

APPEAL NO. 050018-s
FILED FEBRUARY 22, 2005

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. Section 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on December 7, 2004. Hearing officer 2 resolved the disputed issues by deciding that: (1) the Texas Workers' Compensation Commission (Commission) has jurisdiction to determine compensability of the injury alleged in this case despite a previous decision favorable to the appellant (claimant) on this issue in a dispute with (carrier 1); (2) respondent (carrier 2) has not waived the right to contest compensability of the claimed injury because it timely contested the injury in accordance with Sections 409.021 and 409.022; (3) the claimant did not sustain a compensable repetitive trauma injury with a date of injury of (date of injury); (4) carrier 2 is relieved of liability under Section 409.002 because of the claimant's failure to timely notify her employer pursuant to Section 409.001; and (5) the claimant did not have disability resulting from the claimed injury. The claimant appeals, contending that hearing officer 2's determination that he had jurisdiction to hear the claim is without merit because he had no authority to reopen a final decision of another hearing officer, that the only issue to be determined was whether carrier 2 waived its right to dispute compensability, and that carrier 2 did waive its right to dispute compensability. Carrier 2 requests affirmance.

DECISION

Affirmed.

A prior CCH was held on June 2, 2004, between the claimant and carrier 1. Carrier 2 was not a party to that CCH. At the prior CCH, the claimant claimed a repetitive trauma injury with a date of injury of (alleged date of injury). The issues at the prior CCH were:

1. Did the claimant sustain a compensable repetitive trauma injury?
2. Did the claimant have disability resulting from the claimed injury?
3. What is the date of injury?
4. Is the carrier (carrier 1) relieved from liability under Section 409.002 because of the claimant's failure to timely notify her employer pursuant to Section 409.001?
5. Has the carrier (carrier 1) waived the right to contest compensability of the claimed injury by not timely contesting the injury in accordance with Sections 409.021 and 409.022?

In a decision and order signed June 10, 2004, (hearing officer 1), who presided at the prior CCH, decided that:

1. The claimant sustained a compensable repetitive trauma injury.
2. The claimant had disability resulting from the claimed injury beginning July 24, 2003, through the date of the CCH.
3. The date of injury is (date of injury).
4. The carrier (carrier 1) is relieved from liability under Section 409.002 because of the claimant's failure to timely notify her employer pursuant to Section 409.001.
5. The carrier (carrier 1) waived the right to contest compensability of the claimed injury by not timely contesting the injury in accordance with Sections 409.021 and 409.022.

Neither the claimant nor carrier 1 appealed hearing officer 1's decision and order of June 10, 2004, to the Appeals Panel, and thus the June 10, 2004, decision and order became final under Section 410.169. As noted, at the prior CCH the claimant claimed a date of injury of (alleged date of injury). Hearing officer 1's decision does not reflect that any stipulation was taken regarding the time period that the employer had workers' compensation insurance coverage with carrier 1 (the prior CCH record is not in evidence). Commission records indicate that the employer had workers' compensation insurance coverage with carrier 1 beginning June 1, 2003, so the (alleged date of injury), alleged date of injury fell within carrier 1's coverage; however, the (date of injury), date of injury found by hearing officer 1 did not. It is not known when the claimant learned of the coverage periods. According to the claimant, carrier 1 is not paying her benefits because the (date of injury), date of injury was not within its coverage period.

The claimant instituted a second proceeding, this time against carrier 2. At the second CCH, held on December 7, 2004, the parties stipulated that carrier 2's workers' compensation coverage for the employer was in effect on (date of injury), and ended on May 31, 2003, and the parties agreed that the issues were:

1. As a result of the decision and order of the Benefit CCH, does the Commission have jurisdiction to determine compensability?
2. Has the carrier (carrier 2) waived the right to contest compensability of the claimed injury by not timely contesting the injury in accordance with Sections 409.021 and 409.022?

3. Did the claimant sustain a compensable repetitive trauma injury with a date of injury of (date of injury)?
4. Is the carrier (carrier 2) relieved of liability under Section 409.002 because of the claimant's failure to timely notify her employer pursuant to Section 409.001?
5. Did the claimant have disability resulting from the claimed injury, and if so, for what period(s)?

In a decision and order signed on December 8, 2004, hearing officer 2 determined that:

1. The Commission has jurisdiction to determine compensability of the injury alleged in this case despite a previous decision favorable to the claimant on this issue in a dispute with a different carrier (carrier 1).
2. Carrier (carrier 2) has not waived the right to contest compensability of the claimed injury because it timely contested the injury in accordance with Sections 409.021 and 409.022.
3. Claimant did not sustain a compensable repetitive trauma injury with a date of injury of (date of injury).
4. The Carrier (carrier 2) is relieved of liability under Section 409.002 because of the Claimant's failure to timely notify her Employer pursuant to Section 409.001.
5. Claimant did not have disability resulting from the claimed injury.

The claimant appeals hearing officer 2's decision, and carrier 2 has responded.

