APPEAL NO. 030380-s
FILED APRIL 10, 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 December 19, 2002. The hearing officer determined that the respondent (claimant) sustained a compensable injury in the form of an occupational disease with a date of injury of _____; that the appellant (carrier) is not relieved from liability under Section 409.002 because of the claimant's failure to timely notify her employer pursuant to Section 409.001; and that the carrier waived the right to contest compensability of the claimed injury by not timely contesting the injury in accordance with Sections 409.021 and 409.022. The carrier appealed, asserting both that the hearing officer committed legal error in reaching her decision and that the decision is not supported by the evidence. The file does not contain a response from the claimant.

DECISION

Affirmed.

We first discuss the carrier's assertion that the hearing officer erred in determining that the carrier waived the right to contest compensability of the claimed injury by not contesting the injury in accordance with Sections 409.021 and 409.022, and by failing to comply with the Texas Supreme Court's decision in Continental Casualty Company v. Downs, 81 S.W.3d 803 (Tex. 2002). It is the carrier's position that because there was no disability in this case, no "indemnity benefits" had accrued. The carrier essentially argues that because no benefits had accrued or become due, it had no obligation to take any action (within seven days) or give any notice of the action it intended to take. The carrier cites Texas Workers' Compensation Commission Appeal No. 023010-s, decided January 9, 2003, and argues that it is in the same position as the carrier in that case.

We have now had occasion to review and write on several cases involving the application of the Downs decision. The holding in Downs is contained in the first paragraph of the majority decision and it states:

> We conclude that under Texas Labor Code §§ 409.021 and 409.022, a carrier that fails to begin benefit payments as required by the Act or send notice of refusal to pay within seven days after it receives written notice of injury has not met the statutory requisite to later contest compensability.

We believe it is important at this time to reiterate some points made in the closing paragraphs of the Downs decision:

> That construction [advanced by the carrier and by the Texas Workers' Compensation Commission (Commission)] has the perverse effect of

> encouraging a carrier not to file a notice at all—the carrier that does nothing may investigate for sixty days and then deny compensation for any reason. And that carrier, who has violated the statute's language, is in the same position as a carrier who initiates benefits. But the carrier that fulfills its statutory duty to send a notice of refusal and puts the wrong reason in the notice can deny compensation for that reason only. [Citation omitted.]
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> The Legislature mandated that carriers must initiate benefits as required by the Workers' Compensation Act or notify a claimant that it refuses to pay within seven days of when the carrier receives notice of the injury. **Taking some action within seven days** is what entitles the carrier to a sixty-day period to investigate or deny compensability. [Emphasis added.]

We note that the Supreme Court affirmed the court of appeals' judgment, and the lower court had dealt with the concerns we have in this case by saying:

> Our construction of the statute merely requires a carrier to complete and file a form [Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21)] on or before the seventh day after the date it receives written notice of an injury. In TWCC-21, a carrier must state either that it is refusing to pay any benefits because it denies compensability of the injury . . . or that it will pay one or more types of benefits as required by the Workers' Compensation Act. *i.e.*, if, as, and when a benefit accrues. . . . the carrier will simply be required to state whether it will pay income benefits (or any other type of benefit) if, as, and when they accrue.

The Supreme Court recognized that it was the Legislature's express intent that injured workers receive either prompt payment or notice of denial of compensation claims.

The Commission recognized the potential for problems in situations where benefits do not accrue within the seven-day period after the carrier receives written notice. In Texas Workers' Compensation Commission Appeal No. 021153-s, decided June 27, 2002, we stated:

> Because income benefits do not accrue until the eighth day of disability, Section 408.082, and it is practically unrealistic for a carrier to receive, process, and make payment for medical care within the first seven days to pay medical benefits, carriers cannot begin the payment of benefits in many cases within seven days as required. Their only alternative is to agree to make such payments as they accrue and are due. The Commission, through Advisory 2002-08 dated June 17, 2002, has now provided a specific means for a carrier to indicate agreement to a claim with the intent to pay benefits and preserve the right to later deny the claim before the 60th day. Advisory 2002-08 provides in part:

> Also, an insurance carrier may receive an acknowledgment from TWCC of the insurance carrier's agreement to pay benefits as they accrue and are due. The insurance carrier may check the appropriate box in item number 1 on a TWCC-21 form (hereinafter referred to as "cert 21s") and forward the completed form to Texas Workers' Compensation Commission, 4000 S. IH-35, Cert 21s - MS 93A, Austin, Texas 78704. The form will be acknowledged as temporarily received by TWCC with a special TWCC stamp and then the form will be returned to the insurance carrier via the insurance carrier's representative's box at TWCC's Central Office. The TWCC will acknowledge and return the cert 21s received since the August 16th court decision and will return them to the insurance carrier representatives. The TWCC will not retain copies of these cert TWCC 21 forms since they are not required to be filed by Commission rules.

