NO. 07-0766

In the Supreme Court of Texas

SOUTHERN INSURANCE COMPANY,

Petitioner,

v.

MICHAEL BREWSTER,

Respondent.

ON PETITION FOR REVIEW FROM THE FIRST DISTRICT COURT OF APPEALS IN HOUSTON, TEXAS
NO. 01-06-00029-CV

RESPONSE TO PETITION FOR REVIEW

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STATEMENT OF THE CASE

Nature of the Case:	Pursuant to Texas Labor Code § 410.253, Petitioner Southern Insurance Company sought judicial review in the district court of a Texas Workers' Compensation Commission decision requiring Petitioner Southern Insurance Company to pay workers' compensation benefits to Respondent Michael Brewster.
Trial Court:	Judge Ken Wise, 152nd Judicial District Court, Harris County, Texas.
Trial Court's Disposition:	The trial court granted Respondent Michael Brewster's summary judgment motion and entered judgment in favor of Respondent Brewster on November 11, 2005.
Parties in the Court of Appeals:	The appellant is Southern Insurance Company. The appellee is Michael Brewster.
Court of Appeals:	First Court of Appeals in Harris County, Texas; Cause No. 01-06-00029-CV.
Court of Appeals Panel:	Chief Justice Radack; Justice Jennings; Justice Bland.
Court of Appeals Opinion:	Available at 2007 WL 1953903 (Tex. App.—Houston [1st Dist.] July 6, 2007).
Court of Appeals Disposition:	The court of appeals affirmed the trial court's judgment, finding that the trial court properly held that Petitioner's failure to contest Respondent's claim for compensation within the statutory time period for contesting or accepting a claim precluded Petitioner from contesting Respondent's claim based on the untimeliness of Respondent's claim. Petitioner filed a motion for rehearing that was denied on August 6, 2007.

REFERENCE CITATION GUIDE

The Parties

This Brief may refer to the parties as follows:

Appellant Southern Insurance Company	"Petitioner" or "Southern"
Appellee Michael Brewster	"Brewster" or "Plaintiff"

The Record on Appeal

This Brief will refer to the record as follows:

Clerk's Record	"CR __"

NO. 07-0766

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MICHAEL BREWSTER,

Respondent.

ON PETITION FOR REVIEW FROM THE FIRST DISTRICT COURT OF APPEALS IN HOUSTON, TEXAS
NO. 01-06-00029-CV

RESPONSE TO PETITION FOR REVIEW

TO THE HONORABLE SUPREME COURT OF TEXAS:

Respondent Michael Brewster submits this response to Southern Insurance Company's Petition for Review. Contrary to Petitioner's contentions, the court of appeals correctly and properly applied the law to the facts in this case. Accordingly, this Court should deny Southern's petition for review.

JURISDICTION

This case does not merit expenditure of the Court's resources. The court of appeals properly construed the statute at issue in this case, and despite Petitioner's contentions, there is no conflict among decisions of the courts of appeal with respect to the issue in this case.

To the contrary, no courts of appeal have held since *Continental Cas. Co. v. Downs*, 81 S.W.3d 803 (Tex. 2002), that a carrier who, as here, fails to contest a claim within the required seven-day statutory period maintains a right to contest that claim if the claimant untimely filed the claim. The result in this case is consistent with decisions of the Texas Workers' Compensation Commission ("TWCC"),[1] the administrative body primarily responsible for applying the workers' compensation laws. Petitioner's "conflict" is a counterfeit one, created by comparing this case to opinions involving materially different facts and legal principles.

Nor is this case of "such importance to the jurisprudence of the state that . . . it requires correction." TEX. GOV'T CODE ANN. § 22.001(a)(6) (Vernon Supp. 2007). Notably, Petitioner does not question the applicability or viability of the *Downs* decision.[2] Rather, Petitioner only is concerned with whether a carrier's compliance with the seven-day deadline addressed in *Downs* is *excused* if the claimant files a late notice of claim. *See* Pet. at 1. This issue has potential significance only to other carriers, if any, who received a late-filed claim from an injured worker, and failed to pay or contest the claim within the seven-day deadline. Petitioner has offered nothing to suggest that this is a widespread circumstance. The scope

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[1]The TWCC is now known as the Texas Department of Insurance Division of Workers' Compensation ("DWC"). *See Southern Ins. Co. v. Brewster*, Cause No. 01-06-00029-CV, — S.W.3d —, 2007 WL 1953903, *1 (Tex. App.—Houston [1st Dist.] July 6, 2007, pet. filed) ("Court. App. Op.") (attached at Tab 1); TEX. LABOR CODE ANN. § 402.001(b) (Vernon Supp. 2007).

