

APPEAL NO. 081356  
FILED JANUARY 23, 2009

This appeal after a hearing on remand, arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on December 5, 2007. Pertinent to the issues before us the hearing officer, in that proceeding, determined that: (1) the respondent 2 (claimant) sustained a compensable repetitive trauma injury to his right lower extremity; (2) appellant/cross-respondent, AmComp Assurance Corporation (Carrier A) is not relieved of liability under Section 409.002 because of the claimant's failure to timely notify his employer of a claimed repetitive trauma injury pursuant to Section 409.001; and (3) the date of injury pursuant to Section 408.007, the date the employee knew or should have known the disease may be related to the employment, is \_\_\_\_\_. Carrier A appealed the timely notice to the employer and the compensable repetitive trauma issues. Carrier A did not appeal the date of injury found to be \_\_\_\_\_; however, in its appeal, the carrier stated that it "did not commence providing worker's compensation coverage to claimant's employer until October 15, 2006, and therefore, the hearing officer's determination of a \_\_\_\_\_ date of injury removes [Carrier A] from liability for this claim." In Appeals Panel Decision (APD) 080012, decided March 19, 2008, the Appeals Panel remanded the decision for the hearing officer to determine who the correct carrier is for the claimed repetitive trauma injury to the right leg in 2006 and, if it includes a carrier other than the carrier that was present at the CCH, to hold another hearing with all of the potential proper carriers present. On remand the hearing officer is to take official notice of the Texas Department of Insurance, Division of Workers' Compensation (Division) records regarding the proper carrier. The parties are to be allowed the opportunity to present evidence as to the correct carrier in this proceeding.

A hearing on remand was held on August 14, 2008. The hearing officer resolved the disputed issues by deciding that: (1) the claimant sustained a compensable repetitive trauma injury; (2) the "carrier" (without specifying which of the two insurance carriers) is not relieved of liability under Section 409.002 because of the claimant's failure to timely notify his employer of a claimed repetitive trauma injury pursuant to Section 409.001; (3) the date of injury pursuant to Section 408.007, the date the employee knew or should have known the disease may be related to the employment, is \_\_\_\_\_; and (4) the date of the last injurious exposure pursuant to Section 406.031(b) was on (date). The hearing officer ordered the "carrier" to pay benefits without specifying which of the two insurance carriers was being held liable for benefits. Carrier A appealed, contending that the hearing officer erred: (1) in adding the issue as to the date of last injurious exposure and determining the date of last injurious exposure was (date); (2) in determining that the claimant sustained a compensable repetitive trauma injury; and (3) in determining that the claimant had good cause for his failure to timely report a work injury until December 28, 2006, and that the "carrier" was not relieved of liability under Section 409.002. Respondent 1/cross-appellant, Netherlands Insurance Company (Carrier N) responded, urging that the hearing officer did not abuse her discretion in adding the "last injurious exposure" issue but agreeing with Carrier A's

contention that the hearing officer erred in her determination on compensability and good cause for failure to timely report an injury to employer.

Carrier N filed a Request to Correct Clerical Error, urging the hearing officer's decision and order be modified to order Carrier A to pay benefits in accordance with the decision based upon the hearing officer's determination on "last injurious exposure." In the alternative, if no clerical error was appropriate, the complained of "order to carrier" would be included in its cross-appeal.

Carrier N timely filed its cross-appeal, stating the hearing officer erred: (1) in determining that an unspecified "carrier" be ordered to pay benefits; (2) in determining that the date of injury is \_\_\_\_\_; and (3) in determining that the claimant sustained a compensable repetitive trauma injury.

The claimant responded to Carrier A's appeal and to Carrier N's cross-appeal, urging affirmance of the hearing officer's decision. The appeal file contains no response from respondent 3 (subclaimant) to either Carrier A's appeal or to Carrier N's cross-appeal.

## DECISION

Affirmed in part and reversed and rendered in part.

## FACTUAL SUMMARY

On remand, the parties stipulated that at all pertinent times to this case the claimant was an employee of the same employer. Additionally, the parties stipulated that the employer had workers' compensation coverage with Carrier N from October 15, 2005, through October 15, 2006, and with Carrier A from October 15, 2006, through October 15, 2007. At the hearing on remand, all of the potential carriers were present and each carrier was allowed the opportunity to present evidence as to the disputed issues in this case. Also present were the claimant and subclaimant. The hearing officer took official notice of the evidence presented at the CCH held on December 5, 2007, and considered new evidence presented at the CCH on remand held on August 14, 2008.

The claimant testified that he had worked for the employer as an irrigator/sprinkler repairman and regularly stood or knelt in contaminated, standing water while doing his job. He testified because of this work, his skin was rough and cracked and that he treated his irritated skin with over-the-counter creams and extra socks over a band-aid. The claimant testified that although he suffered skin problems and a rash with his right leg, which he related to his work, around \_\_\_\_\_, he continued to work for about six months, until on (date), when he had such an increase in pain and swelling in his right foot that he could not stand on his right foot and leg. (date), was the last day that the claimant worked for the employer. The claimant sought medical attention for his swollen right leg and foot and was diagnosed with a "fungal infection and secondary

cellulitis.” The claimant was subsequently diagnosed with acute cellulitis. The claimant testified that his treating dermatologist told him that it was caused by his work environment, working in water. The claimant testified that, prior to seeking medical attention, he had trivialized his injury and tried to treat himself as he had with past skin condition problems. The claimant contended that he had good cause for not reporting his injury to his employer until December 28, 2006.

