

## APPEAL NO. 002862

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 November 14, 2000. The hearing officer held that the injury was compensable because the appellant (carrier) did not timely dispute "compensability" and, thus, whether the respondent (claimant) gave timely notice of injury to her employer was not a viable defense.

The carrier appeals, arguing that compensability of an injury and timely notice to an employer are two different things. The carrier argues that it should have been permitted to prevail on the notice issue. The claimant responds that the decision should be affirmed.

### DECISION

The hearing officer's decision is reversed and a new decision rendered that the carrier is relieved of liability because the claimant did not give timely notice of her injury to her employer.

The hearing officer erred by determining that the defense of notice to the employer was not a "viable request" based upon his opinion that the carrier had waived the right to dispute the claim.

The two issues in this case reported from the benefit review conference were whether the carrier was relieved from liability because the claimant had not given timely notice of her injury to her employer and whether the claimant had disability. Whether the carrier had waived the right to dispute compensability was not in issue.

At the outset, the hearing officer proposed four stipulations, which included that the "claimant sustained a compensable injury on \_\_\_\_\_." The carrier's response was that the hearing officer could not agree to this proposed stipulation because "as far as compensability, the carrier never raised it as a defense nor is it an issue today," as it had only raised the timely notice issue. The hearing officer then responded that it was "his understanding" that the carrier had not disputed compensability within 60 days, had waived this dispute, and then declared that the stipulations would "stand." Because there was no agreement, however, we cannot regard this as a true "stipulation."

### **Brief Facts on Injury and Notice**

The claimant, who had worked for 30 years as a line server in private school, contended that on \_\_\_\_\_, a weekday, she was lifting a heavy pan, dropped it when it was heavier than expected, and then felt a pain shooting through her wrists.

The claimant said that she reported her injury to Ms. H, a supervisor, two times that same day but was told that the required form for reporting the injury was not available. The claimant said that she mentioned her injury four or five times thereafter to Ms. H, including

the following day. Her description of the first three reports to Ms. H was detailed. Ms. H said that the claimant did not report a wrist injury to her until the last part of May. She offered and explained her time sheet as evidence that she did not work either February 17 or 18. The food service supervisor, Ms. B, also said that the injury to her wrists was not reported to her until May 17.

Ms. P, who was retired from the employer, said that she was walking with Ms. H on February 17 when the claimant came over and reported her injury. Ms. P was positive about the date; but Ms. P also said that the claimant's report occurred after the claimant's burn injury and she was positive about this as well.

The claimant had two more injuries on \_\_\_\_\_ (a burn) and \_\_\_\_\_ (a sprained finger). She reported these injuries to supervisors other than Ms. H and was promptly treated. The claimant did not have a clear explanation for not mentioning the injury to her wrists to the doctors who treated these injuries.

The claimant first sought medical treatment for her wrists on May 17, 2000. She was taken off work beginning May 24, 2000 (not March 24 as stated in the decision). The claimant said that when the school was out of session entirely, she received no benefits, but was paid short-term disability benefits in August when the school year would have begun. She was continuing to receive this benefit at the time of the CCH.

The carrier filed a Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) on May 24, 2000, within a day of the date it stated that it received first written notice of injury (May 23). There is no evidence in the record that these dates are not correct. The only defense that the carrier raised was that it was relieved of liability because the claimant had not given timely notice of her injury.

### **Correction of Typographical Error on Disability**

Although the hearing officer refers to the date of the beginning of disability as "March" 24, the evidence undoubtedly supports May 24 as the first date that the claimant had disability, and we reform the decision to reflect this date, as the March reference appears to be a typographical error.

### **A Dispute Based Upon Lack of Timely Notice is a Dispute to Compensability**

We have expressly held that disputing the timeliness of notice to the employer under Section 409.001 is a dispute to "compensability" of a claim which must be raised within 60 days or it is waived. Texas Workers' Compensation Commission Appeal No. 982888, decided January 26, 1999. A "compensable injury" is defined in Section 401.011(10) as an injury that arises out of and in the course and scope of employment "for which compensation is payable." "Compensation" is defined in Section 401.011(11) as "payment of a benefit." If the concept of compensability meant only whether an injury arose from the course and scope of employment, the second part of the definition "for which

compensation is payable" would not have been necessary. Benefits must also be "payable" for an injury to be considered a "compensable" injury. By disputing its liability for payment of benefits under Section 409.002 in the TWCC-21, the carrier disputed compensability of the claimant's work-related injury. It was error to simply reject the viability of the notice defense because course and scope was not also challenged.

### **Notice to the Employer**

Because of the erroneous application of waiver, the hearing officer made no express findings of fact on the notice issue. However, his discussion stated that the evidence "indicates" that the claimant had not reported her injury within the required time. The evidence on notice is conflicting. There was no evidence offered on good cause because the claimant's position was that she timely reported her injury.

Under the circumstances, we interpret the discussion to be the hearing officer's evaluation of the weight of the evidence and a statement that he believed that the claimant did not timely report her injury. Accordingly, we reverse and render a new finding of fact that the claimant did not report her injury to her employer within 30 days and that she did not show good cause for the failure to report her injury within that time. We render a decision that omits the erroneous "stipulation" that the claimant sustained a "compensable injury." We render a conclusion of law that the carrier is relieved of liability under Section 409.002 because of the claimant's failure to report her injury.

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Susan M. Kelley  
Appeals Judge

CONCUR:

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Thomas A. Knapp  
Appeals Judge

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Robert W. Potts  
Appeals Judge