[2]As the court of appeals noted in its opinion, the petitioners in *S.W. Bell Tel. Co. v. Mitchell*, No. 04-04-00466-CV, 2005 WL 154203 (Tex. App.—San Antonio Jan. 26, 2005, pet. granted), have asked this Court to overrule *Downs*. Court App. Op., 2007 WL 1953903, at *1, n.2. In the event that the Court decides to reconsider *Downs* in the *Mitchell* proceeding, any change to the rule in *Downs* should be applied prospectively only from the date of the decision in *Mitchell*.

of carriers potentially experiencing this situation is further limited by the fact that the statute interpreted in *Downs*, and applied by the lower courts here, has now been amended and revised, beginning with injuries dated on or after September 1, 2003. It is unlikely that a significant number of cases are still pending which involve injuries predating September 1, 2003. Thus, any decision on this question would have extremely limited relevance, if any at all, to the jurisprudence or residents of Texas.

In the absence of valid grounds for jurisdiction, this Court should deny Southern's petition for review.

ISSUE PRESENTED

Brewster objects to the statement of the issues in Southern Insurance Company's petition for review. Pursuant to Rule 53.3(c)(1) of the Texas Rules of Appellate Procedure, Brewster identifies the issue as follows:

> **Where a carrier failed to timely contest compensability of a workers' compensation claim and therefore waived any right to contest compensability under *Continental Cas. Co. v. Downs,* 81 S.W.3d 803 (Tex. 2002), does the carrier nevertheless retain a right to contest compensability of the claim if the carrier's argument is that the employee filed his claim late?**

STATEMENT OF FACTS

Pursuant to Rule 53.3(b) of the Texas Rules of Appellate Procedure, Brewster offers the following Statement of Facts:

I. The Injuries

On September 13, 2000, Brewster was involved in an accident in the course of his employment. (CR 241). He suffered severe neck pain following the accident. (CR 192, 242). Brewster's supervisor advised him to visit a doctor and to file a claim under his group insurance. (CR 243-244, 247; *see* CR 280). Brewster's employer did not report the accident as a potential worker's compensation claim. (CR 198). Although Brewster received physical therapy, he continued to experience neck pain. (CR 108, 193). On April 3, 2001, Brewster underwent an MRI, which revealed that he was suffering from herniated discs. (CR 36).

On July 5, 2001, Brewster reaggravated his injuries due to a fall in the course of his employment. (CR 66, 91, 103, 106, 181, 244). Over the next week, Brewster's doctor observed that Brewster was suffering both neck and back pain. (CR 57-58; *see* CR 56).

II. The Worker's Compensation Claims

Before Brewster reaggravated his injuries in July 2001, Brewster hired an attorney, Jonas Hunter, to help him recover compensation for his neck injuries from the September 2000 accident. (CR 249; *see* CR 223-24). Brewster thought that his attorney filed a worker's compensation claim in August 2001 for the September 2000 injuries. (CR 249).

Brewster filed a timely notice of claim with the TWCC pertaining to the July 2001 incident, describing "neck and back" injuries. (CR 55). In a statement to an adjuster,

Brewster also discussed his September 2000 accident. (CR 61, 64). His employer's carrier, Petitioner Southern Insurance Company, initially disputed the July 2001 injury, but ultimately agreed to pay benefits only for Brewster's back injuries — not his neck injuries. (CR 81).

Although Brewster thought that his attorney had previously filed a notice of claim relating to his September 2000 accident, Brewster filed another notice of claim on October 26, 2001. (CR 50). In this notice, Brewster identified his injuries as "back and neck, headaches and nose bleeds," and identified the date of his injuries as September 13, 2000. (*Id.*). On February 25, 2002, Brewster's employer notified Southern — allegedly for the first time — of Brewster's September 2000 accident. (CR 158).

