

APPEAL NO. 030286
FILED MARCH 20, 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 January 8, 2003. The hearing officer determined that: (1) respondent (claimant) sustained a compensable injury; (2) claimant had disability from June 11, 1999, through the date of the hearing; (3) both appellant/cross-respondent, (carrier 1) and respondent/cross-appellant, (carrier 2) provided workers' compensation insurance for claimant's _____, injury; (4) carrier 2 did not waive the right to contest the compensability of the claim and timely disputed the claim; (5) the issuance and existence of the workers' compensation policy issued by carrier 2 did not cancel the policy from carrier 1 that had been previously issued to (employer); (6) the Texas Workers' Compensation Commission (Commission) does not have authority to determine the amount of reimbursement to be paid to carrier 1 by carrier 2; (7) carrier 1 is not relieved from all liability for benefits in this claim on and after December 1, 2000, and is not relieved from liability prior to that date, because it has a valid policy of workers' compensation insurance covering claimant's injury; (8) carrier 1 has "not been guilty of laches and because it has appropriately adjusted, paid, and defended this claim, it is therefore not barred from denying liability to [carrier 2] on the basis of estoppel, laches, detrimental reliance or waiver"; (9) carrier 1 "had coverage over Claimant's injury, and failure to file a [Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21)] on coverage does not create a waiver"; (10) the existence of a workers' compensation policy from carrier 1 did not cancel the policy from carrier 2; and (11) employer, carrier 2, and (Company B) intended for carrier 2's policy to be the primary coverage for employer's employees working at Company B.

Carrier 1 appealed the determinations that: (1) the employer had a valid workers' compensation insurance policy that covered and did not exclude claimant as an employee; (2) carrier 1 gave carrier 2 verbal and incomplete written notice of the claim not later than August 31, 2000; (3) carrier 2 received written notice of the claim on December 1, 2000; (4) carrier 2 has not waived the right to contest compensability; (5) the issuance of carrier 2's policy did not cancel carrier 1's policy; (6) the Commission does not have authority to determine the amount of reimbursement; and (7) carrier 1 is not relieved of all or partial liability in this case and had a valid policy covering the injury. Carrier 2 responds that: (1) there is no legal authority that carrier 1's policy was cancelled or cancelled in part only as to the employees at Company B's (city) facility (Facility B); (2) carrier 1's policy was valid and in effect at the time of claimant's injury and carrier 1 was a carrier on the claim; (3) Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 110.1(j) (Rule 110.1(j)), relied on by carrier 1, was not in effect at any time relevant to the claim; (4) neither employer nor carrier 1 had given any cancellation notice as required by Sections 406.007 and 406.008, so carrier 1's coverage was still in effect at the time of the injury; (5) there is coverage by carrier 1, not through waiver, but pursuant to the terms of its own insurance policy; (6) the Commission has ordered that two carriers must share liability on claims in the past, and this is not "untenable" as alleged

by carrier 1; (7) the hearing officer did not have authority to order equitable reimbursement; (8) carrier 1 is not entitled to reimbursement as a subclaimant; (9) carrier 1 is not entitled to reimbursement pursuant to Section 410.033 because carrier 1 did not pay benefits pursuant to an interlocutory order; (10) carrier 2 timely disputed the claim after receiving written notice in December 2000 and there was no waiver; and (11) carrier 2 did not receive notice of the claim for the purposes of Rule 124.1(a)(3) until December 1, 2000.

