

APPEAL NO. 032912
FILED DECEMBER 23, 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 14, 2003. The hearing officer resolved the disputed issues by deciding that: (1) the appellant (carrier) is not relieved from liability under Section 409.002 because the respondent (claimant) timely notified his employer pursuant to Section 409.001; (2) even though 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, the carrier is not relieved from liability under Section 409.004 because the carrier did not specifically contest liability on the issue of timely filing a claim for compensation with the Commission pursuant to Section 409.003 and Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 124.2(f) (Rule 124.2(f)); and (3) the carrier specifically contested liability on the issue of timely notice to the employer but did not specifically contest liability on the issue of timely filing a claim for compensation with the Commission pursuant to Section 409.003 and Rule 124.2(f). The carrier appealed, disputing the determination that the claimant timely notified his employer and the determination that the carrier did not specifically contest liability on the issue of timely filing a claim. The claimant responded, urging affirmance.

DECISION

Affirmed in part, reversed and rendered in part.

FACTUAL SUMMARY

The parties stipulated that the claimant sustained an injury while in the course and scope of employment on _____. The claimant testified that on that date he was involved in a motor vehicle accident (MVA) and sustained a back and neck injury. The evidence reflects that the claimant filed an Employee's Notice of Injury or Occupational Disease and Claim for Compensation (TWCC-41) on September 10, 2002, claiming an injury to his head, neck, back, and right shoulder as a result of a MVA. A Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) reflects that the carrier first received written notice of the injury on October 16, 2002, and that it disputed compensability of the claimed injury on October 18, 2002, when it filed the TWCC-21.

The carrier disputes the finding that "because Claimant did not miss any work as a result of the injury, Employer was not obligated to file a [Employer's First Report of Injury or Illness (TWCC-1)]." 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 claimant testified that he did not miss work as a result of the injuries he sustained. There is sufficient evidence to support the challenged finding.

TIMELY NOTICE

With regard to timely notice, the claimant had the burden to prove that he gave timely notice of injury to his employer pursuant to Section 409.001. Section 409.001(a) provides that an employee or a person acting on the employee's behalf shall notify the employer of the employee of an injury not later than the 30th day after the date on which the injury occurred. The hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). As the finder of fact, the hearing officer resolves the conflicts in the evidence and determines what facts have been established. The hearing officer was persuaded by the claimant's testimony that the claimant notified the employer, through his supervisor, within three days after _____, that he sustained an injury as a result of a work-related MVA. The hearing officer determined that the carrier is not relieved from liability under Section 409.002 because the claimant timely notified the employer pursuant to Section 409.001. We conclude that the hearing officer's timely notice determination is supported by sufficient evidence and is not so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

TIMELY FILING WITHIN ONE YEAR

The claimant had the burden to prove that he filed his claim of injury within one year of the date of his injury pursuant to Section 409.003, or had good cause for not timely filing. Section 409.003 requires that a claimant file a claim for compensation with the Commission not later than one year after the date of injury. Pursuant to Section 409.004, failure to do so, absent a showing of good cause or actual knowledge of the injury by the employer, relieves the carrier and employer of liability for the payment of benefits for the injury. The test for good cause is that of ordinary prudence; that is, whether the employee has prosecuted his or her claim with the degree of diligence that an ordinarily prudent person would have exercised under the same or similar circumstances. Hawkins v. Safety Casualty Company, 207 S.W.2d 370 (Tex. 1948). The hearing officer determined that the claimant did not timely file his TWCC-41 within one year of sustaining an injury, that a reasonable person would have filed the TWCC-41 within one year of sustaining an injury, and that the claimant did not show good cause for untimely filing. We conclude that the hearing officer's timely filing determination is supported by sufficient evidence and is not so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. Cain, supra.

CARRIER WAIVER

The carrier had the burden to prove that it specifically contested liability on the issues of timely notice to the employer and timely filing of a claim within one year of the injury. Neither party disputes the hearing officer's determination that the carrier specifically contested liability on the issue of timely notice, however, the carrier argues that the hearing officer erred in determining that the carrier did not specifically contest liability on the issue of timely filing a claim for compensation with the Commission pursuant to Section 409.003 and Rule 124.2(f).

The hearing officer considered the carrier's TWCC-21 and found that the carrier "did not specifically contest liability of the issue of timely filing a claim for compensation with the Commission because the language was rambling and never specifically mentioned the Commission." We disagree. The Appeals Panel has said that "magic words are not necessary" to contest the compensability of an injury under the statute and rule, and that the Commission will look to "a fair reading of the reasoning listed" to determine if the notice of refusal or denial is sufficient. Texas Workers' Compensation Commission Appeal No. 93326, decided June 10, 1993. And, as was stated in Texas Workers' Compensation Commission Appeal No. 93533, decided August 9, 1993, "[t]he key point to be determined is whether, read as a whole, any of the reasons listed by carrier would be a defense to compensability that could prevail in a subsequent proceeding."

The carrier's TWCC-21, in block 43, states as follows:

Carrier disputes entitlement to any benefits under Workers' Compensation Act. Claimant made clear choice at time of injury which was _____ to pursue third party liability carrier. Claimant did not lose any time from work. Claimant did not elect to file under workers' compensation until 9/10/02 via TWCC-41. At no time prior to that did claimant make attempt to file workers' compensation thru the employer or to identify the workers' compensation carrier. Now nearly 2 years later claimant has now filed under work [SIC] compensation. All treatment claimant may have received during this time frame as well as any recovery from third party would not have been under the strictures of the workers compensation guidelines and would not allow the workers compensation carrier the ability to address claim timely, accurately and under guidelines of workers compensation for medical care, subrogation, etc.

Placing the language of the TWCC-21 in context we believe results in a fair inference that the carrier was raising the defense of the claimant's failure to timely file a claim. Though the carrier's controversion could have been more clear and definitive, we conclude that the language used, under the particular circumstances, was sufficient to fairly apprise the claimant that the carrier's dispute included an allegation that the claim was not timely filed. We find the evidence reflects that the TWCC-21 is sufficient to contest liability of the issue of timely filing within one year of the injury. Accordingly, we reverse the determination that the carrier did not specifically contest liability on the issue of timely filing a claim for compensation and render a new determination that the carrier did specifically contest liability on the issue of timely filing a claim for compensation.

The hearing officer's timely notice and timely filing determinations are affirmed. The determination that the carrier is not relieved from liability under Section 409.004 because the carrier did not specifically contest liability on the issue of timely filing a claim for compensation with the Commission pursuant to Section 409.022 and Rule 124.2(f) is reversed, and a new determination is rendered that carrier is relieved from

liability under Section 409.004 because the carrier specifically contested liability on the issue of timely filing a claim for compensation with the Commission pursuant to Section 409.022 and Rule 124.2(f)

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

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

Margaret L. Turner
Appeals Judge

CONCUR:

Elaine M. Chaney
Appeals Judge

Robert W. Potts
Appeals Judge