Southern claims that it first received notice of Brewster's September 2000 injuries on February 22, 2002. (CR 96). Whether Southern learned of the claim in October 2001 or in February 2002, *Southern admittedly failed to respond to Brewster's claim within seven days after receiving notice of Brewster's injuries*. (*See* CR 25, 38).

On March 22, 2002, Southern filed a Notice of Refused or Disputed Claim denying that it owed any benefits for the September 2000 accident, asserting that "[t]he claimant did not sustain any disability as there was no lost time from employment." (CR 96).

III. Relevant Procedural History Before the TWCC

Brewster continued to experience significant neck pain. (*See* CR 250). He requested a TWCC hearing on Southern's decision to pay benefits only for Brewster's back injuries from the July 2001 incident, not for his neck injuries. The Case Hearing Officer concluded

that Brewster's injury on July 5, 2001 "does not extend to and include an injury to the neck." (CR 115). The TWCC Appeals Panel affirmed. (CR 117).

Brewster then sought a TWCC hearing on Southern's denial of benefits arising from the September 2000 accident. At a Benefit Review Conference on May 5, 2004, Southern argued that Brewster had waived this claim by failing to file a notice of claim within one year of his injury, citing Texas Labor Code § 409.004. (CR 356). Brewster argued that he had timely filed his notice, believing that his attorney, Jonas Hunter, had done so in August 2001. (*Id.*; *see* CR 249, 272). The parties were unable to resolve their differences. (CR 35).

The TWCC conducted a contested case hearing on July 1, 2004. The parties agreed that one issue to be decided was whether Section 409.004 relieved Southern from any obligation to pay benefits. (CR 229-30). The Case Hearing Officer ruled that Section 409.004 did not relieve Petitioner from liability "because Carrier failed to timely contest compensability of the claim." (CR 38-39).

The Appeals Panel affirmed the Case Hearing Officer's decision. (CR 7). Taking the evidence in the light most favorable to Southern, the Appeals Panel found that "the latest date the carrier received written notice of the claim was *February 22, 2002*, and the earliest date the carrier filed a TWCC-21 with the Commission was *March 25, 2002*." (CR 10) (emphasis added).[3] By failing to dispute Brewster's claim within seven days, Petitioner "waived the right to contest compensability." (*Id.*). The Appeals Panel rejected Southern's argument that Brewster had waived the right to complain about Southern's untimely contest:

[3]Although Southern actually filed its Notice of Disputed Claim on March 22, 2002, the TWCC received and file-stamped the notice on March 25, 2002. (CR 96).

> We disagree with the carrier's argument that waiver was not an issue before the hearing officer, because the hearing officer had to determine whether the carrier contested the claimed injury under Section 409.021, to ultimately determine whether the carrier is relieved of liability under Section 409.004(2). Since the carrier lost its right to contest compensability by not complying with the requirements of Section 409.021, it lost its right to assert a defense under Section 409.004 based upon the claimant's failure to timely file a claim for compensation.

(*Id.*). Consequently, the Appeals Panel ruled that Southern must pay benefits to Brewster for the injuries that he suffered in the September 2000 accident.

IV. Relevant Procedural History in Court

Southern filed this action on October 14, 2004, seeking to set aside the Appeals Panel's decision pursuant to Texas Labor Code § 410.253. (CR 2). On February 3, 2005, Southern filed a Motion for Summary Judgment, arguing that Brewster's claim for benefits relating to his September 2000 accident was "barred based on a failure to timely file a claim." (CR 19-20). Southern also asserted — for the first time — that Brewster had "waived any right to raise the issue of Plaintiff's timely contest of the claim by not presenting same at any administrative level of the TWCC." (CR 25).

After Brewster filed a Cross Motion for Summary Judgment, Southern urged the trial court to resolve the case on the basis of the parties' respective motions. (CR 318, 320, 359). On July 12, 2005, the trial court signed an order denying Southern's Motion for Summary Judgment and granting Brewster's Cross Motion for Summary Judgment. (CR 361).

