APPEAL NO. 030284-s
FILED MARCH 18, 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 8, 2003, with (hearing officer 2). Hearing officer 2 stated that the disputed issues were: (1) whether the Texas Workers' Compensation Commission (Commission) has jurisdiction to readdress the issue of compensability; (2) if the Commission has jurisdiction, whether the appellant (claimant) sustained a compensable injury; and (3) if the Commission has jurisdiction, whether the respondent (self-insured) waived the right to contest compensability. Hearing officer 2 decided that the Commission does not have jurisdiction to determine the issues in the case. The claimant appealed and the self-insured responded.

DECISION

Affirmed.

PROCEDURAL BACKGROUND

On June 21, 2002, a CCH was held with (hearing officer 1). The issues at that CCH were: (1) whether the claimant sustained a compensable injury on _____; (2) whether the claimant had disability; and (3) whether the self-insured is relieved of liability under Section 409.002 because of the claimant's failure to timely notify the self-insured pursuant to Section 409.001. In a decision and order signed on June 21, 2002, hearing officer 1 decided: (1) the claimant did not sustain a compensable injury on _____; (2) the claimant did not have disability because she did not sustain a compensable injury; and (3) the self-insured is not relieved of liability under Section 409.002 because the claimant timely notified the self-insured pursuant to Section 409.001. The order section of hearing officer 1's decision states "The Self-Insured is not liable for benefits and it is so ordered." Hearing officer 1 noted in the decision that he refused the claimant's request to add an issue on carrier waiver under Continental Casualty Company v. Downs, 81 S.W.3d 803 (Tex. 2002) because the requested issue was not raised at or before the benefit review conference. Hearing officer 1 noted that the case arguably was a Downs situation, but also noted that the Commission was not following the Downs decision as of the date of the CCH. *See* Texas Workers' Compensation Commission Appeal No. 021944-s, decided September 11, 2002, where the Appeals Panel applied the Downs decision, noting that on August 30, 2002, the Texas Supreme Court denied the carrier's motion for rehearing and the Downs decision became final.

The claimant appealed the decision of hearing officer 1 to the Appeals Panel. In Texas Workers' Compensation Commission Appeal No. 021909, decided September 16, 2002, the Appeals Panel noted that the claimant appealed the injury and disability determinations on sufficiency grounds and that the claimant asserted that hearing

officer 1 erred in denying her request to add the issue of carrier waiver pursuant to Downs. The Appeals Panel held that the decision and order of hearing officer 1 became final under Section 410.169 because the claimant's appeal was not timely filed with the Commission.

At the January 8, 2003, CCH heard by hearing officer 2, the parties represented that the Appeals Panel decision in Appeal No. 021909 had not been appealed to the district court.

CLAIMANT'S APPEAL

The claimant asserts that the actual issue to be decided by hearing officer 2 was whether the self-insured timely filed its notice of denial or initiated payment of benefits as required by Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 124.3 (Rule 124.3) "as interpreted by *Downs*." We note that Downs construed and applied Sections 409.021 and 409.022 of the 1989 Act and did not interpret Rule 124.3, and that at the January 8, 2003, CCH the claimant argued that the self-insured waived its right to contest compensability under Downs. The claimant contends that the evidence is sufficient to show that the self-insured "violated its mandate" under Rule 124.3 (entitled Investigation of an Injury and Notice of Denial/Dispute); that hearing officer 2's determination that the claimant was requesting a redetermination of compensability is clearly erroneous; and that hearing officer 2's refusal to issue a decision on the issue of carrier waiver is a clear violation of the claimant's legal rights to redress of all valid issues. The claimant requests that the Appeals Panel find that the self-insured failed to meet its "statutory mandate" under Rule 124.3 and, therefore, waived its right to contest compensability. In the alternative, the claimant requests that the Appeals Panel find that a decision on the merits has not been made on the issue of carrier waiver, and remand the case to hearing officer 2 for such a determination.