### **COMPENSABLE INJURY, DATE OF INJURY, GOOD CAUSE FOR FAILURE TO TIMELY NOTIFY EMPLOYER OF AN INJURY, AND LAST INJURIOUS EXPOSURE**

The hearing officer’s determinations that: (1) the claimant sustained a compensable repetitive trauma injury; (2) the date of injury is \_\_\_\_\_; (3) the claimant had good cause for not reporting his injury until December 28, 2006, and (4) the date of the last injurious exposure is (date), are supported by sufficient evidence and are affirmed.

### **PROPER CARRIER**

The hearing officer’s order on the remand hearing states that “Carrier is ordered to pay benefits in accordance with this decision, the [1989 Act], and the Commissioner’s Rules.” The “carrier” is unspecified by the hearing officer. Carrier N argues that it should not be ordered to pay benefits based on the hearing officer’s determination of “last injurious exposure” which is on (date), the date for which Carrier A was providing insurance coverage for the employer. Carrier A argues that Carrier N is liable for the benefits because the date of injury, \_\_\_\_\_, is a date for which Carrier N was providing insurance coverage for the employer.

Carrier N argues that it should not be ordered to pay benefits based on the hearing officer’s determination of “last injurious exposure” and because the date of injury should be (date), rather than \_\_\_\_\_.

In Garcia v. Travelers Indemnity Company of Rhode Island, 892 F. Supp. 153, 1995 U.S. Dist. LEXIS 13864 (W.D. Tex. 1995), the court cited and followed Hernandez v. Travelers Indemnity Company of Rhode Island, 855 S.W.2d 786, 789 (Tex. App.-El Paso, 1993, no writ), which dealt with the issue of liability for an employee’s occupational disease between two workers’ compensation carriers for the same employer. The court in Hernandez, concluded that “where an employer who has worked for the same employer makes a claim for workers’ compensation benefits due to an occupational disease, the compensation carrier at the time of the first distinct manifestation of the disease is liable for such benefits.” In discussing Hernandez, the court in Garcia, stated that the employee “first manifested the occupational disease” during the policy period of one carrier, but was “last exposed” to the injurious material during the policy period of another carrier. The court held that pursuant to TEX. REV. CIV. STAT. ANN. Article 8307 § 4a (West Supp. 1995) (repealed 1991) (Article 8307 § 4a) that:

[When] an employee who has worked for the same employer makes a claim for workers' compensation benefits due to an occupational disease, the compensation carrier at the time of the first distinct manifestation of the disease is liable for such benefits.

The court further noted that although Article 8307 § 4a was repealed on January 1, 1991, the legislature passed an amended version of the 1989 Act which became effective on September 1, 1993. The 1989 Act defines the operative date of an injury for purposes of attaching liability under the 1989 Act. Pursuant to Section 408.007, the date of injury for an occupational disease is the date on which the employee knew or should have known that the disease may be related to the employment. Also, pursuant to Section 409.001 and to Section 409.003, the notice to the employer and filing of a claim with the Division for an occupational disease is in reference to the date of injury, the date the employee knew or should have known that the disease was related to the employment.

The court in Garcia, *supra*, further stated that an attempt to locate, through the legislative history, the reasons given by the legislature for repealing Article 8307 § 4a and passing Section 401.001 *et. seq.* was unsuccessful. "Nevertheless, the Court is confident the term 'knew or should have known' is the functional and legal equivalent of 'first distinct manifestation,'" citing Travelers Insurance Co. v. Miller, 390 S.W.2d 284 (Tex. Civ. App.-El Paso 1965, no writ), the definitive case interpreting the "first distinct manifestation." The court in Garcia, was satisfied that "the standard for identifying the date of injury has not substantively changed between the old and new [1989] Act." The court in Garcia, also dismissed the argument that the question of liability under the 1989 Act could be resolved by determining the carrier at the time that the employee was last injuriously exposed to the hazards that caused the disease. "Last injurious exposure" is applicable only to situations in which there is a dispute as to which one of several possible employers is the employer for purposes of the 1989 Act.<sup>1</sup> This was not the factual situation in Hernandez, *supra*, or in Garcia, nor in the instant case, which involved only one employer. See *also* APD 961355, decided August 28, 1996, and APD 960238, decided March 21, 1996.

Accordingly, because we have affirmed the hearing officer's determinations on compensability, date of injury and notice to employer, we reverse the hearing officer's order that "Carrier is ordered to pay benefits in accordance with this decision, the [1989] Act, and the Commissioner's Rules" and render a new order that Carrier N is ordered to pay benefits in accordance with this decision, the [1989] Act, and the Commissioner's Rules" and that Carrier A is not liable for benefits.

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<sup>1</sup> A factual determination of "last injurious exposure" is not required to resolve which carrier will be liable for benefits under the facts of this case.

The true corporate name of Carrier A is **AMCOMP ASSURANCE CORPORATION** and the name and address of its registered agent for service of process is

**CORPORATION SERVICE COMPANY  
701 BRAZOS STREET, SUITE 1050  
AUSTIN, TEXAS 78701-3232.**

The true corporate name of Carrier N is **NETHERLANDS INSURANCE COMPANY** and the name and address of its registered agent for service of process is

**CORPORATION SERVICE COMPANY  
701 BRAZOS STREET, SUITE 1050  
AUSTIN, TEXAS 78701-3232.**

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Thomas A. Knapp  
Appeals Judge

CONCUR:

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Veronica L. Ruberto  
Appeals Judge

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Margaret L. Turner  
Appeals Judge