ARGUMENT

A. The Court of Appeals Properly Determined That the Issue of Petitioner's Compliance with the Seven-Day Deadline Was Raised Before the TWCC

The crux of Petitioner's argument is that Brewster did not raise the issue of Petitioner's non-compliance with the seven-day deadline of Texas Labor Code § 409.021[4] before the TWCC, and that therefore the trial court should not have reached the issue in this case. In support of this theory, Petitioner argues that its challenge to Brewster's claim on the ground that it was late-filed did not encompass or "subsume" the issue of whether Petitioner had lost the right to contest Brewster's claim by failing to comply with the seven-day deadline. Pet. at 4-5, 9-11. Petitioner's argument is mistaken.

1. Brewster Raised Before the TWCC the Issue of Petitioner's Untimely Contest of Brewster's Claim

Petitioner asserts that Brewster "admittedly" did not raise the issue of Southern's failure to timely contest his claim before the TWCC "at any level." Pet. at 7. Based on the record, however, the court of appeals properly found that Brewster raised before the TWCC the issue of Petitioner's non-compliance with the seven-day requirement in Section 409.021. The court of appeals found that "[d]uring the first hearing, on July 15, 2002, Brewster's counsel raised an issue whether the carrier had waived its right to dispute compensability as

[4]The version of Section 409.021(a) in effect at the time of the events in this lawsuit provided: "(a) An insurance carrier shall initiate compensation under this subtitle promptly. Not later than the seventh day after the date on which an insurance carrier receives written notice of an injury, the insurance carrier shall: (1) begin the payment of benefits as required by this subtitle; or (2) notify the commission and the employee in writing of its refusal to pay and advise the employee of: (A) the right to request a benefit review conference; and (B) the means to obtain additional information from the division." TEX. LABOR CODE § 409.021(a) (Vernon 2001). All references to Section 409.021 in this response are to this version.

to the September 2000 injury by not contesting compensability in accordance with the notice requirements of chapter 28 of the Administrative Code." Court App. Op., 2007 WL 1953903, at *3. The court noted that at the second Benefits Review Conference hearing, Petitioner raised, for the first time, its argument that Brewster had not timely filed his claim. *Id*. At a contested case hearing to review the TWCC recommendation, the hearing officer agreed with Brewster's prior contention that Petitioner had "failed to timely contest compensability of the claim." *Id*. at *4.

Thus, the court of appeals properly found that Brewster raised with the TWCC the issue of whether Petitioner failed to comply with the seven-day deadline in Section 409.021.

2. The Issue of Brewster's Timely Filing Is Subsumed Within the Question Whether Petitioner Lost the Right to Contest Brewster's Claim When it Failed to Comply with the Deadline for Paying or Contesting a Claim

Petitioner asserts that the TWCC appeals panel "stat[ed] Brewster did not have to raise the issue throughout the administrative process in order for the Hearing Officer to have authority to rule on the issue." Pet. at 11. This statement is evidently intended to suggest that the issue of Petitioner's non-compliance with the seven-day deadline in Section 409.021 was never raised before the TWCC. To the contrary, not only did Brewster raise the issue in the first BRC hearing, but Petitioner itself put the matter in issue when it asserted a defense that subsumed the question of whether Petitioner had lost the right to assert the defense.

a. The trial court and Court of Appeals properly interpreted and applied Section 410.051, 409.021(a), and 409.004

In arguing that the issue of Petitioner's compliance with Section 409.021(a) was not properly before the TWCC and the lower courts here, Petitioner is relying on Section

410.151, which provides that, absent consent or good cause, the Case Hearing Officer may not consider in the Contested Case Hearing any issues that the parties failed to raise at the Benefit Review Conference. TEX. LABOR CODE ANN. § 410.151 (Vernon Supp. 2007). The TWCC has continuously interpreted Section 410.151, however, to allow a Case Hearing Officer to consider issues that "have been subsumed in a general, related issue."[5] Tex. Workers' Comp. Comm'n, Appeal No. 981714, 1998 WL 917648, *2 (Sept. 10, 1998) (attached at Tab 2). *See* Tex. Workers' Comp. Comm'n, Appeal No. 033278, 2004 WL 3315974, *1 (Feb. 12, 2004) (attached at Tab 3).[6]

Consistently with these principles, the court of appeals agreed with the TWCC appeals panel that the issue of Petitioner's compliance with the seven-day deadline was properly before the TWCC. Citing Section 409.004 of the Labor Code, Petitioner asserted as a defense before the TWCC that Brewster had failed to file his claim within a year after his injury. Section 409.004 provides:

> Failure to file a claim for compensation with the division as required under Section 409.003 [within one year of injury] relieves the employer and the employer's insurance carrier of liability under this subtitle ***unless***:
>
> (1) good cause exists for failure to file a claim in a timely manner; or
>
> (2) the employer or ***the employer's insurance carrier does not contest the claim.***

[5]An administrative agency's interpretation of a statute "is entitled to serious consideration" when it is consistent with the statute's plain language. *Zurich Am. Ins. Co. v. Gill*, 173 S.W.3d 878, 882 (Tex. App.—Fort Worth 2005, pet. denied).