Carrier 2 appeals the determinations that: (1) claimant sustained an injury on _____, and had disability; (2) employer, carrier 2, and Company B intended for carrier 2's policy to be the primary coverage for employer's employees working at Company B; (3) employer notified carrier 1 of claimant's injury not later than June 25, 1999; (4) carrier 1 learned of the existence of carrier 2's policy sometime in the summer of 2000, prior to August 31, 2000; (5) carrier 1 acted diligently and was not negligent in not learning earlier of carrier 2's policy; (6) carrier 1 appropriately adjusted and investigated the claim of injury, and paid benefits accrued; (7) carrier 2 was not prejudiced by any delay of carrier 1 in notifying carrier 2 of the claim; (8) carrier 1 has "not been guilty of laches and because it has appropriately adjusted, paid, and defended this claim, it is therefore not barred from denying liability to [carrier 2] on the basis of estoppel, laches, detrimental reliance or waiver"; (9) carrier 1 "had coverage over Claimant's injury, and failure to file a TWCC-21 on coverage does not create a waiver"; and (10) the existence of a workers' compensation policy from carrier 1 did not cancel the policy from carrier 2. Carrier 1 responded that: (1) carrier 2 did not contest the compensability of claimant's claim other than to say it was not able to investigate the claim; (2) claimant met his burden of proof regarding compensability and disability; (3) carrier 2 could have investigated the claim in this case and was not prevented from doing so; (3) carrier 1 was not responsible for employer's failure to discover the second worker's compensation policy with carrier 2; (4) carrier 1 acted with diligence when it discovered the existence of carrier 2's policy; (5) carrier 1 appropriately adjusted claimant's claim; (6) carrier 2 was not harmed by the delay in its ability to investigate the claim; (7) carrier 1 "did not file a TWCC-21 denying the claim because this was, and still is, a valid compensable claim"; (8) carrier 2 failed to file a TWCC-21 alleging there was no coverage and/or that it had equitable defenses to the claim; (9) carrier 2's policy shows it had coverage in this case; (10) carrier 2 is not entitled to equitable relief; (11) for the period after August 31, 2000, when carrier 2 had notice of the claim, it could have participated in adjusting the claim; (12) all benefits paid by carrier 1 were reasonable and necessary; (13) carrier 1 did not waive its right to contest compensability of the claim; (14) carrier 1 did not file a TWCC-21 because by alleging it does not have coverage, it is not alleging the claim is not "compensable" for the purposes of Section 409.021(c); (15) coverage by carrier 1 cannot be created by waiver; and (16) carrier 2 is not entitled to equitable relief.

Claimant filed a response stating that the hearing officer did not err in making the findings regarding injury and disability.

DECISION

We affirm as reformed.

BACKGROUND FACTS

Carrier 1 had a workers' compensation insurance policy covering the employer's employees. The policy indicated that it took effect July 1, 1998, and expired on July 1, 1999. Thereafter, employer and Company B negotiated an agreement wherein employer would send employees to various facilities of Company B to perform contract work for Company B. Employer agreed to provide workers to Facility B. Pursuant to a May 3, 1999, service agreement signed by employer and Company B, Company B purchased a workers' compensation insurance policy that covered only employer's employees who were working at Company B's Facility B. Employer was to compensate Company B for the premiums on the policy through a system set forth in the agreement. Carrier 2 issued this policy of insurance to employer and the "designated workplaces exclusion endorsement" of the policy said the policy does not cover work except "operations in connection with . . . the work at . . . [Facility B]."

Claimant testified that he was injured at work on _____, when he fell to the floor while attempting to sit in a chair. There was evidence that the chair tipped back and claimant landed, still in the chair, but flat on his back. Claimant said he felt his neck snap and that he began to have increasing symptoms over the next few days and sought medical treatment. He reported the claim the next Monday to his supervisor at employer.

When claimant reported his injury to employer, Ms. K, notified *only* carrier 1 of the claim. Carrier 1 began to pay workers' compensation benefits. Ms. V, an adjuster for carrier 1, testified that she received a call on August 31, 2000, indicating that there was a possibility that there was another carrier on the claim. Ms. V said carrier 1 had no knowledge before August 31, 2000, regarding the policy issued by carrier 2. There was evidence that during an audit of the file by employer, it discovered carrier 2's policy and notified carrier 1.

Ms. V testified that she sent an email to Ms. M, with carrier 2, and also attempted to contact her by telephone to discuss the policies.

CARRIER 1's APPEAL

Carrier 1 appealed and contended that its workers' compensation insurance policy was cancelled by the issuance of carrier 2's policy. Carrier 1 notes that the effective date of carrier 2's policy was ten months after the effective date of carrier 1's policy, and asserts that this shows that this was a replacement policy meant to cancel carrier 1's policy. Carrier 1 asserts that, pursuant to Rule 110.1(j), if an employer switches insurance carriers, the original policy will be considered cancelled as of the

date the new policy takes effect. Carrier 1 asserts that its policy was cancelled effective May 3, 1999, when carrier 2's policy took effect.

