

APPEAL NO. 081343  
FILED NOVEMBER 12, 2008

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A consolidated contested case hearing was held on July 28, 2008. With regard to Docket No. 1, the issue before the hearing officer was:

- (1) Does the compensable injury of (date of injury for Docket No. 1), include bilateral cubital tunnel syndrome [CuTS]?

The hearing officer determined that the compensable injury of (date of injury for Docket No. 1), does not include bilateral CuTS.

With regard to Docket No. 2), the issues before the hearing officer were:

- (1) Did the appellant/cross-respondent (claimant) sustain a compensable repetitive trauma injury, with a date of injury of (date of injury for Docket No. 2)?
- (2) Did the claimant have disability resulting from the claimed injury?
- (3) Is respondent 2/cross-appellant, Zenith Insurance Company (Carrier Z) relieved from liability under Section 409.002 because of the claimant's failure to timely notify her employer pursuant to Section 409.001?
- (4) Is Carrier Z relieved from liability under Section 409.004 because of the claimant's failure to timely file a claim for compensation with the Texas Department of Insurance, Division of Workers' Compensation (Division) within one year of the injury, as required by Section 409.003?

The hearing officer determined that: (1) the claimant did not sustain a compensable repetitive trauma injury, with a date of injury of (date of injury for Docket No. 2); (2) the claimant did not have disability within the meaning of the 1989 Act, at any time; (3) because of the claimant's failure to timely notify her employer, Carrier Z is relieved from liability under Section 409.002; and (4) because the claimant filed her Employee's Notice of Injury or Occupational Disease and Claim for Compensation (DWC-41) before the employer filed its Employer's First Report of Injury or Illness (DWC-1) for the claimed injury of (date of injury for Docket No. 2), Carrier Z is not relieved from liability under Section 409.004.

With regard to Docket No. 1, the hearing officer's extent-of-injury determination was not appealed and has become final pursuant to Section 410.169.

With regard to Docket No. 2, the claimant appealed the hearing officer's compensability, disability and timely notice to the employer determinations. Carrier Z appealed the hearing officer's timely filing of a claim determination. Carrier Z argues that the tolling statute does not apply. Carrier Z maintains that the hearing officer erred in determining the timely filing of a claim issue because the claimant did not file her claim with the Division within one year as required by Section 409.003, and that the claimant's failure to file a claim with the Division within one year relieves Carrier Z from liability under Section 409.004. Respondent 1, Utica Mutual Insurance Company (Carrier U) responded to the claimant's and Carrier Z's appeals, urging affirmance. Carrier Z responded to the claimant's appeal. The claimant did not respond to Carrier Z's appeal.

## DECISION

Affirmed in part and reversed and rendered in part.

### **COMPENSABILITY, DISABILITY AND TIMELY NOTICE TO THE EMPLOYER (DOCKET NO. 2)**

The hearing officer's determinations on the issues of compensability, disability and timely notice to the employer are supported by sufficient evidence and are affirmed.

### **TIMELY FILING OF A CLAIM (DOCKET NO. 2)**

In an unappealed finding of fact, the hearing officer found that following treatment for the compensable injury of (date of injury for Docket No. 1), the claimant returned to work in March 2006. The parties stipulated that the compensable injury of (date of injury for Docket No. 1), includes bilateral carpal tunnel syndrome (CTS). The claimant underwent a carpal tunnel release to the right wrist on December 20, 2005, and a carpal tunnel release to the left wrist on April 4, 2006. The claimant testified that she sustained a new repetitive trauma injury, bilateral CuTS, on (date of injury for Docket No. 2), and that she notified her employer on that same date. The medical evidence reflects that the claimant received treatment for more than one year in the form of injections, splints, medication and therapy to her wrists and elbows from (date of injury for Docket No. 2), through February 28, 2008, from her treating doctor. In evidence is an operative report dated November 29, 2006, which reflects that she received injections for bilateral CTS. An operative report dated December 7, 2007, indicates that the claimant underwent surgery for a left cubital tunnel release.

In an unappealed finding of fact, the hearing officer found that the claimant filed her DWC-41 on December 13, 2007. In evidence is a letter from the Division to Carrier Z dated February 6, 2008, entitled "NOTICE TO CARRIER OF INJURY" listing a date of injury of "(date of injury for Docket No. 2)" and Carrier Z as the carrier. The employer's representative testified that on February 8, 2008, Carrier Z called the employer and

notified them that the claimant was alleging a work related-injury of (date of injury for Docket No. 2). The hearing officer comments in the Background Information section of the decision that the employer “first learned of the claimed injury on February 8, 2008, when [Carrier Z] called [the employer] about the claimed injury” and that “[a]fter being advised that the claimant was alleging a new injury, the employer filed a DWC-1 on February 13, 2008.” In an unappealed finding of fact, the hearing officer found that the employer filed its DWC-1 on February 13, 2008.