We note that the claimant attaches two letters to her appeal that were not offered at the CCH or made a part of the CCH record. We do not consider those letters on appeal because Section 410.203(a)(1) provides that the Appeals Panel shall consider the record developed at the CCH and because the letters have not been shown to constitute newly discovered evidence. In Jackson v. Van Winkle, 660 S.W.2d 807 (Tex. 1983), the court stated that it is incumbent upon a party who seeks a new trial on the ground of newly discovered evidence to satisfy the court that the evidence has come to his or her knowledge since the trial; that it was not owing to the want of due diligence that it did not come sooner; that it is not cumulative; and that it is so material that it would probably produce a different result if a new trial were granted. We do not believe that the two letters meet the requirements for newly discovered evidence. In particular, we note that the letters do not address the particular fact situation under consideration in the instant case, that is, there is no mention in the letters that a prior CCH decision determined that the claimant did not sustain a compensable injury and that the self-insured was not liable for benefits or that the CCH decision became final because no timely appeal was filed.

RESOLUTION

In light of the prior CCH decision, which was not timely appealed, we conclude that hearing officer 2 did not err in determining that the Commission does not have jurisdiction to decide the issues of whether the claimant sustained a compensable injury and whether the self-insured waived its right to contest compensability. Section 410.169 provides that a decision of a hearing officer regarding benefits is final in the absence of a timely appeal by a party and is binding during the pendency of an appeal to the Appeals Panel. Since the claimant did not file a timely appeal with the Appeals Panel of hearing officer 1's decision and order that she did not sustain a compensable injury and that the self-insured is not liable for benefits, that decision and order became final. Furthermore, Section 410.205 provides that a decision of an Appeals Panel regarding benefits is final in the absence of a timely appeal for judicial review. The parties represented that judicial review of Appeal No. 021909, *supra*, holding that the claimant's appeal was not timely filed, was not sought.

Hence, hearing officer 1's decision and order that the claimant did not sustain a compensable injury and that the self-insured is not liable for benefits is final. It is clear that the claimant wants to have a decision in her favor on a carrier waiver issue because when a carrier waives its right to contest compensability of the injury, the injury becomes compensable as a matter of law, provided that there is physical harm or damage to the body, and the carrier is liable for workers' compensation benefits. Texas Workers' Compensation Commission Appeal No. 023017, decided January 27, 2003. Such a decision would be contrary to the prior decision in this case since it has already been finally determined that the self-insured is not liable for benefits because the claimant did not sustain a compensable injury. Thus, we disagree with the claimant's assertion that she is not requesting that the issue of compensability be redetermined. Accordingly, we find that hearing officer 2 did not err in his determinations.

We believe that our decision is supported by the Texas Supreme Court's decision in Lumbermens Mutual Casualty Co. v. Manasco, 971 S.W.2d 60 (Tex. 1998), wherein the court held that the claimant in that case could not use evidence of a substantial change in condition to reopen proceedings on the issue of his impairment rating (IR) after he failed to appeal the CCH decision on his IR and that CCH decision became final under Section 410.169. Although the following two Appeals Panel decisions were not cited by the parties or by the hearing officer, we note that in Texas Workers' Compensation Commission Appeal No. 000204, decided March 15, 2000, the Appeals Panel held that the Commission did not have jurisdiction to determine whether good cause existed to relieve a claimant from the effects of a CCH agreement on the claimant's IR because the CCH decision that determined the claimant's IR based on the agreement had become final under Section 410.169 when the CCH decision was not timely appealed to the Appeals Panel. We believe that our decision in Appeal No. 000204 supports our decision in this case because it has already been finally determined that the self-insured is not liable for benefits. In Texas Workers' Compensation Commission Appeal No. 020432-s, decided April 10, 2002, the majority

opinion allowed a carrier to reopen the issue of a claimant's entitlement to lifetime income benefits (LIBs) despite a prior unappealed CCH decision that found the claimant entitled to LIBs. The dissenting opinion in Appeal No. 020432-s succinctly pointed out that the unappealed prior CCH decision awarding LIBs had become final under Section 410.169 and cited the Manasco decision in support of an affirmance of the hearing officer's decision that the Commission did not have the authority to reopen the final determination that the claimant is entitled to LIBs. The majority opinion in Appeal No. 020432-s was apparently based on a determination that the Commission has continuing jurisdiction to resolve disputes over LIBs because those benefits may be paid for a claimant's lifetime. Since the instant case does not involve a question of continuing jurisdiction over LIBs, we do not believe that Appeal No. 020432-s is dispositive of the issues in the instant case.

We affirm hearing officer 2's decision and order.

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

SUPERINTENDENT
(ADDRESS)
(CITY), TEXAS (ZIP CODE).

_____
Robert W. Potts
Appeals Judge

CONCUR:

_____
Daniel R. Barry
Appeals Judge

_____
Michael B. McShane
Appeals Panel
Manager/Judge