We first note that the effective date of Rule 110.1(j) was March 13, 2000, so it did not apply. Further, we question whether there was actually a "switch" of carriers in this case, as contemplated by this rule. This is not a case where an employer totally switched carriers. Instead, another workers' compensation policy was obtained to cover just a select number of employer's employees. In any case, as we said, given the effective date of the rule, it did not apply in this case. We have reviewed the record and we conclude that the hearing officer did not err in determining that: (1) the employer had a valid workers' compensation insurance policy with carrier 1 that covered and did not exclude claimant as an employee; (2) the issuance of carrier 2's policy did not cancel carrier 1's policy; and (3) carrier 1 had a valid policy covering the injury in this case.

In the alternative, carrier 1 contends that carrier 2 was the primary carrier and should be charged with sole responsibility for the claim. The hearing officer determined in Finding of Fact No. 5, that it was "intended" that carrier 2's policy be primary, but he still ordered that both carriers were liable on the claim. We are aware of no legal authority for the Commission to relieve carrier 1 of liability for the claim when its policy was still in effect. We conclude that the hearing officer did not err in failing to find that carrier 2 was solely liable for this claim. We strike Finding of Fact No. 5 as unnecessary to the decision in this case.

Carrier 1 contends that carrier 2 waived the right to contest the compensability of the claim by failing to timely file a TWCC-21 after receiving the August 31, 2000, email from Ms. V. Carrier 1 asserts that this email gave carrier 2 written notice of the claim that was sufficient under Rule 124.1(a)(3). We conclude that the hearing officer did not err in determining that this email did not constitute sufficient written notice pursuant to Rule 124.1(a)(3). The hearing officer determined that carrier 2 received written notice of the claim on December 1, 2000, and that it timely filed its TWCC-21 on December 8, 2000. We conclude that the hearing correctly determined that carrier 2 did not waive the right to contest the compensability of the claim.

Carrier 1 contends the hearing officer erred in determining that the Commission does not have authority to determine the amount of reimbursement. We note that it has not been determined that carrier 1 is "not liable for the payment of benefits." Therefore, carrier 1 is not entitled to reimbursement pursuant to Section 410.033. Further, that section is not applicable because carrier 1 did not pay benefits pursuant to an interlocutory order of a benefit review officer. We agree with the hearing officer that the Commission does not have authority to order equitable reimbursement. See Texas Workers' Compensation Commission Appeal No. 992012, decided November 4, 1999. Carrier 1 contends that it is entitled to reimbursement as a subclaimant pursuant to Section 409.009. However, we do not view either of two or more carriers disputing the amounts of their respective liability to a claimant, or their liability to one another for amounts paid to a claimant, to be "subclaimants" for the purposes of Section 409.009.

See Texas Workers' Compensation Commission Appeal No. 992487, decided December 22, 1999. We conclude that the hearing officer did not err in failing to order reimbursement.

CARRIER 2's APPEAL

Carrier 2 appeals the determinations that claimant sustained an injury on _____, and had disability. Carrier 2 states that claimant had the burden of proof regarding compensability and disability and then asks the Appeals Panel to reverse the hearing officer's determinations that claimant sustained a compensable injury and that he had disability. Carrier 1 responds that carrier 2 did not state the grounds for its appeal of the hearing officer's injury and disability determinations. Although its appeal is vague, it appears that carrier 2 is contending that claimant did not meet his burden of proof on these issues. We have reviewed the complained-of determinations and conclude that the issues involved fact questions for the hearing officer. The hearing officer reviewed the record and decided what facts were established. We conclude that the hearing officer could determine that claimant met his burden of proof on these issues. The hearing officer's determinations are supported by the record and are 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).

Carrier 2 also complains that it is "at a distinct disadvantage" and that it was deprived of its opportunity to properly investigate this matter. Carrier 2 did not ask for a continuance in this regard and any possible error is waived. It appears that carrier 2 is likely referring to the fact that it did not find out about the claim until late in 2000, and so was unable to investigate until then. To the extent that carrier 2 is arguing that carrier 1 should be responsible for the claim for equitable reasons, we do not have authority to decide that issue.

Carrier 2 contends the hearing officer erred in determining that employer, carrier 2, and Company B intended for carrier 2's policy to be the primary coverage for employer's employees working at Company B. We strike this determination as unnecessary to the decision in this case.