We recognize that Advisory 2002-08, cited in Appeal No. 021153-s, was superceded by Advisory 2002-15, dated September 12, 2002. Advisory 2002-15 was issued by the Commission soon after the Downs case became final, and continued the practice of providing an acknowledgement of a carrier's agreement to pay benefits. The Advisory provided:

> The Commission will continue to provide an acknowledgement of an insurance carrier's agreement to pay benefits as they accrue and are due. The insurance carrier must check the appropriate box in item number 1 on a TWCC-21 form (hereinafter referred to as "cert 21s") and forward the completed form to Texas Workers' Compensation Commission, 4000 S. IH-35, Cert 21s - MS 93A, Austin, Texas 78704. The acknowledged form will be returned to the insurance carrier via the insurance carrier's representative's box at TWCC's Central Office. Since the TWCC will not retain copies of these cert TWCC 21 forms, insurance carriers will be responsible for providing the TWCC acknowledged forms at any subsequent dispute.

We read the Advisory as clearly placing the burden on the carrier to prove that it has complied with the decision in the Downs case. The carrier can comply with Downs by submitting a dispute within seven days. In addition, the Commission has provided a method (the "cert 21" procedure) by which the carrier can establish that they have "taken some action within seven days." Since there has not been a legislative change to this section of the 1989 Act nor has there been a Commission rule promulgated to require an insurance carrier to notify the Commission or the claimant of its intent to pay benefits as they accrue, we suggest that a carrier should take advantage of the "cert 21" procedure. A carrier that chooses not to utilize the "cert 21" procedure in instances where no benefits have accrued within seven days of receiving written notice of the

injury, and then later tries to assert that they "intended to pay in accordance with the 1989 Act but no benefits were due," does so at its own risk.

Returning to the facts of this case, the record reflects that the carrier received their first written notice of the claimed injury on May 17, 2002, and filed their TWCC-21 with the Commission on July 12, 2002, a date which is clearly not within seven days of the date the carrier received its first written notice of the injury. Box 43 of the carrier's TWCC-21 indicates the grounds upon which the carrier disputed the claim. It states the following:

> [Carrier] disputes an injury or occupational disease in course & scope of employment. [Claimant's] current complaints are that of an ordinary disease of life. [Claimant] did not timely notify the employer of injury. Carrier denies claim & entitlement to [temporary income benefits, impairment income benefits, supplemental income benefits] & medical treatment. Carrier reserves its right to further amend this dispute based on additional evidence that might be discovered.

The claimant did not allege any period of disability as a result of her injury at the hearing on this matter.

The carrier argues that because there was no disability, it had no obligation to take any action or give any notice of the action it intended to take. We disagree. The Supreme Court said: "**Taking some action within seven days** is what entitles the carrier to a sixty-day period to investigate or deny compensability. [Emphasis added.]" In Appeal No. 023010-s, *supra*, we found that the self-insured initiated income benefits as required by the 1989 Act, and concluded that, based upon the language contained in the 1989 Act and the rules, the self-insured had not waived the right to contest compensability of the claimed injury. However, we realize from subsequent CCHs, and from appeals being brought after those CCHs, that our opinion in Appeal No. 023010-s did not serve the purpose of clarifying the law after the Downs case. We hereafter decline to follow Appeal No. 023010-s. In the case before us, the carrier presented no evidence, nor does it argue on appeal, that it took any action on this claim within seven days of receiving its first written notice of the claimed injury as required by the Downs decision. As noted earlier, in Appeal No. 023010-s, our emphasis was on the term "as required by the 1989 Act," instead of emphasizing the requirement to "take some action within seven days." We hold 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. This avoids the "perverse effect" described in Downs. 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.

Turning to the hearing officer's decision on the merits of the case, 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 disputed issues of injury, date of injury, and timely notice of the injury to the employer 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 Insurance Association 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 Insurance Company of Newark, New Jersey, 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 regarding injury, date of injury, and timely notice to the employer 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).

We affirm the decision and order of the hearing officer.

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

CT CORPORATION SYSTEM
350 NORTH ST. PAUL STREET
DALLAS, TEXAS 75201.

_____
Michael B. McShane
Appeals Panel
Manager/Judge

CONCUR:

_____
Gary L. Kilgore
Appeals Judge

_____
Robert W. Potts
Appeals Judge