[6]Nothing in Section 410.151 imposes any strict rules of pleading on the parties. *Cf. Great Am. Indemnity Co. v. McElyea*, 57 S.W.2d 966, 967 (Tex. Civ. App.—El Paso 1933, writ ref'd) (noting, under a predecessor statute, that administrative proceedings are informal and claims "need not be alleged with the same particularity as they would be in a court").

TEX. LABOR CODE ANN. § 409.004 (Vernon Supp. 2007) (emphasis added).[7] The court of appeals in this case agreed with the TWCC that, by invoking this provision, Petitioner put in issue the subsumed question of whether Petitioner "did not contest the claim" when it failed to pay or contest Brewster's claim within the seven-day period in Section 409.021, and therefore lost the right to contest the claim under *Downs*. The court of appeals stated:

> As recited on the face of the appeals-panel opinion, the panel "decided" Brewster's section 409.021(a), or *Downs* waiver, issue. *See* TEX. LAB. CODE ANN. § 410.302. The record further demonstrates, not only that Brewster raised the carrier's lack of compliance with section 409.021(a) at a BRC hearing, Tex. Lab. Code Ann. § 401.151, but also that the appeals panel deemed that issue joined because of the carrier's contention, at the previous BRC and contested-case hearing, that the lack of compliance with section 409.004(2) by Brewster, as demonstrated by the record, relieved the carrier of any duty to pay benefits. Accordingly, we . . . conclude . . . that the scope of our and the trial court's review, as dictated by section 410.151 of the Labor Code, encompasses the substantive legal consequences of the carrier's lack of compliance with section 409.021(a).

Court App. Op., 2007 WL 1953903, at *4, 9.

Simple logic confirms the court of appeals' reasoning. The logical structure of Section 409.004 is that "X is true unless Y." When a carrier asserts that "X is true unless Y," then the question whether "Y" occurred is necessarily in issue. In fact, the assertion that "X is true unless Y" *cannot* be resolved without a determination of whether "Y" occurred. Thus, here, where Southern invoked a rule providing that Brewster's late claim precluded carrier liability ("X") *unless* Southern failed to contest the claim ("Y"), a determination of whether Brewster's late claim precluded carrier liability cannot be made unless there is a

[7]The same language was in effect during the time of the events in this lawsuit.

determination whether Southern failed to contest the claim.[8] The Appeals Panel properly determined whether Southern failed to contest the claim, under *Downs*, by looking to whether Southern had contested or paid the claim within the required seven-day time period under Section 409.021(a).

The court of appeals's reasoning is also consistent with the way in which the TWCC has interpreted and applied Section 409.004. The TWCC has consistently interpreted Section 410.151 to hold that "issues regarding timely notice subsume exceptions thereto." Tex. Workers' Comp. Comm'n, Appeal No. 950516, 1995 WL 365606, *3 (May 17, 1995) (attached at Tab 4). *See also* Tex. Workers' Comp. Comm'n Appeal No. 960420, 1996 WL 191954, *7 (April 11, 1996) ("The Appeals Panel has made clear a number of times that issues regarding timely notice subsume all exceptions thereto.") (attached at Tab 5). In Appeal No. 950516, the carrier raised Section 409.004 as a defense in the Benefit Review Conference. At the Contested Case Hearing, the Case Hearing Officer found that the claimant had good cause for filing an untimely claim. Because "good cause," like failure to contest a claim, is an exception to the Section 409.004 defense, the Appeals Panel emphasized:

