

APPEAL NO. 111095
FILED OCTOBER 13, 2011

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 July 5, 2011. With regard to the five issues before him (the fifth issue being added by the hearing officer on his own motion), the hearing officer determined that: (1) the appellant/cross-respondent (claimant) did not sustain a compensable injury in the form of an occupational disease; (2) the claimant did not 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, but did have good cause for failing to timely file a claim; (3) the respondent/cross-appellant (self-insured) is not relieved from liability under Section 409.002 because of the claimant's failure to timely notify the employer pursuant to Section 409.001; (4) because the claimant did not sustain a compensable injury, the claimant had no disability; and (5) the self-insured waived the defense of the claimant's failure to file a claim within one year of the date of injury by not timely filing the grounds for refusing to pay benefits in accordance with Section 409.022.

The claimant appealed the hearing officer's determinations on compensability and disability. The self-insured cross-appealed the determinations that the claimant had good cause for failing to file her claim for compensation within one year; that the self-insured was not relieved of liability under Section 409.002 because of the claimant's failure to timely notify the employer pursuant to Section 409.001; and that the hearing officer improperly added the issue of "whether the self-insured waived the defense of the claimant's failure to file a claim within one year of the injury by not timely stating this as a defense to paying benefits in accordance with [Section] 409.022?" The self-insured responded to the claimant's appeal urging affirmance for the issues on which it prevailed. The appeal file does not contain a response by the claimant to the self-insured's cross-appeal.

DECISION

Affirmed in part and reversed and rendered in part.

The claimant is alleging an occupational disease in the form of chemical sensitivity headaches, allergic reactions, and asthma as a result of exposure to carbon monoxide and/or mold. The parties stipulated that the date of injury is (date of injury).

**COMPENSABLE INJURY, TIMELY FILING A CLAIM WITHIN ONE YEAR,
DISABILITY AND TIMELY NOTICE TO THE EMPLOYER**

The hearing officer's determinations that: (1) the claimant did not sustain a compensable injury in the form of an occupational disease; (2) the self-insured is not relieved of liability because of the claimant's failure to timely file a claim; (3) the claimant did not have disability; and (4) the self-insured is not relieved of liability because of the claimant's failure to timely notify the employer are supported by sufficient evidence and are affirmed.

**WHETHER THE SELF-INSURED WAIVED THE DEFENSE OF THE CLAIMANT'S
FAILURE TO FILE A CLAIM WITHIN ONE YEAR OF THE INJURY BY NOT TIMELY
STATING THIS DEFENSE**

The hearing officer, under the Issues section of his decision stated:

Though not certified, the following issue was added because it was actually litigated before this [CCH] and should have been certified after the fifth [b]enefit [r]eview [c]onference (BRC), on May 17, 2011:

5. Whether the self-insured waived the defense of the [c]laimant's failure to file a claim within one year of the injury by not timely stating this as a defense to paying benefits in accordance with [Section] 409.022?

A BRC held on May 17, 2011, lists the issue "[i]s the [self-insured] relieved from liability under [Section] 409.004 because of [c]laimant'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's position was that the "[self-insured] has waived the right to raise this defense [sic] as they [the self-insured] first raised this in 2009." The claimant did not file a response to the BRC report or otherwise request that "carrier waiver" be added as an issue.

Our review of the record indicates that the "carrier waiver" issue had not been litigated at the CCH and in fact had been first brought up in the claimant's closing argument. The hearing officer, before the closing arguments began, had reminded the parties that closing argument is not evidence and the hearing officer doesn't even need to have closing arguments. The claimant then in closing, for the first time at the CCH, brought up the matter of the self-insured's waiver of the defense of failure to file a claim within one year of the injury in its denial of benefits filed on September 11, 2002, or any time thereafter. The self-insured began its closing by saying "waiver [of the defense of failure to file a claim within one year] is not an issue so that is out." Subsequently, the self-insured's attorney discussed the issue with the hearing officer but certainly the self-

insured never agreed to the addition of an issue on the waiver of the defense of failure to file a claim within one year. The self-insured alleges that it was prejudiced by the addition of this issue and that it objected, opposing the claimant's position regarding carrier waiver of the claimant's failure to file a claim within one year defense.

While perhaps the issue of carrier waiver of the defense of claimant's failure to file a claim within one year should have been certified at or after the BRC, the fact of the matter is that it was not requested to be added by either party and indeed was not even mentioned at the CCH until the claimant's closing argument. The claimant did not request that the waiver issue be added for good cause nor did the hearing officer make a ruling on whether the waiver of the defense was to be added as an issue. The hearing officer on his own motion added the issue in the decision and order after the CCH.

28 TEX. ADMIN. CODE § 142.7 (Rule 142.7) states that disputes not expressly included in the statement of disputes will not be considered by the hearing officer. Rule 142.7(c) provides a party may submit a response to the disputes identified as unresolved in the BRC report. Rule 142.7(d) is a provision for adding disputes by unanimous consent. Neither of these provisions were applicable in this case. Rule 142.7(e) provides in part:

Additional disputes by permission of the hearing officer. A party may request the hearing officer to include in the statement of disputes one or more disputes not identified as unresolved in the benefit review officer's report. The hearing officer will allow such amendment only on a determination of good cause.

[omission]

- (2) An unrepresented claimant may request additional disputes to be included in the statement of disputes by contacting the [Division] in any manner no later than 15 days before the hearing.

Neither party requested the issue of carrier waiver of a defense to be added nor was there a determination of good cause by the hearing officer.

It was an abuse of discretion to add an issue of carrier waiver of a defense over the self-insured's objection because: (1) it was not certified out of the BRC and (2) no good cause was shown for the addition of this issue. The hearing officer erred in the addition of an issue that had not been raised as an issue at the BRC nor reported by the benefit review officer in the BRC report. Accordingly, we reverse the hearing officer's determination in Conclusion of Law No. 6 and the Decision that the self-insured waived

the defense of the claimant's failure to file a claim within one year of the injury by not timely filing the grounds for refusing to pay benefits in accordance with Section 409.022 and render a new decision by striking Conclusion of Law No. 6 and the sentence in the Decision which states the self-insured waived the defense of the claimant's failure to file a claim within one year of the injury by not timely filing the grounds for refusing to pay benefits in accordance with Section 409.022.

The true corporate name of the insurance carrier is **(a self-insured governmental entity)** and the name and address of its registered agent for service of process is

(NAME)
(ADDRESS)
(CITY), TEXAS (ZIP CODE).

Thomas A. Knapp
Appeals Judge

CONCUR:

Cynthia A. Brown
Appeals Judge

Margaret L. Turner
Appeals Judge