

## APPEAL NO. 010003

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On October 17, 2000, a hearing was held. The hearing officer determined that: (1) the respondent (carrier) did not waive the right to dispute compensability of the claimed injury, pursuant to section 409.021; (2) the appellant (claimant) did not timely file a claim for compensation with the Texas Workers' Compensation Commission (Commission) as required by Section 409.003 and good cause did not exist; (3) the claimant did not sustain a compensable injury on \_\_\_\_\_; and (4) the claimant did not have disability resulting from the injury.

### DECISION

We affirm.

#### **Time for Disputing Compensability**

The hearing officer did not err in determining that the carrier did not waive the right to dispute compensability of the claimed injury. The Commission has declined to follow Downs v. Continental Casualty Co., 32 S.W.3d 260 (Tex.App.-San Antonio 2000, pet. filed), until it becomes final upon completion of the judicial process. Texas Workers' Compensation Commission Advisory No. 2000-07, issued August 28, 2000; Texas Workers' Compensation Commission Appeal No. 001214, decided July 20, 2000. Therefore, a carrier has 60 days from the receipt of written notice of a claimed injury before a contest is waived. Section 409.021(c). It is undisputed that the carrier received written notice of the claimed injury on August 11, 1998, and filed a Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) with the Commission disputing compensability 15 days later on August 26, 1998. Therefore, the hearing officer's determination that the carrier did not waive the right to dispute compensability of the claimed injury is not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175 (Tex. 1986).

#### **Claim for Compensation**

##### **Tolling the Statute**

The hearing officer did not err in determining that the claimant failed to timely file a claim for compensation with the Commission. Section 409.003 provides that an employee or person acting on the employee's behalf shall file with the Commission a claim for compensation for an injury not later than one year after the date on which the injury occurred. The claimant did not file a Texas worker's compensation claim within one year after the date of injury, because he was pursuing his claim in Oklahoma as an extension of prior injury which occurred in that state. Notwithstanding, the claimant asserts that the time for filing a claim for compensation in this state was tolled, pursuant to Section 409.008, because he was not informed of his rights and responsibilities under the 1989 Act, as required by Section 409.005(g), when the Employer's First Report of Injury or

Illness (TWCC-1) was filed or sent to the claimant. The claimant also argues that the carrier is not relieved from liability, under Section 409.004, because the carrier did not timely dispute compensability.

Section 409.008 provides:

If an employer or the employer's insurance carrier has been given notice or has knowledge of an injury to or the death of an employee and the employer or insurance carrier fails, neglects, or refuses to file the report under Section 409.005, the period for filing a claim for compensation under Sections 409.003 and 409.007 does not begin to run against the claim of an injured employee or a legal beneficiary until the day on which the report required under Section 409.005 has been furnished.

Contrary to the claimant's assertion, the statute does not contemplate tolling the filing requirement established by Section 409.003 for the employer's failure to furnish the claimant with a statement of his rights and responsibilities, along with the TWCC-1. Rather, the remedy available for an employer's failure to comply with Section 409.005(g) is the assessment of administrative penalties, pursuant to Section 409.005(j).

With regard to claimant's second argument, we disagree that the carrier is not relieved from liability, in view of our decision *supra*. The hearing officer's determination that the claimant failed to timely file a claim for compensation is not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain, supra.

Finally, we note that the hearing officer based his determinations as to when the TWCC-1 was filed upon official notice of the Commission records, but failed to attach copies of what was officially noticed. The better practice is to include these in the record so that they may be reviewed on appeal.

#### **Good Cause for Failure to File an Employee's Notice of Injury or Occupational Disease & Claim for Compensation (TWCC-41)**

Section 409.004 provides, in part, that failure to file a claim for compensation, required under Section 409.003, relieves the employer and the employer's insurance carrier of liability under the 1989 Act, unless good cause exists for failure to file a claim in a timely manner. The claimant testified that he was advised by an attorney to pursue his claim as an extension of a prior injury which occurred in Oklahoma, before filing a claim in Texas. The claimant asserts that his reliance on such advice constitutes good cause for failing to file a claim for compensation later than one year after the date of his injury. This contention was addressed in Texas Workers' Compensation Commission Appeal No. 931157, decided on February 3, 1994, citing St. Paul Fire and Marine Insurance Company v. Lake Livingston Properties, Incorporated, 546 S.W.2d 404 (Tex. Civ. App.-Beaumont 1977, writ ref'd, n.r.e.) which held as a matter of law that bad advice from one's attorney

as to time for filing a claim does not constitute good cause. The hearing officer did not abuse his discretion in determining that good cause did not exist for failing to file a claim for compensation not later than one year after the date of injury.

**Compensable Injury**

The hearing officer did not err in determining as a conclusion of law that the claimant did not sustain a compensable injury on \_\_\_\_\_. “Compensable injury” means an injury that arises out of and in the course and scope of employment *for which compensation is payable under the 1989 Act*. Section 401.011(10). Although the claimant was found to have been injured in the course and scope of employment, the claimant’s injury is not a compensable injury, because he failed to file a claim for compensation not later than one year after the date on which the injury occurred.

**Disability**

The hearing officer did not err in determining that the claimant did not have a disability. The 1989 Act requires the existence of a compensable injury as a prerequisite to the a finding of disability. Section 401.011(16). Because the claimant was found not to sustain a compensable injury, the hearings officer properly concluded that the claimant did not have a disability.

The decision and order of the hearing officer is affirmed.

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Susan M. Kelley  
Appeals Judge

CONCUR:

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Philip F. O’Neill  
Appeals Judge

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Robert W. Potts  
Appeals Judge