

APPEAL NO. 111175
FILED SEPTEMBER 19, 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 was held on July 21, 2011. Regarding the five disputed issues before him, the hearing officer determined that: (1) the date of the claimed injury is (date of injury); (2) the appellant (claimant) did not sustain a compensable injury; (3) the respondent (carrier) "waived its right to contest compensability of the claimed injury by not timely contesting the injury in accordance with [Sections] 409.021 and 409.022;" (4) the carrier is not relieved of liability under Section 409.022 even though the claimant failed to timely notify his employer pursuant to Section 409.001 because the carrier waived its right to contest compensability of the claimed injury; and (5) the carrier is not relieved of liability under Section 409.004 because the time for the claimant's filing of his claim for compensation with the Texas Department of Insurance, Division of Workers' Compensation (Division) was extended pursuant to Section 409.008 to include the date of filing, July 21, 2011.

The hearing officer's determinations that the date of the claimed injury is (date of injury), and that the carrier is not relieved of liability under Section 409.004 because the time for the claimant's filing of his claim for compensation with the Division was extended pursuant to Section 409.008 to include the date of filing, July 21, 2011, have not been appealed and have become final pursuant to Section 410.169.

Although the claimant does not specifically appeal the determination that the carrier waived its right to contest compensability of the claimed injury, by not timely contesting the injury in accordance with Sections 409.021 and 409.022, the entire gist of the claimant's appeal involved carrier waiver and the application of Continental Casualty Company v. Williamson, 971 S.W.2d 108 (Tex. App.—Tyler 1998, no pet.) to the hearing officer's carrier waiver conclusion. The carrier responded, urging affirmance.

DECISION

Affirmed in part and reversed and rendered in part as reformed.

The hearing officer's findings of fact that: (1) the claimant did not have damage or harm of any kind to the physical structure of his lungs on (date of injury);¹ (2) the claimant first notified his employer of the claimed injury on January 27, 2011, which was not within 30 days of the date of injury; and (3) the claimant did not have good cause for

¹ Section 401.011(26) defines injury to mean "damage or harm to the physical structure of the body and a disease or infection naturally resulting from the damage or harm."

failure to timely report his injury to the employer, are not against the great weight and preponderance of the evidence and are affirmed.

Section 409.021 provides that for claims based on a compensable injury that occurred on or after September 1, 2003, that no later than the 15th day after the date on which an insurance carrier receives written notice of an injury, the insurance carrier shall: (1) begin the payment of benefits as required by the 1989 Act; or (2) notify the Division and the employee in writing of its refusal to pay. Section 409.021(c) provides that if an insurance carrier does not contest the compensability of an injury on or before the 60th day after the date on which the insurance carrier is notified of the injury, the insurance carrier waives its right to contest compensability.

In Williamson, *supra*, the court stated that “if a hearing officer determines that there is no injury, and that finding is not against the great weight and preponderance of the evidence, the carrier’s failure to contest compensability cannot create an injury as a matter of law.”

This case revolves around the application of Williamson, *supra*. The hearing officer, in his Background Information, commented, in pertinent part:

Carrier received its first written notice of injury on February 3, 2011, and prepared a denial of the claim dated April 4, 2011. However, [c]arrier was unable to show that it had filed the denial with the Division Official [n]otice was taken of the absence of a record of dispute of this claim filed by either the [e]mployer or the [c]arrier However, since an injury is not found, liability does not result from the failure to dispute timely. [Williamson, *supra*].