---

[8]By way of comparison, Texas Rule of Appellate Procedure 25.2 provides: "In a plea bargain case — that is, a case in which a defendant's plea was guilty or nolo contendere and the punishment did not exceed the punishment recommended by the prosecutor and agreed to by the defendant — a defendant may appeal only: (A) those matters that were raised by a written motion filed and ruled on before trial, or (B) after getting the trial court's permission to appeal." TEX. R. APP. P. 25.2(a)(2). No one would seriously suggest that "X" — the defendant's right to appeal in a plea bargain case — can be decided for purposes of Rule 25.2 without addressing "Y" — whether the defendant got the trial court's permission to appeal or raised the subject matter of the appeal by a written motion ruled on before trial. In other words, "X" subsumes "Y," and the defendant's invocation of "X" necessarily puts "Y" in issue. The same is true with respect to Petitioner's invocation of Section 409.004.

> We believe that ***when a carrier argues that a claim was not timely filed***, and seeks to be discharged of liability for the claim for this reason, that ***a claimant is entitled to meet this assertion by proof*** not only of a timely filing, but ***of the provisions set out in Sections 409.004*** and 409.008. Thus, we reject the argument that good cause was not part of the issue before the hearing officer, finding that he expressly noted (and correctly so) that it was inherently part of the issue on timely filing of a claim.

Appeal No. 950516, 1995 WL 365606, at *3 (emphasis added).

b. Petitioner's case authorities are inapposite.

Although Petitioner asserts that "[n]o court decision since enactment of the new workers' compensation law on January 1, 1991 has interpreted 409.004(2) to subsume the question of whether the carrier waived its right to dispute a claim," Pet. at 11-12, Petitioner neglects to inform this Court that *none* of the cases on which Petitioner relies have addressed this question since *Downs*. In other words, since *Downs*, Texas courts have not addressed the question whether Section 409.004 subsumes or includes the question whether the carrier has complied with the seven-day requirement in Section 409.021(a). Moreover, as discussed above, Petitioner's position is contrary to the TWCC's decisions on this issue. In light of this, Petitioner's repeated reference to a "general rule" embracing Petitioner's position is baseless. The trial court and the court of appeals in this case applied *Downs*, as they were required to do, to reach the only legally valid result available under the facts of this case.

The only case that Petitioner cites involving a situation similar to the one here — where a carrier who failed to respond timely to an injured workers' claim seeks to avoid liability on the ground that the worker's claim was not presented timely — was decided ***prior*** to *Downs*. *See* Pet. at 9 (citing *Cardenas v. Continental Ins. Co.*, 960 S.W.2d 401 (Tex.

App.—Corpus Christi 1998, writ denied)). The court in *Cardenas* treated the question whether the carrier had contested the claim as a *waiver* issue—a plea in avoidance—that the claimant had to raise at the Benefit Review Conference. *Id.* at 403 ("Cardenas waived her right to rely ***on Continental's waiver***.") (emphasis added). As the supreme court explained in *Downs*, the effect of a carrier's failure to comply with Section 409.021(a) is not a "waiver" that a claimant must then allege against the carrier essentially as a plea in avoidance. *Downs*, 81 S.W.3d at 807. Rather, the effect of a failure to comply with Section 409.021(a) is that the carrier loses the right to contest the claim as a matter of law. *Id.* This distinction renders *Cardenas* inapplicable here.

Petitioner also invokes *Krueger v. Atascosa County,* 155 S.W.3d 614, 618 (Tex. App.—San Antonio 2004, no pet.) and *Hefley v. Sentry Ins. Co.*, 131 S.W.3d 63, 65 (Tex. App.—San Antonio 2003, pet. denied). *Krueger* and *Hefley* involved a different statute, Section 410.302, which states that judicial review of a decision of the Appeals Panel is limited to the issues that the Appeals Panel decided in its opinion. *See* TEX. LABOR CODE ANN. § 410.302 (Vernon Supp. 2007). Section 410.302 is essentially a jurisdictional statute: just as a court of appeals will generally review only those issues that the trial court resolves in a final order or judgment, a trial court may review only the issues that the Appeals Panel decides in its opinion in a worker's compensation case. Unlike Section 410.051, which has been interpreted to permit the hearing officer to address issues "subsumed" in other issues that have been raised, Section 410.302 has not been interpreted to permit judicial review of matters that were not specifically decided by the Appeals Panel. This distinction makes

imminent sense: while the Hearing Officer needs to have discretion to decide issues subsumed within the matters presented by the parties where necessary to decide those matters, it is neither necessary nor even possible for a court to review matters that were not actually decided by the Hearing Officer. Cases such as *Krueger* and *Hefley*, which interpret or apply Section 410.302 with respect to the scope of judicial review, are irrelevant to the interpretation and application of Section 410.051.