We do not agree that hearing officer 2 has reopened hearing officer 1's decision, which became final under Section 410.169 because it was not appealed to the Appeals Panel. In the prior CCH, the claimant claimed a date of injury of (alleged date of injury), which was during carrier 1's coverage period and carrier 1 was a party, but not carrier 2. In the second CCH, the claimant was claiming a date of injury of (date of injury), which was during carrier 2's coverage period and carrier 2 was a party. Because of hearing officer 1's determination of a date of injury of (date of injury), carrier 2 is the correct carrier. The claimant did not present any evidence at the second CCH regarding date of injury, repetitive trauma injury, disability, or timely notice of injury to the employer. The prior CCH decision was in evidence. While hearing officer 1 did find that the claimant sustained a repetitive trauma injury in the course and scope of employment, she also determined that carrier 1 was relieved of liability because of the claimant's failure to timely notify the employer of her injury. Consequently, hearing officer 1's

determination of a compensable injury must have been based on her determination that carrier 1 waived its right to contest compensability.

The claimant proceeded at the second CCH under the theory that all she had to do was to prove that carrier 2 waived the right to contest compensability. We distinguish the instant case from Texas Workers' Compensation Commission Appeal No. 030284-s, decided March 18, 2003, because in that case the claimant was attempting to assert waiver against the self-insured employer where a prior final decision had determined that the claimant had not sustained a compensable injury and that the self-insured was not liable for benefits. Thus, in Appeal No. 030284-s the Appeals Panel determined that the hearing officer did not err in determining that the Commission did not have jurisdiction to decide whether the claimant had sustained a compensable injury and whether the self-insured waived its right to contest compensability because of the prior final decision that the self-insured employer was not liable for benefits because the claimant had not sustained a compensable injury. In the instant case, carrier 2 was not a party to the prior CCH, but is the correct carrier with regard to a (date of injury), date of injury, and the prior CCH did not determine carrier 2's liability.

The evidence at the second CCH reflected that carrier 2 was provided written notice on June 9, 2003, that the claimant was claiming a date of injury of (alleged date of injury), and that carrier 2 filed a dispute with the Commission on July 7, 2003, which was more than seven days from the date it received written notice of injury. However, carrier 2 did not provide coverage for the claimed date of injury of (alleged date of injury). Consequently, carrier 2's failure to timely dispute the notice of a (alleged date of injury), date of injury would not create coverage for the claimed injury with that date of injury. In Houston General Insurance v. Association Casualty Insurance Company, 977 S.W.2d 634 (Tex. App.-Tyler 1998, no pet.), the court noted that waiver does not create an insurance contract where none existed by the terms of the policy. See also Texas Workers' Compensation Commission Appeal No. 022268-s, decided October 30, 2002, where the Appeals Panel held that there was no waiver by a self-insured employer when it was given notice of an injury with an injury date that was prior to the date the employee became an employee of the self-insured employer.

The evidence reflects that carrier 2 first received written notice of the claimant's injury with a date of injury of (date of injury), which was within its coverage period, on June 28, 2004, and that carrier 2 timely disputed compensability (no injury in course and scope of employment and no timely notice of injury to the employer) on June 30, 2004. We conclude that hearing officer 2 did not err in determining that carrier 2 has not waived the right to contest compensability of the claimed injury because it timely contested the injury in accordance with Sections 409.021 and 409.022.

Hearing officer 1's decision of June 10, 2004, determined that the claimant had failed to timely notify the employer pursuant to Section 409.001 and timely notice to the employer was an issue that was actually litigated at the prior CCH. Hearing officer 1's decision became final because it was not appealed to the Appeals Panel. This case is

significant because, although carrier 2 was not a party at the prior CCH, it is permitted to assert collateral estoppel against the claimant with regard to the timely notice issue at the second CCH. See Hardy v. Fleming, 553 S.W.2d 790 (Tex.Civ.App.-El Paso, 1977, writ ref'd n.r.e.) (where it had been previously found in a plaintiff's workers' compensation case that he had not sustained a heart attack and judgment in that case had become final, even though the defendant doctor was not a party in privity with any party in such case, the doctrine of collateral estoppel barred the later malpractice suit against the doctor). Based on the doctrine of collateral estoppel, the hearing officer did not err in determining that carrier 2 is relieved of liability under Section 409.002 because of the claimant's failure to timely notify the employer pursuant to Section 409.001.

Because the claimant failed to timely notify her employer of her injury under Section 409.001, carrier 2 is relieved of liability. Hence, hearing officer 2 did not err in determining that the claimant did not sustain a compensable injury and, without a compensable injury, the claimant would not have disability as defined by Section 401.011(16).

We agree with hearing officer 2's analysis that the doctrine of res judicata would not apply to an entity which was not a party, or in privity with a party, to the first proceeding. See *generally* Amstadt v. U.S. Brass Corp, 919 S.W.2d 644 (Tex. 1996) regarding the elements of res judicata.

We note that when the date of injury is a disputed issue and there is the potential for coverage by more than one carrier due to an uncertain date of injury, all potentially liable carriers should be joined in the proceeding in order to fully resolve the disputed issues and to determine liability in the same proceeding. See Texas Workers' Compensation Commission Appeal No. 042603, decided November 29, 2004, where the Appeals Panel remanded a case to have a hearing officer determine the proper carrier for the date of injury. In the instant case, since there was no appeal of the prior CCH decision, the Appeals Panel did not have the opportunity to take such corrective action, had the need for it been pointed out on appeal.

We affirm hearing officer 2's decision and order.

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

**LEE F. MALO
12222 MERIT DRIVE, SUITE 700
DALLAS, TEXAS 75251.**

Robert W. Potts
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Margaret L. Turner
Appeals Judge