

APPEAL NO. 023066  
FILED JANUARY 15, 2003

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 October 31, 2002. The hearing officer resolved the disputed issue by deciding that the respondent (claimant) sustained an injury (made compensable by carrier waiver) on \_\_\_\_\_; that the claimant failed to timely notify his employer pursuant to Section 409.001; but that the respondent (carrier) is not relieved from liability under Section 409.002; that the claimant failed to timely file a claim for compensation with the Texas Workers' Compensation Commission (Commission) within one year of the injury as required by Section 409.003; but that the carrier is not relieved from liability under Section 409.004; that the claimant is not barred from pursuing workers' compensation benefits because of an election to receive benefits under a group health insurance policy; that the carrier waived the right to contest compensability of the claimed injury by not timely contesting the injury in accordance with Section 409.021; and that due to his \_\_\_\_\_, compensable injury, the claimant has been unable to obtain employment at his preinjury wage from August 4 through November 17, 2001. The carrier appealed on sufficiency of the evidence grounds and the claimant responded.

DECISION

Affirmed.

The claimant, a retail store employee, testified that he sustained a back injury on \_\_\_\_\_, when he lifted a box of papers at work. He said that he reported the injury to a manager the same day. The claimant testified that he had ruptured a disc and tore a ligament in his back from the lifting incident and as a result had back surgery on August 4, 2001. The claimant testified that he was involved in a motor vehicle accident (MVA) prior to his lifting incident, however the MVA did not cause him back problems. The claimant testified that after his back surgery he reported his injury as work-related to his employer and filed a workers' compensation claim within one year of his injury. The claimant is claiming disability from August 4 through November 17, 2001.

In considering all the evidence, the hearing officer determined that the claimant's testimony was not persuasive and the claimant's recollection of the date of injury and date of disability were inconsistent with other evidence. However, the hearing officer's determinations on this case turned on whether the carrier waived the right to contest compensability of the claimed injury by not timely contesting the injury in accordance with Section 409.021.

Section 409.021(a) provides that 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. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 124.2(d) (Rule 124.2(d)) provides that the carrier shall notify the Commission and the claimant of a denial of a claim based on noncompensability or lack of coverage in accordance with this section and as otherwise provided by this title.

The Payment of Compensation or Notice of Refused/Disputed Claim Interim (TWCC-21) in evidence indicates that the carrier received written notice of the injury on September 7, 2001, and that it disputed the claimant's claim in its entirety that same day. However, the TWCC-21 does not indicate that it was received or filed with the Commission. The form does indicate a copy was sent to the claimant. The hearing officer determined that the carrier did not timely contest the injury in accordance with Section 409.021, "as evidenced by the lack of documentation, such as an appropriate form with a timely date stamp, to evidence a timely contest." Since the carrier's TWCC-21 did not have a receipt stamp by the Commission or other documentation to show that the carrier had notified the Commission of its refusal to pay benefits in accordance with Section 409.021, the hearing officer's determination that the carrier waived the right to contest compensability of the claimed injury and that the \_\_\_\_\_, injury is compensable is supported by the evidence and is affirmed. By failing to timely contest compensability, the carrier also lost the right to assert defenses under Section 409.002 and 409.004 based on the claimant's failure to give timely notice of injury to the employer and to timely file a claim for compensation. See Continental Casualty Company v. Downs, 81 S.W.3d 803 (Tex. 2002); Texas Workers' Compensation Commission Appeal No. 022027-s, decided September 30, 2002; and Texas Workers' Compensation Commission Appeal No. 022091-s, decided October 7, 2002. Regarding the election of remedies issue, the Appeals Panel has followed the holding in Valley Forge Insurance Company v. Austin, 65 S.W.3d 371 (Tex. App.-Dallas 2001, no pet. h.) where the Court of Appeals determined that election of remedies is no longer a viable defense under the 1989 Act. See Appeal No. 022027-s.

Upon review of the record before us, and the complained-of determinations, we conclude that there is sufficient legal and factual support for the hearing officer's decision. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986). The hearing officer's decision and order are affirmed.

The true corporate name of the insurance carrier is **AMERICAN HOME ASSURANCE COMPANY** and the name and address of its registered agent for service of process is

**ROBERT PARNELL  
8144 WALNUT HILL LANE, SUITE 1600  
DALLAS, TEXAS 75231-4813.**

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Thomas A. Knapp  
Appeals Judge

CONCUR:

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Terri Kay Oliver  
Appeals Judge

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Edward Vilano  
Appeals Judge