Petitioner finally cites *Texas Workers' Comp. Ins. Fund v. Simon*, 980 S.W.2d 730, 734 (Tex. App.— San Antonio 1998, no pet.). However, *Simon* did not involve any issue under Section 409.004. The claimant in *Simon* suffered a serious bee sting and died. The carrier did *not* contend that the claimant filed an untimely notice of claim under Section 409.004. The only issues at the Benefit Review Conference were (a) whether the claimant had suffered a compensable injury and (b) whether the proper legal beneficiaries were pursuing the claim. On appeal to the Appeals Panel, the beneficiaries of the claimant argued for the first time that the carrier had waived any right to contest the claim by filing a defective denial of coverage. Citing Section 410.151, the San Antonio Court of Appeals ruled that the beneficiaries "waived any right to argue that the initial notice denying coverage was insufficient." *Id.*

B. The TWCC Properly Determined That Petitioner Lost the Right to Contest Brewster's Claim When it Failed to Comply with the Seven-Day Deadline for Paying or Contesting a Claim

On October 26, 2001, Brewster filed a notice of claim with the TWCC requesting worker's compensation benefits for the injuries that he suffered in September 2000. (CR 50).

Petitioner admits that it did not respond to Brewster's notice of claim until March 22, 2002—more than seven days after Petitioner admits that it received notice of Brewster's injuries. (CR 25). Since *Downs*, the TWCC and DWC have consistently interpreted Section 409.004(2) to require that the carrier have contested the claimant's claim in accordance with Section 409.021(a) before the carrier may assert a defense that the claimant untimely filed his notice of claim:

- "A carrier that does not timely dispute the compensability of a claim cannot avail itself of the timely filing defense provided in Section 409.003." Tex. Workers' Comp. Comm'n, Appeal No. 041065, 2004 WL 2147900, *2 (June 28, 2004) (attached at Tab 6).

- "By failing to comply with Section 409.021, a carrier loses its right to contest compensability, which includes its right to assert a defense under Sections 409.002 and 409.004 and election of remedies." Tex. Workers' Comp. Comm'n, Appeal No. 040800, 2004 WL 1947133, *2 (June 1, 2004).

- "Due to our affirmance of the hearing officer's waiver determination, we likewise affirm his determination that the claimant sustained a compensable injury because the injury became compensable as a matter of law due to the carrier's waiver of its right to dispute compensability." Tex. Workers' Comp. Comm'n, Appeal No. 040256, 2004 WL 1240313, *2 (March 29, 2004) (attached at Tab 7).

- "Section 409.004 provides that if a claimant fails to timely file a claim pursuant to Section 409.003, the employer and the employer's insurance carrier are relieved of liability unless the employer or the employer's insurance carrier does not contest the claim. As noted above, the carrier did not comply with the requirements of Section 409.021(a) by either initiating benefits or filing a notice of refusal. Thus, the carrier has lost its right to contest compensability, which, we hold, includes its right to assert a defense under Section 409.004 based upon the claimant's failure to timely file a claim for compensation." Tex. Workers' Comp. Comm'n, Appeal No. 022091-s, 2002 WL 31473918, *3 (Oct. 7, 2002) (attached at Tab 8).

The TWCC's interpretation is consistent with *Downs*. Therefore, the district court and court of appeals did not err in concluding that the TWCC properly applied the law in this case.

C. Petitioner's Statutory Intent Arguments Are Illogical and Unpersuasive

Petitioner's "legislative intent" argument seeks to augment the statute with language that the Legislature did not use. Pet. at 11-12. This is untenable. A court may insert additional words into a statute "[o]nly when it is necessary to give effect to the clear legislative intent." *Hunter v. Fort Worth Capital Corp.*, 620 S.W.2d 547, 552 (Tex. 1981). Here, Petitioner's argument is unclear and lacks any support. As this Court reasoned in *Downs*, the purpose of the seven-day requirement in Section 409.021 is to ensure that the claimant will know *promptly* whether his claim is accepted or denied.[9] The claimant's need to know the answer to this question is no less pressing when the claimant has missed the one-year deadline. Given this purpose, Petitioner's attempt to augment the statute must fail.