Section 409.003 provides, in part, that if the injury is an occupational disease, the employee or a person acting on the employee’s behalf shall file with the Division a claim for compensation for an injury not later than one year after the date on which the employee knew or should have known that the disease was related to the employee’s employment. Section 409.004 provides, in part, that failure to file a claim for compensation with the Division as required under Section 409.003 relieves the employer and the carrier of liability 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. In the instant case, the undisputed date of injury for the claimed repetitive trauma injury under Section 408.007 was (date of injury for Docket No. 2), and under Section 409.003 a claim must be filed within one year of the date of injury. The claimant filed her DWC-41 on December 13, 2007, more than one year after the date of injury. The evidence establishes the claimant failed to timely file a claim for compensation with the Division within one year of the injury, as required by Section 409.003.

The hearing officer incorrectly determined that because the claimant filed her DWC-41 on December 13, 2007, before the employer filed its DWC-1 on February 13, 2008, for the claimed injury of (date of injury for Docket No. 2), Carrier Z is not relieved from liability under Section 409.004. Carrier Z states in its appeal that the timeframe for the claimant to file her claim was not tolled under Section 409.008, since the employer had no knowledge of the claimed injury.

Section 409.008 provides, in part, that if an employer or the employer’s insurance carrier has been given notice or has knowledge of an injury to an employee and fails to file the report under Section 409.005, the period for filing a claim for compensation under Section 409.003 does not begin to run against the claim of an injured employee until the day on which the report required under Section 409.005 has been furnished.<sup>1</sup> In the instant case, the hearing officer failed to make a finding of when the employer had notice or knowledge of the (date of injury for Docket No. 2), injury. However, the hearing officer states in the Background Information section of his decision that the employer “first learned of the claimed injury on February 8, 2008,” then it “filed a DWC-1 on February 13, 2008.” It is clear from the hearing officer’s discussion, he was

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<sup>1</sup> Section 409.005(a)(2) provides that an employer shall report to the employer’s insurance carrier if an employee of the employer notifies that employer of an occupational disease under Section 409.001. Section 409.005(b)(2) provides that the report must be made not later than the eighth day after the day on which the employer receives notice under Section 409.001 that the employee has contracted an occupational disease.

persuaded that the employer first had notice of the (date of injury for Docket No. 2), claimed injury on February 8, 2008, which is supported by the evidence.

The tolling provision of Section 409.008 does not apply unless there is first the duty to file a DWC-1 pursuant to Section 409.005. See Appeals Panel Decision (APD) 992923 and APD 992963, both decided February 10, 2000. In the instant case, the employer was not required to file a DWC-1 pursuant to Section 409.005 before the claimant was required to file her DWC-41, because the evidence supports that the employer did not have notice or knowledge of the claimed injury until February 8, 2008, more than a year after the claimed injury of (date of injury for Docket No. 2). Accordingly, we reverse the hearing officer's determination that because the claimant filed her DWC-41 before the employer filed its DWC-1 for the claimed injury of (date of injury for Docket No. 2), that Carrier Z is not relieved from liability under Section 409.004, and we render a new decision that Carrier Z is relieved from liability under Section 409.004 because of the claimant's failure to timely file a claim with the Division within one year of the injury as required by Section 409.003.

### **SUMMARY**

We affirm the hearing officer's determinations on the issues of compensability, disability and timely notice to the employer. We reverse the hearing officer's determination that because the claimant filed her DWC-41 before the employer filed its DWC-1 for the claimed injury of (date of injury for Docket No. 2), that Carrier Z is not relieved from liability under Section 409.004, and we render a new decision that Carrier Z is relieved from liability under Section 409.004 because of the claimant's failure to timely file a claim for compensation with the Division within one year of the injury as required by Section 409.003.

The true corporate name of insurance Carrier U is **UTICA MUTUAL INSURANCE COMPANY** and the name and address of its registered agent for service of process is

**RICHARD A. MAYER  
11910 GREENVILLE AVENUE, SUITE 600  
DALLAS, TEXAS 75243-9332.**

The true corporate name of insurance Carrier Z is **ZENITH INSURANCE COMPANY** and the name and address of its registered agent for service of process is

**JAMES H. MOODY III  
2001 BRYAN STREET, SUITE 1800  
DALLAS, TEXAS 75201-3070.**

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Veronica L. Ruberto  
Appeals Judge

CONCUR:

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Thomas A. Knapp  
Appeals Judge

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Margaret L. Turner  
Appeals Judge