

APPEAL NO. 020375
FILED MARCH 28, 2002

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on February 6, 2002. The hearing officer determined that (1) the respondent (carrier) is relieved of liability for the _____, injury of the appellant (claimant) because the claimant, without good cause or other legal excuse, failed to timely file a claim; (2) the carrier did not waive the right to contest compensability of the injury but timely and properly contested compensability on the basis of newly discovered evidence that could not have been reasonably discovered earlier; and (3) the claimant's injury is not compensable. The claimant appealed these determinations on sufficiency grounds. The carrier responded that the Appeals Panel should affirm the hearing officer's decision and order.

DECISION

We reverse and render.

The relevant procedural facts of the case show that the undisputed, work-related date of injury was _____. The claimant did not file an Employee's Notice of Injury or Occupational Disease and Claim for Compensation (TWCC-41) until June 28, 2001. The carrier stated on its Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21), filed on July 3, 2001, that it first received written notice of the claimed injury on April 10, 2000. The carrier filed its TWCC-21 on the ground that it was relieved of liability because the claimant did not timely file a claim within one year. The hearing officer found good cause for not filing a claim within one year, but that this good cause ended on April 10, 2000. This determination was not appealed.

The claimant contends that the hearing officer erred in failing to properly apply Section 409.004. A carrier may be 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 and 409.004; Texas Workers' Compensation Commission Appeal No. 012360, decided November 26, 2001. However, a carrier is not relieved of liability for such failure if the carrier does not contest the claim. Section 409.004(2). Specifically, Section 409.004 provides:

Sec. 409.004. FAILURE TO FILE A CLAIM FOR COMPENSATION. Failure to file a claim for compensation with the [Texas Workers' Compensation Commission (Commission)] as required under Section 409.003 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.* [Emphasis added.]

Section 409.021 provides in pertinent part:

- (c) If an insurance carrier does not contest the compensability of an injury on or before the 60th day after the date on which the insurance carrier is notified of the injury, the insurance carrier waives its right to contest compensability.

* * * * *

- (d) An insurance carrier may reopen the issue of the compensability of an injury if there is a finding of evidence that could not reasonably have been discovered earlier.

In Texas Workers' Compensation Commission Appeal No. 94224, decided April 1, 1994, we said:

[T]he failure to timely file a claim does not extinguish this claimant's right to benefits, but may relieve the carrier of the legal liability to pay those benefits. When such a claim is filed more than one year after the date of injury, it is payable only under two circumstances. Either, there is good cause for untimely filing . . . or the carrier does not contest the claim. Section 409.004(2). The 1989 Act in Section 409.021(c) and (d) specifies how and when a contest must be made: existing defenses (such as failure to file a claim within one year) must be raised by the carrier within 60 days of notice of the claim; other defenses not reasonably discoverable earlier may be raised by the carrier when discovered. A defense to liability is lost if not timely and expressly contested as required by Sections 409.004(2) and 409.021(c) of the 1989 Act.

The claimant asserts that, pursuant to Section 409.004(2), the carrier was not relieved of liability because the carrier did not contest the claim. The claimant also asserts that the hearing officer erred in determining that the carrier did not waive its right to contest the compensability of the claimant's _____, injury, pursuant to Section 409.021.

**WHETHER THE CARRIER WAIVED THE DEFENSE OF
FAILURE TO TIMELY FILE A CLAIM**

The carrier first had written notice of injury on _____, which was more than one year after the _____, date of injury. Thus, the "defense" of failure to file a claim was already applicable as of _____, and was present throughout the 60-day period after the carrier received its first written notice of injury. However, the carrier did not

file a TWCC-21 on the ground that the claimant failed to file a claim within one year until it filed its TWCC-21 on July 3, 2001, which was more than 60 days after _____. Therefore, the carrier waived the right to contest compensability of the injury for this reason. In Texas Workers' Compensation Commission Appeal No. 950050, decided March 1, 1995, we stated:

In [Appeal No. 94224, *supra*,] the majority determined that carrier had waived its defense to liability related to claimant's failure to timely file a claim by not raising it within the 60-day period established in Section 409.021(c). In Appeal No. 94224, the carrier received the first written notice of injury, triggering the running of the 60-day period more than one year after the date of injury; therefore, we decided that it had to raise the defense of claimant filing an untimely claim within the 60-day period for contesting compensability, as it would any other available defense, or risk waiver.