Petitioner appears to suggest that the legislative intent of Section 409.004(2) is to "allow the injured worker to avoid having to file a claim when there is no dispute on behalf of [sic] the Carrier." Pet. at 12.[10] However, nothing in the statute suggests that the

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[9] *See Downs*, 81 S.W.3d at 806-07 (rejecting a statutory interpretation that "would permit carriers to do nothing, thereby delaying benefits and eliminating the statutory requirement of early notice of denial that gives employees certain protections, and permit carriers to take up to sixty days to investigate without paying benefits or risking being bound by an earlier ground for refusal.").

[10] Petitioner's argument is cryptic, but appears to suggest that an injured worker may forego filing a notice of claim if the carrier somehow gives the impression — without actually complying with Section 409.021(a) — that it "acknowledge[s] being aware of the compensable injury allegation." Pet. at 12. In other words, Petitioner appears to advocate ignoring the statute's requirements both with respect to the claimant's obligation to file a claim and with respect to the carrier's obligation to accept or deny claims in accordance with the TWCA. Petitioner provides no basis for such an approach. It is also unclear how Petitioner believes that a carrier can contest compensability for up to a year after accepting a claim, *see id.*, since even if a carrier accepts the claim within seven days after notice of a claim, the carrier has no more than 60 days in which to contest compensability. TEX. LABOR CODE § 409.021 (Vernon 2001).

Legislature intended to dispense with the requirement of filing a claim. Rather, injured employees are required to initiate a claim by filing a TWCC Form 41, an "Employee's Notice of Injury or Occupational Disease and Claim for Compensation." Brewster submitted this form, and Petitioner allegedly received it on February 22, 2002. (CR 50, 96). If Petitioner desired to deny the claim, Petitioner could easily and simply have notified Brewster within seven days of its grounds for refusal, *e.g.*, a contention that Brewster failed to comply with the one year deadline in Section 409.003 of the Texas Labor Code. Petitioner's failure to do so did not relieve Brewster of the obligation to file a claim — he had already done so — but it deprived Petitioner of the right to contest the claim.

Petitioner's suggestion that Section 409.004(2) only applies to "the carrier's actions within the one year anniversary," rather than actions after the one-year deadline, is even more ill-conceived. *See* Pet. at 14. Since the Legislature wrote Section 409.004 to permit claims filed *after* the one-year deadline to be valid under certain circumstances, this provision cannot be construed to apply only to a carrier's actions *before* the one-year deadline.

CONCLUSION

Brewster respectfully requests that this Court deny Southern Insurance Company's petition for review and grant all such further and additional relief to which Brewster may show himself to be justly entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of December, 2007, a true and correct copy of the foregoing was served upon the following counsel by facsimile and by certified mail, return receipt requested:

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APPENDIX

Tab	Document
1	Court of Appeals Opinion, *Southern Ins. Co. v. Brewster*, Cause No. 01-06-00029-CV, — S.W.3d —, 2007 WL 1953903 (Tex. App.—Houston [1st Dist.] July 6, 2007, pet. filed)
2	Tex. Workers' Comp. Comm'n, Appeal No. 981714, 1998 WL 917648 (Sept. 10, 1998)
3	Tex. Workers' Comp. Comm'n, Appeal No. 033278, 2004 WL 3315974 (Feb. 12, 2004)
4	Tex. Workers' Comp. Comm'n, Appeal No. 950516, 1995 WL 365606 (May 17, 1995)
5	Tex. Workers' Comp. Comm'n Appeal No. 960420, 1996 WL 191954 (April 11, 1996)
6	Tex. Workers' Comp. Comm'n, Appeal No. 041065, 2004 WL 2147900 (June 28, 2004)
7	Tex. Workers' Comp. Comm'n, Appeal No. 040256, 2004 WL 1240313 (March 29, 2004)
8	Tex. Workers' Comp. Comm'n, Appeal No. 022091-s, 2002 WL 31473918 (Oct. 7, 2002)