between the date of injury and the date of the subsequent denial," because the hearing officer determined that it could raise the defense of intoxication based on newly discovered evidence pursuant to Section 409.021(d). Although the hearing officer's

determination allowing the carrier to raise the defense of intoxication was not appealed, we recognize our decision in Texas Workers' Compensation Commission Appeal No. 031208, decided June 18, 2003, which states that a carrier is required to take some action within seven days of receiving written notice of an injury *in order to be entitled to reopen the issue of compensability based on newly discovered evidence*. Notwithstanding the hearing officer's unappealed error, we decline to limit the carrier's liability in the manner asserted, when the carrier has failed to take some action within seven days after receipt of written notice of an injury pursuant to Section 409.021(a).

## **INTOXICATION**

The hearing officer did not err in determining that the injury did not occur while the claimant was in a state of intoxication, as defined in Section 401.013, from the introduction of a controlled substance. This determination involved a question of fact for the hearing officer to resolve. The hearing officer is the sole judge of the weight and credibility of the evidence (Section 410.165(a)) and, as the trier of fact, resolves the conflicts and inconsistencies in the evidence including the medical evidence (Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ)). In view of the evidence presented, the hearing officer could find that the claimant was not intoxicated at the time of the injury. Contrary to the carrier's assertion, nothing in our review of the record indicates that the hearing officer held the carrier to an improper burden of proof in reaching this determination. Accordingly, we cannot conclude that the hearing officer's intoxication determination is so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

The carrier asserts that the hearing officer demonstrated bias in reaching his intoxication determination. We find no support in the record for the carrier's contention that the hearing officer was motivated by or in any way demonstrated bias in favor of the claimant. The fact that the hearing officer developed the record and issued a decision adverse to the carrier does not, in our view, demonstrate bias but is the prerogative of the hearing officer. Accordingly, we find no basis to reverse the hearing officer's decision.

## **COMPENSABILITY AND DISABILITY**

The hearing officer did not err in determining that the claimant sustained a compensable injury on \_\_\_\_\_, and had disability from January 4, 2003, through the date of the hearing. The carrier's challenge to the compensability and disability determinations is premised upon the success of its arguments with regard to waiver and intoxication. Given our affirmance of the waiver and intoxication determinations above, we likewise affirm the hearing officer's compensability and disability determinations.

The decision and order of the hearing officer is affirmed.

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

**CORPORATION SERVICE COMPANY  
800 BRAZOS  
AUSTIN, TEXAS 78701.**

---

Edward Vilano  
Appeals Judge

CONCUR:

---

Chris Cowan  
Appeals Judge

---

Gary L. Kilgore  
Appeals Judge