We conclude that the hearing officer erred in determining that the carrier did not waive the right to contest compensability. Accordingly, the carrier is not relieved of liability under Section 409.004 because the carrier did not timely contest the claim. Section 409.004(2); Appeal No. 94224, *supra*.

WHETHER THE CARRIER'S DEFENSE WAS BASED ON NEWLY-DISCOVERED EVIDENCE

The claimant complains of the hearing officer's determination that "[t]he carrier did not waive the right to contest compensability of the [injury], but timely and properly contested compensability on the basis of newly discovered evidence that could not have been discovered earlier." See Section 409.021(d). The carrier had a duty to investigate and could have discovered that a claim had not been filed within one year after the date of injury. The duty to investigate is not "abstract," as the hearing officer suggests, but an affirmative duty triggered by receipt of written notice of injury. Texas Workers' Compensation Commission Appeal No. 93967, decided December 9, 1993. The claimant's June 28, 2001, TWCC-41 constituted newly discovered evidence that could not reasonably have been discovered by the carrier at an earlier time. However, the carrier already had received written notice of the claimed injury within 60 days of _____, and could have investigated and discovered that the claimant had not yet filed a claim within one year. The claimant's June 28, 2001, TWCC-41 did not provide any new evidence that would raise a defense or reason for relief from liability not already available to the carrier on _____. See Appeal No. 94224, *supra*. We conclude that the hearing officer erred in determining that the carrier contested compensability on the basis of newly discovered evidence.

WHETHER THE TOLLING STATUTE APPLIES

The claimant contends that the hearing officer failed to properly apply Section 409.008. The claimant asserts that, because an Employer's First Report of Injury or Illness (TWCC-1) was not filed in accordance with Section 409.005, the one-year deadline for filing a claim was tolled. Section 409.008 provides:

Sec. 409.008. FAILURE TO FILE EMPLOYER REPORT OF INJURY; LIMITATIONS TOLLED. 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 legal beneficiary until the day on which the report required under Section 409.005 has been furnished.

The tolling provision does not apply unless there is first the duty to file the first report of injury. Texas Workers' Compensation Commission Appeal No. 000444, decided April 13, 2000. Section 409.005(a)(1) states that a TWCC-1 shall be filed with the Commission if an injury results in the absence of a worker from work for more than one day. In this case, the injury was a specific injury and the hearing officer found that the claimant did not miss work for more than one day due to the injury. Therefore, there was no requirement for the filing of a TWCC-1 pursuant to Section 409.005 and the hearing officer did not err in determining that there was no tolling in this case. Appeal No. 000444.

The claimant complains of the hearing officer's determination that he did not miss more than one day of work. The claimant testified that he "guessed" that he might have missed a total of thirty hours of work related to the injury over a two-and-one-half year period. He said he went to some doctors' appointments on his lunch hour. On his June 28, 2001, TWCC-41, however, the claimant represented that he did not miss any time from work. The hearing officer considered the claimant's testimony and the record before him and determined that the claimant did not establish that he missed more than one day of work as a result of the injury. This involved a fact question for the hearing officer. We conclude that the hearing officer's determination in this regard 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, 176 (Tex. 1986).

We reverse the hearing officer's determination that the carrier is relieved of liability for the claimant's injury and render a decision that the carrier is not relieved of liability due to the claimant's failure to timely file a claim. We reverse the hearing officer's determination that the carrier did not waive the right to contest the compensability of the claim and render a decision that the carrier waived the right to contest the compensability of the _____, injury. The claimant's injury is therefore considered "compensable," and the carrier is ordered to pay income and medical benefits according to the 1989 Act and rules.

According to information provided by the carrier, the true corporate name of the insurance carrier is **AMERICAN MANUFACTURERS MUTUAL INSURANCE COMPANY** and the name and address of its registered agent for service of process is

**CORPORATION SERVICE COMPANY
800 BRAZOS
AUSTIN, TEXAS 78701.**

Susan M. Kelley
Appeals Judge

CONCUR:

Philip F. O'Neill
Appeals Judge

Robert W. Potts
Appeals Judge