In this case the claimant is alleging an inhalation injury by the inhalation of some insulation while working in the course and scope of his employment. The hearing officer is the sole judge of the weight and credibility to be given to the evidence. Section 410.165(a). The hearing officer was acting within his province as the fact finder in rejecting the claimant’s testimony and medical reports in evidence regarding the inhalation of a foreign body and accepting expert medical evidence of a pulmonologist that “with normal CT and chest x-ray [it was] unlikely to be [a] foreign body” in the claimant’s lungs. We have previously affirmed the hearing officer’s finding of fact that the claimant did not have damage or harm of any kind to the physical structure of his lungs on (date of injury). Williamson, *supra*, 110, notes that “[a]n injury and a compensable injury are two different animals.” The court further stated that the carrier “may have waived its right to contest the compensability of an injury, but it never waived its right to contest the injury itself.” In the instant case, as in Williamson, the issue of compensability never arose, because no injury was ever proven. The court concluded

“that if a hearing officer determines that there is no injury and that finding is not so against the great weight and preponderance of the evidence, the carrier’s failure to contest compensability cannot create an injury as a matter of law.” We note that the hearing officer makes this determination of no injury (“ . . . did not have damage or harm of any kind to the physical structure of his lungs on [date of injury].”) Accordingly, we reverse and reform some of the hearing officer’s determinations as a matter of law.

The unappealed Conclusion of Law No. 7 states that the carrier is not relieved of liability under Section 409.004 because the time for claimant’s filing of his claim for compensation with the Division was extended pursuant to Section 409.008 to include the date of filing, July 21, 2011. That determination is inconsistent with Finding of Fact No. 9 which states that the claimant “did not have good cause for failure to timely file his Notice of Injury with the Division.” Accordingly, we reverse Finding of Fact No. 9 and render a new decision by striking Finding of Fact No. 9 in its entirety as being inconsistent with an unappealed conclusion of law.

Conclusion of Law No. 4 states that the claimant did not sustain a compensable injury is reformed by adding the phrase “because the claimant did not sustain an injury.”

Conclusion of Law No. 5 states that the carrier waived its right to contest compensability of the claimed injury by not timely contesting the injury in accordance with Sections 409.021 and 409.022 is reversed. We render a new decision that the carrier has not waived its right to contest compensability of the claimed injury because the claimant has not sustained an injury.

Conclusion of Law No. 6 states that the carrier is not relieved of liability under Section 409.002 even though the claimant failed to timely notify his employer pursuant to Section 409.001 because the carrier waived its right to contest compensability of the claimed injury is reversed and we render a new decision that the carrier is relieved of liability under Section 409.002 because of the claimant’s failure to notify his employer pursuant to Section 409.001.

SUMMARY

We affirm the hearing officer’s factual determination that: (1) the claimant did not have damage or harm of any kind to the physical structure of his lungs on (date of injury); (2) that the claimant first notified his employer of the claimed injury on January 27, 2011, which was not within 30 days of the date of injury; and (3) the claimant did not have good cause for failure to timely report his injury to the employer.

We reverse the hearing officer’s factual determination that the claimant did not have good cause for failure to timely file his Notice of Injury with the Division as being

inconsistent with the unappealed Conclusion of Law No. 6. We render a new decision by striking Finding of Fact No. 9 in its entirety.

We reform Conclusion of Law No. 4, which states that the claimant did not sustain a compensable injury by adding the phrase “because the claimant did not sustain an injury.”

We reverse Conclusion of Law No. 5 which states that the carrier waived its right to contest compensability of the claimed injury by not timely contesting the injury in accordance with Sections 409.021 and 409.022 and render a new decision that the carrier has not waived its right to contest compensability of the claimed injury because the claimant has not sustained an injury.

We reverse Conclusion of Law No. 6 which states that the carrier is not relieved of liability under Section 409.002 even though the claimant failed to timely notify his employer pursuant to Section 409.001 because the carrier waived its right to contest compensability of the claimed injury. We render a new decision that the carrier is relieved of liability under Section 409.002 because of the claimant’s failure to notify his employer pursuant to Section 409.001.

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

**CT CORPORATION SYSTEM
350 NORTH ST. PAUL STREET
DALLAS, TEXAS 75201.**

Thomas A. Knapp
Appeals Judge

CONCUR:

Cynthia A. Brown
Appeals Judge

Margaret L. Turner
Appeals Judge