Carrier 2 also complains of the determinations that: (1) carrier 2 was not prejudiced by any delay of carrier 1 in notifying carrier 2 of the claim; (2) carrier 1 acted diligently and was not negligent in not learning earlier of carrier 2's policy; (3) employer notified carrier 1 of claimant's injury not later than June 25, 1999; (4) carrier 1 appropriately adjusted and investigated the claim of injury, and paid the benefits that accrued; (5) carrier 1 has "not been guilty of laches and because it has appropriately adjusted, paid, and defended this claim, it is therefore not barred from denying liability to [carrier 2] on the basis of estoppel, laches, detrimental reliance or waiver"; and (6) carrier 1 learned of the existence of carrier 2's policy sometime in the summer of 2000, prior to August 31, 2000. Findings of Fact Nos. 9, 12, and 13 and Conclusion of Law No. 9 concern whether one carrier or the other should be liable or relieved of liability

pursuant to equitable principles and/or negligence. We do not have authority to decide these matters and we strike Findings of Fact Nos. 9, 12, and 13 and Conclusion of Law No. 9 as unnecessary to the decision in this case. The hearing officer's determinations in Findings of Fact Nos. 7 and 8 are not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain, supra.

Any determinations we make regarding reimbursement, liability, or relief from liability for the payment of benefits must be in keeping with our authority pursuant to the 1989 Act and rules. Generally, the powers of an administrative agency are derived entirely from legislative enactment. The agency has the powers that are expressly conferred by statute together with those necessarily implied from powers and duties expressly given or imposed. Texas Workers' Compensation Commission Appeal No. 93642, decided September 10, 1993. There is no provision in the 1989 Act or rules for the equitable relief sought by either carrier and we are hesitant to grant such relief. We acknowledge that the Appeals Panel has recognized an "element of estoppel," an equitable principle, in some cases in order to preserve the integrity of the system and to prevent a party from taking unfair advantage. See, e.g. Texas Workers' Compensation Commission Appeal No. 980101, decided March 4, 1998. However, we are quite hesitant to order reimbursement between carriers or shift responsibility for a claim from one carrier to another in the absence of a statute or rule authorizing this.¹

Carrier 2 complains of the determination that carrier 1 did not waive the right to contest the compensability of the claim. One issue at the hearing was whether carrier 1 "waived its right to raise the issue of coverage by failing to file a TWCC-21 asserting a dispute over coverage or who the correct carrier is." A court of appeals has determined that coverage is not an issue of "compensability" as that term is used in Section 409.021(c), and a carrier need not timely dispute on that basis or face waiver under that section. See Houston Gen. Ins. Co. v. Association Cas. Ins. Co., 977 S.W.2d 634 (Tex. App.-Tyler 1998, no writ). Further, we note that the hearing officer determined that the facts regarding the existence of dual coverage were not known to carrier 1 within the 60-day period after it obtained notice of the claim. Therefore, if anything, it appears that the reopening provision of Section 409.021(d) would apply. Again, however, carrier 1 would not need to "reopen compensability" in a timely manner because coverage is not a "compensability" issue. See Houston Gen. at 636. We conclude that the hearing officer did not err in determining that there was no waiver by carrier 1.

Carrier 2 contends the hearing officer erred in determining that the existence of a workers' compensation policy from carrier 1 did not cancel the policy from carrier 2. Carrier 2's policy says, "If another insurance company notifies the [Commission] that it is insuring you as an employer, such notice shall be a cancellation of this policy effective when the other policy starts." We note that in this case, carrier 1 was already insuring employer when carrier 2 issued its policy. Therefore, carrier 1 did not file a notice that it was insuring employer after carrier 2's policy became effective. There is no legal authority for the Commission to determine that carrier 2's policy was cancelled.

¹ We are mindful of the limitations of our authority. See generally Rodriguez v. Service Lloyd's Insurance Company, 997 S.W.2d 248 (Tex. 1999).

We conclude that the hearing officer did not err in this regard. As reformed, we affirm the hearing officer's decision and order.

According to information provided by carrier 1, the true corporate name of insurance carrier 1 is **TRAVELERS INDEMNITY COMPANY OF ILLINOIS** and the name and address of its registered agent for service of process is

**CT SYSTEMS, INCORPORATED
350 ST. PAUL STREET
DALLAS, TEXAS 75201.**

According to information provided by carrier 2, the true corporate name of insurance carrier 2 is **ILLINOIS NATIONAL INSURANCE COMPANY** and the name and address of its registered agent for service of process is

**CORPORATION SERVICE COMPANY
800 BRAZOS SUITE 750, COMMODORE 1
AUSTIN, TEXAS 78701.**

Judy L. S. Barnes
Appeals Judge

CONCUR:

Terri Kay Oliver
Appeals Judge

Edward Vilano
Appeals Judge