

APPEAL NO. 021944-s
FILED SEPTEMBER 11, 2002

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A consolidated contested case hearing was held on June 19, 2002. In Docket No. 1, the hearing officer determined that the appellant (claimant) did not sustain a compensable injury on _____; that she did not have disability resulting from an injury sustained on _____; and that the respondent (carrier) is liable for payment of accrued benefits in this claim under Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 124.3 (Rule 124.3) for the period resulting from its failure to dispute or initiate the payment of benefits within seven days of the date it received written notice of the injury. In Docket No. 2, the hearing officer determined that the carrier has not waived the right to dispute compensability of the claimed injury because it timely disputed the claimed occupational disease, contesting the injury in accordance with Section 409.021; that the date of the claimed occupational disease injury is _____; that the claimant did not sustain a compensable injury in the form of an occupational disease; and that the claimant did not have disability resulting from an occupational disease injury sustained on _____. The claimant appealed the above determinations, asserting that the hearing officer improperly applied the recent Texas Supreme Court decision in Downs v. Continental Casualty Co., (Case No. 00-1309) and on sufficiency grounds. The carrier responded, urging affirmance.

DECISION

Affirmed in part, reversed and remanded in part, reversed and rendered in part.

In Docket No. 2, the claimant initially asserted that she sustained a specific compensable injury to her thoracic spine on _____, and was sent for medical treatment that same day. The claimant was initially diagnosed with a thoracic strain. The initial medical reports indicate that the claimant was also complaining of numbness and tingling in her hands. The claimant reported the injury to her employer and an Employer's First Report of Injury or Illness (TWCC-1) was generated on August 28, 2001, indicating that the claimant had sustained an upper back injury. It is undisputed that the carrier received written notice of the specific injury on August 28, 2001. On September 20, 2001, after reviewing the claimant's medical records the carrier filed a Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) in which it disputed both a specific injury and an occupational disease in the form of carpal tunnel syndrome (CTS). On December 12, 2001, the benefit review officer directed that a separate claim file be established when it became clear that the claimant was also asserting an occupational disease in the form of CTS with an _____, date of injury. The carrier filed a separate TWCC-21 disputing the occupational disease on December 17, 2001, but this document was filed in the existing claim file as the Texas Workers' Compensation Commission (Commission) had not yet established a new file. On February 4, 2002, the claimant filed an Employee's Notice of Injury or Occupational

Disease and Claim for Compensation (TWCC-41) in which she asserted that she had sustained an occupational disease in the form of bilateral CTS. At this point, Docket No. 2 was the claim file which related to the alleged occupational disease and Docket No. 1 was newly established to deal with the claimant's claimed specific injury.

In Docket No. 1 the claimant asserts that the carrier has waived its right to contest compensability of the claimed specific injury based upon the recent Texas Supreme Court decision in Downs, supra. It is undisputed that the carrier received written notice of the claimed specific injury to the claimant's thoracic spine on August 28, 2001, and that it neither initiated payment of benefits or denied the claim until September 20, 2001, which is over seven days. The Commission has previously determined that the holding in Downs would not be followed until the motion for rehearing process has been exhausted. See TWCC Advisory No. 2002-08 (June 17, 2002). On August 30, 2002, the Texas Supreme Court denied the carrier's motion for rehearing, and the Downs decision, along with the requirement to adhere to a seven-day "pay or dispute" provision, is now final.

Based upon the above, we find that the hearing officer erred in determining that the carrier did not waive its right to contest the compensability of the claimed specific injury to the claimant's thoracic spine and that the claimant did not sustain a compensable injury to her thoracic spine. Based upon the now final decision in Downs, we reverse the hearing officer's determination that the claimant did not sustain a compensable injury to her thoracic spine and render a new decision that the claimant did sustain a compensable injury to her thoracic spine. Because we find that the claimant did sustain a compensable injury to her thoracic spine on _____, we remand the case back to the hearing officer solely to determine whether or not the claimant had disability due to her compensable thoracic spine injury.

As to Docket No. 2, the hearing officer did not err in determining that the claimant did not sustain a compensable injury in the form of an occupational disease (bilateral CTS) on _____. On December 12, 2001, it was directed that a new file be established to address the claimant's claimed occupational disease. On December 17, 2001, the carrier filed a TWCC-21 specifically disputing the claimed occupational disease. As such, we find that the carrier timely disputed the claimed injury and it did not waive its right to contest compensability.

What remains is a sufficiency of the evidence appeal of the hearing officer's injury and disability determinations as they relate to the claimed occupational disease. We have reviewed the complained-of determinations and find that the hearing officer's Decision and Order is supported by sufficient evidence to be affirmed. The issues presented questions of fact for the hearing officer. The hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a); Texas Employers Ins. Ass'n v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). There was conflicting evidence presented on the disputed issues. It was for the hearing officer, as the trier of fact, to resolve the conflicts and inconsistencies in the evidence and to determine what facts had been established. Garza v. Commercial Ins. Co., 508

S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). Nothing in our review of the record reveals that the hearing officer's determinations are so contrary to the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. As such, no sound basis exists for us to reverse those determinations on appeal. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

The hearing officer's decision and order that the claimant did not sustain a specific compensable injury to her thoracic spine on _____, is reversed and a new decision is rendered that the claimant did sustain a compensable injury to her thoracic spine. The hearing officer's decision and order that the claimant did not have disability as a result of her thoracic spine injury is reversed and remanded back to the hearing officer to determine whether or not the compensable injury resulted in disability. The hearing officer's decision and order that the claimant did not sustain a compensable occupational disease injury in the form of bilateral CTS on _____, is affirmed.

Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Commission's Division of Hearings, pursuant to Section 410.202 which was amended June 17, 2001, to exclude Saturdays and Sundays and holidays listed in Section 662.003 of the Texas Government Code in the computation of the 15-day appeal and response periods. See Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

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.**

Michael B. McShane
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Philip F. O'Neill
Appeals Judge