

APPEAL NO. 091971  
FILED FEBRUARY 23, 2010

This appeal 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 November 17, 2009. The disputed issues before the hearing officer were:

- (1) What is the date of injury?
- (2) Did the appellant/cross-respondent (claimant) sustain a compensable injury?
- (3) Did the claimant have disability?
- (4) Did the claimant timely notify the employer; and if not, does he have good cause for not timely notifying the employer?
- (5) Did the claimant timely file a claim for compensation; and if not, does he have good cause for not timely filing a claim for compensation?

The hearing officer resolved the disputed issues by deciding that: (1) the date of injury is \_\_\_\_\_; (2) the claimant did not sustain a compensable injury on \_\_\_\_\_; (3) the claimant has not had disability; (4) because the claimant did not report an injury to the employer within 30 days after the date of injury and did not have good cause for failing to report the injury timely, the respondent/cross-appellant (carrier) is relieved from liability under Section 409.002 because of the claimant's failure to timely notify the employer pursuant to Section 409.001; and (5) the claimant timely filed a claim for compensation.

The claimant appealed the hearing officer's determinations that: (1) the claimant did not sustain a compensable injury; (2) the claimant did not have disability; and (3) the claimant did not timely notify his employer of the claimed injury and did not have good cause for failing to timely notify his employer of the claimed injury. The carrier cross-appealed the hearing officer's determination that the claimant timely filed a claim for compensation, and contends that the hearing officer erred in determining that the time for filing a claim was tolled pursuant to Section 409.008. The hearing officer's determination that the date of injury is \_\_\_\_\_, has not been appealed and has become final pursuant to Section 410.169.

DECISION

Affirmed in part and reversed and rendered in part.

## **COMPENSABILITY, DISABILITY AND TIMELY NOTICE TO THE EMPLOYER**

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**

Section 409.003 provides, in part, that an employee or person acting on the employee's behalf shall file with the Texas Department of Insurance, Division of Workers' Compensation (Division) a claim for compensation for an injury not later than one year after the date on which the injury occurred. 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.

The claimant testified that he stepped on a nail or tack-like object with his left great or big toe while working for the employer on \_\_\_\_\_. It is undisputed that the claimant had diabetes at the time of the injury. In evidence is the claimant's recorded statement to the carrier's adjuster, in which he states that his big toe became infected and he underwent a partial amputation of his left foot on March 4, 2008. In evidence is an undated medical report in Spanish from (Dr. HJ), a surgeon in (Country), which references the partial left foot amputation on March 4, 2008.<sup>1</sup> The claimant filed an Employee's Claim for Compensation for a Work-Related Injury or Occupational Disease (DWC-41) on April 28, 2009, more than one year after the date of injury. The employer's representative testified that the employer was notified of the claimed injury after the claimant filed a DWC-41. The employer filed an Employer's First Report of Injury or Illness (DWC-1) on May 6, 2009. In the Background Information section of the decision, the hearing officer states that "[i]t was not until the end of April or early May of 2009 that the employer had knowledge that [c]laimant was asserting that he had punctured his foot after [c]arrier informed employer that a claim for compensation had been filed," and concluded that "the time for filing a claim with the Division was tolled; and [c]laimant's filing was timely."

The hearing officer incorrectly determined that because the claimant filed his DWC-41 on April 28, 2009, before the employer filed its DWC-1 on May 6, 2009, for the claimed injury of \_\_\_\_\_, the claimant timely filed a claim for compensation. The carrier contends that the timeframe for the claimant to file his claim was not tolled under Section 409.008, since the employer had no knowledge of the claimed injury until it was notified after the claimant filed his DWC-41.

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<sup>1</sup> At the CCH the medical report from Dr. HJ was read into the record by the court interpreter from Spanish to English.

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. In the instant case, although the hearing officer comments in the Background Information section of his decision that the employer did not have knowledge of the claimed injury "until the end of April or early May of 2009," the hearing officer failed to make a specific finding of an exact date the employer had notice or knowledge of the \_\_\_\_\_, injury.

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. It is clear from the hearing officer's discussion, he was persuaded that the employer first had notice of the \_\_\_\_\_, injury after the claimant filed DWC-41 on April 28, 2009, more than a year after the claimed injury occurred. 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 his DWC-41, because the employer did not have notice or knowledge of the claimed injury until after the claimant filed his claim on April 28, 2009. See APD 081343, decided November 12, 2008. Accordingly, we reverse the hearing officer's determination that the claimant timely filed a claim for compensation and we render a new decision that the carrier 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 the claimant timely filed a claim for compensation and we render a new decision that the carrier 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.

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

**MAC SHIPMAN  
5525 LBJ FREEWAY  
DALLAS, TEXAS 75240-6241.**

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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