

APPEAL NO. 101342
FILED NOVEMBER 15, 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 was held on August 12, 2010. The issues before the hearing officer were:

- (1) Did the appellant/cross-respondent (claimant) sustain a compensable injury in the form of an occupational disease?
- (2) Did the claimant have disability resulting from the claimed injury, from November 9, 2000, through November 12, 2002?
- (3) What is the date of injury?
- (4) Is the respondent/cross-appellant (carrier) relieved from liability under Section 409.002 because of the claimant's failure to timely notify his employer pursuant to Section 409.001?
- (5) Is the carrier 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 injury in the form of an occupational disease;
- (2) Because the claimant did not sustain a compensable injury, the claimant did not have disability;
- (3) The date of injury as defined in Section 408.007 is _____;
- (4) The carrier is relieved from liability under Section 409.002 because of the claimant's failure to timely notify his employer pursuant to Section 409.001; and
- (5) The carrier is not 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 claimant appealed the hearing officer's determinations on compensability, disability, and timely notice to the employer. The carrier responded, urging affirmance of the determinations appealed by the claimant. The carrier appealed the hearing officer's determination on timely filing of a claim. The claimant responded, urging affirmance of the determination appealed by the carrier. 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.

The claimant testified that he suffered pulmonary interstitial fibrosis that was caused by or was aggravated by his inhalation of dust and chemicals over a six year period of time at work in a plant at which glue was made.

COMPENSABILITY, DISABILITY, AND TIMELY REPORTING AN INJURY

The hearing officer's decision that the claimant did not sustain a compensable injury in the form of an occupational disease is supported by sufficient evidence and is affirmed.

The hearing officer's decision that because the claimant did not sustain a compensable injury, the claimant did not have disability is supported by sufficient evidence and is affirmed.

The hearing officer's decision that the carrier is relieved from liability under Section 409.002 because of the claimant's failure to timely notify his employer pursuant to Section 409.001 is supported by sufficient evidence and is affirmed.

TIMELY FILING OF A CLAIM/TOLLING STATUTE

Section 409.003(2) provides that an employee or 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 if the injury is an occupational disease, 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.

Section 409.005(a) provides that an employer shall file a written report with the Division and the employer's insurance carrier if: (1) an injury results in the absence of

an employee of that employer from work for more than one day; or (2) an employee of the employer notifies that employer of an occupational disease under Section 409.001.

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.

We have affirmed the hearing officer's determinations on the claimant's failure to timely notify the employer of the claimed injury. The hearing officer made the following Findings of Fact (FOF):

FOF No. 9: [The] [c]laimant did not provide the [e]mployer with notice of the claimed injury within the 30 day period following _____ [the date of injury].

FOF No. 10: Neither the [e]mployer, nor any employee of the [e]mployer who held a supervisory or management position, nor the [c]arrier had actual knowledge of the claimed injury within the 30 day period following _____.

FOF No. 11: Good cause does not exist for [the] [c]laimant's failure to provide the [e]mployer with notice of the claimed injury in a timely manner.

FOF No. 12: [The] [c]laimant filed his [Employee's Claim for Compensation for a Work-Related Injury or Occupational Disease (DWC-41)] claim for compensation with the Division on February 14, 2007, and the filing was acknowledged by the Division in a letter to [the] [c]laimant dated February 14, 2007. (Unappealed.)

FOF No.13: Copies of the DWC-41 and Division notice letters were provided to the [e]mployer and [the] [c]arrier within a week after February 14, 2007.

In the Background Information section of his decision, the hearing officer states:

Copies of the DWC-41 and Division notice letters were probably provided to the [e]mployer and [the] [c]arrier at or near the same time. This is both an occupational disease claim and a lost time claim. The [e]mployer did not file its [Employer's First Report of Injury or Illness (DWC-1)] until April 2, 2008. The one year period to file a claim for compensation was tolled pursuant to Section 409.008 of the Act.

There is no evidence in the record that the claimant ever provided notice of an injury to the employer or the carrier. Further, there is no evidence in the record that the Division provided copies of the DWC-41 and notice letters to the employer and to the carrier within a week after February 14, 2007, the date the claimant filed his DWC-41 claim for compensation with the Division.

There is no evidence in the record to support the hearing officer's speculation about the "probable" actions of the Division upon the receipt and acknowledgment of the claimant's DWC-41 filed on February 14, 2007. To the contrary, the only evidence in the record as to the specific date that the employer was given notice or had knowledge of an injury to the claimant regarding his claimed occupational disease was reflected in the letter dated March 3, 2008, sent by the Division to the carrier stating that the Division had received notice of an injury to the claimant with an alleged date of injury of (alleged date of injury), and requesting the carrier to submit the first report of injury to the Division electronically.

Also in evidence is the Notice of Denial of Compensability/Liability and Refusal to Pay Benefits (PLN-1) dated March 19, 2008, which identifies the claimant and the claimed occupational injury with a date of injury of (alleged date of injury). The PLN-1 further states that on March 6, 2008, the carrier received notice that the claimant reported an on the job injury. Therefore, the employer's or insurance carrier's duty to file such report as required by Section 409.005 was not triggered by the claimant's untimely filing of his DWC-41 claim.

In the instant case, the employer's obligation to file a DWC-1 pursuant to Section 409.005 was not triggered until after the Division's March 3, 2008, letter was sent to the carrier because there is no evidence that the employer had notice or knowledge of the claimed injury until after the Division contacted the carrier by its letter dated March 3, 2008. See Appeals Panel Decision (APD) 081343, decided November 12, 2008. 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 APD 992923 and APD 992963, both decided February 10, 2000.

In reviewing a "great weight" challenge, we must examine the entire record to determine if: (1) there is only "slight" evidence to support the finding; (2) the finding is so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust; or (3) the great weight and preponderance of the evidence supports its nonexistence. See Cain v. Bain, 709 S.W.2d 175 (Tex. 1986).

Accordingly, we hold that the hearing officer's determination that the carrier is not 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 to be so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust. We reverse the hearing officer's determination that the carrier is not 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 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 for compensation with the Division within one year of the injury as required by Section 409.003.

SUMMARY

We affirm the hearing officer's decision that the claimant did not sustain a compensable injury in the form of an occupational disease.

We affirm the hearing officer's decision that because the claimant did not sustain a compensable injury, the claimant did not have disability.

We affirm the hearing officer's decision that the carrier is relieved from liability under Section 409.002 because of the claimant's failure to timely notify his employer pursuant to Section 409.001.

We reverse the hearing officer's decision that the carrier is not 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 and 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 for compensation with the Division within one year of the injury as required by Section 409.003.

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

**CORPORATION SERVICE COMPANY
211 EAST 7TH STREET, SUITE 620
AUSTIN, TEXAS 78701-3232.**

Cynthia A. Brown
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Margaret L. Turner
Appeals Judge