

APPEAL NO. 012360
FILED NOVEMBER 26, 2001

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 August 15, 2001. The hearing officer found that the respondent (carrier) had waived the right to dispute compensability, and further found that the appellant (claimant) was injured on _____, in the course and scope of his employment. He further held that the claimant had good cause for the failure to give timely notice of his injury. (Many of these findings were made due to stipulations of the parties). However, he held that the carrier was relieved of liability because the claimant had failed to file a claim for compensation within one year after the date of his injury.

The appellant appeals the hearing officer's determination that the respondent is relieved of liability because of the claimant's failure to timely file a claim with the Texas Workers' Compensation Commission (Commission). The carrier responds urging affirmance, stating that even if it did not file a Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) asserting the late-claim defense, its raising of this defense at the benefit review conference (BRC) was sufficient. The carrier further states that any secondary waiver issue relating to this was not raised as an issue by the claimant, was not properly before the hearing officer, and therefore should not be decided by the Appeals Panel.

DECISION

Reversed and rendered.

The hearing officer erred in determining that the carrier was relieved of liability under Section 409.004 because the carrier did not raise this defense within a reasonable time after the defense became known.

The issue in this case involves the application of the law. The hearing officer determined that, although the carrier waived its right to contest the compensability of the claimant's injury in accordance with Section 409.021 of the 1989 Act, the carrier was relieved of liability because of the claimant's failure to file a claim with the Commission within one year. Carrier contends that because claimant did not timely file a claim, it is relieved of liability and the hearing officer did not err in the application of the law in this case. Carrier says that any inquiry as to whether first raising this defense at the BRC was not timely was not made an issue and therefore cannot be determined by the hearing officer or the Appeals Panel.

The facts of the case show that the date of injury was _____; the hearing officer found that neither the claimant nor someone acting on his behalf had filed a claim for compensation up to the date of the CCH. The decision indicates, although it is not clear, that the hearing officer considered both whether a Employee's Notice of Injury or

Occupational Disease & Claim for Compensation (TWCC-41) was filed or whether there were any other documents in the record that could be considered a “claim” under the case of Cadengo v. Compass Insurance Co., 721 S.W.2d 415 (Tex. App.-Corpus Christi 1986, no writ); the hearing officer declined the motion of the claimant to search through the claims file for such a document. The claimant’s exhibits do not show any document filed with the Commission within one year that would satisfy these requirements.

Prior to one year after the injury, the carrier filed a TWCC-21; the agreed date of filing was December 15, 1999. Because this was filed prior to one year after the date of injury, it obviously could not have disputed the claim based upon the claimant’s failure to timely file a claim. There was no evidence that the carrier had paid benefits on the claim notwithstanding its TWCC-21. There is no evidence of an amended TWCC-21 or any other document adding the defense under Section 409.004 at any time after _____, until the BRC report. The BRC was held on June 20, 2001. The position of the claimant on that issue was that he had timely filed a claim.

There was no specific issue questioning whether the carrier had raised the one year filing issue within a reasonable time after _____. A discussion ensued at the beginning, part of which concerned the “issue codes” of the Commission, as to whether a separately-stated issue on this matter was required. The hearing officer stated that he did not fully understand the point that the parties were making but after further argument stated that he believed that whether the carrier had waived the Section 409.004 defense would be subsumed in the claims filing issue. The carrier disagreed but argument was given during opening and closing on the matter.

The hearing officer appears to have dealt with the timeliness of the carrier’s Section 409.004 defense in this finding of fact:

The carrier effectively contested the potentially filed claim with its filing of the TWCC-21 on December 15, 1999, and therefore at all times pertinent through the date of the contested case hearing.

This was the same TWCC-21 that the hearing officer found was not filed within 60 days and therefore amounted to a waiver of the right to dispute compensability of the claim on the merits.

A carrier is relieved of liability if an injured worker fails to timely file a claim for compensation within one year after the date of injury. Sections 409.003, 409.004. Good cause may exist for the failure of an injured worker to file a claim within one year after the date of injury if a carrier does not contest a claim. Section 409.004(2). Where compensability of the injury is disputed, however, within the first year, but not within 60 days, a resultant waiver of the right to contest compensability does not preclude a later defense that the carrier is relieved of liability for a claimant’s failure to file a claim within one year. Texas Workers’ Compensation Commission Appeal No. 94192, decided March 31, 1994.

The failure of the claimant to file a claim within one year does not automatically relieve the carrier of liability, because the defense under Section 409.004 must itself be raised within a reasonable period of time. Section 409.022(b); Texas Workers' Compensation Commission Appeal No. 982888, decided January 26, 1999; Texas Workers' Compensation Commission Appeal No. 950613, decided June 8, 1995; see *also* Texas Workers' Compensation Commission Appeal No. 94224, decided April 1, 1994; Texas Workers' Compensation Commission Appeal No. 941480, decided December 12, 1994.

Our review of the Appeals Panel decisions persuades us that the failure of the carrier to raise a defense under 409.004 has generally been articulated as an issue when dealt with by the hearing officer or the Appeals Panel. See Texas Workers' Compensation Commission Appeal No. 962230, decided December 20, 1996. Nevertheless, the hearing officer announced at the beginning of the CCH that the issue would be subsumed in the one year filing issue. The issue was actually tried and argued. Although the carrier announced disagreement with the hearing officer's position, it has not filed an appeal of the finding that the hearing officer made on this issue.

Because the defense of failing to timely file a claim would have arisen after _____, the one-year anniversary of the date of injury, the hearing officer erred by finding that the December 1999 TWCC-21 "effectively contested the potentially filed claim." Section 409.022 and Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE §124.2 (Rule 124.2) make clear that disputes have to be express and specific. There is no room for implying a prospective dispute based upon Section 409.004 from a bare stipulation that a TWCC-21 was filed several months in advance of the claims filing deadline. As to whether the record would support a determination that the timely filing issue was raised in a reasonable amount of time, such that it retained its "newly discovered" aspect under Section 409.022(b), we hold that disputing a matter at a June 2001 BRC on grounds that would have been apparent within a short time after _____, was not a reasonable amount of time for raising the dispute.

We accordingly reverse the determination that the carrier is not liable for benefits, and render a decision that the carrier's raising of a defense to liability under Section 409.004 was not based upon newly discovered evidence at the time that it was raised and consequently it is not discharged from liability.

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

**MARCUS MERRITT
VICE PRESIDENT OF ACE USA
6600 CAMPUS CIRCLE DRIVE EAST, SUITE 200
IRVING, TEXAS 75063.**

Susan M. Kelley
Appeals Judge

CONCUR:

Judy L. S. Barnes
Appeals Judge

Michael B. McShane
Appeals Judge