

APPEAL NO. 141205
FILED JULY 25, 2014

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 May 2, 2014, in San Antonio, Texas, with [hearing officer] presiding as hearing officer. The hearing officer resolved the disputed issues by deciding that: (1) the respondent (claimant) did sustain a compensable injury on [date of injury], ; (2) the claimant did have disability resulting from an injury sustained on [date of injury], beginning August 28, 2012, and continuing through the date of the CCH; (3) the appellant (carrier) is not relieved from liability under Section 409.002 because of the claimant's failure to timely notify his employer pursuant to Section 409.001; and (4) the claimant is not barred from pursuing Texas workers' compensation benefits because of an election to receive benefits under his group health insurance.

The carrier appealed the hearing officer's determinations that the claimant sustained a compensable injury and had disability beginning August 28, 2012, and continuing through the date of the CCH, arguing that these determinations were not supported by legally or factually sufficient evidence. The carrier additionally appealed the hearing officer's determination that the carrier is not relieved from liability under Section 409.002 because of the claimant's failure to timely notify his employer pursuant to Section 409.001. Further, the carrier argued that the hearing officer's determination that the claimant is not barred from pursuing Texas workers' compensation benefits because of an election to receive benefits under his group health insurance policy was erroneous. The claimant responded, urging affirmance of the disputed determinations.

DECISION

Affirmed.

Section 410.203(b) was amended effective September 1, 2011, to allow the Appeals Panel to affirm the decision of a hearing officer as prescribed in Section 410.204(a-1). Section 410.204(a) provides, in part, that the Appeals Panel may issue a written decision on an affirmed case as described in subsection (a-1). Subsection (a-1) provides that the Appeals Panel may only issue a written decision in a case in which the panel affirms the decision of a hearing officer if the case: (1) is a case of first impression; (2) involves a recent change in law; or (3) involves errors at the CCH that require correction but do not affect the outcome of the hearing. This case is a situation that requires correction but does not affect the outcome of the hearing.

The claimant testified that he was stepping into a "basket" at work on [date of injury], when his right knee twisted and he heard a loud pop as he stepped down on the

rail of a platform. There was evidence that the claimant suffered from pre-existing right knee osteoarthritis and a lateral meniscus tear prior to the date of injury. However, as noted by the hearing officer, the claimant was able to return to work full duty prior to the [date of injury]. The hearing officer noted that she found the claimant's testimony credible that he twisted his right knee and heard a loud pop while working on [date of injury]. Whether the claimant sustained a compensable injury and had resulting disability were questions of fact for the hearing officer to decide. The hearing officer specifically found that the claimant sustained damage or harm to the physical structure of his body in the course and scope of his employment on [date of injury], and that due to the injury he was unable to obtain and retain employment at wages equivalent to his pre-injury wage beginning August 28, 2012, and continuing through the date of the CCH. The hearing officer's determinations that the claimant sustained a compensable injury on [date of injury], and had disability beginning August 28, 2012, and continuing through the date of the CCH are supported by sufficient evidence and are affirmed.

The 1989 Act generally requires that an injured employee or person acting on the employee's behalf notify the employee's employer of the injury no later than 30 days after the injury occurred. Section 409.001. The burden is on the claimant to prove the existence of notice of injury. *Travelers Insurance Company v. Miller*, 390 S.W.2d 284 (Tex. Civ. App.-El Paso 1965, no writ). In the present case, there was conflicting evidence as to whether or not the claimant gave timely notice of an [date of injury], , injury to his employer. It was within the province of the hearing officer to resolve the conflicting evidence. The hearing officer's determination that the carrier is not 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.

The hearing officer specifically found that the claimant did not make an informed election to receive health insurance benefits in lieu of workers' compensation benefits. The hearing officer's determination that the claimant is not barred from pursuing Texas workers' compensation benefits because of an election to receive benefits under his group health insurance is supported by sufficient evidence and is affirmed.

In her discussion of the evidence the hearing officer stated, in part, that "[i]n *Valley Forge Ins. Co. v. Austin*, 65 S.W.3d 371 [(Tex. App.-Dallas 2001, pet. denied with per curiam opinion)], the Court of Appeals determined that election of remedies is no longer a viable defense under the 1989 Act." We write to clarify that although in *Valley Forge Insurance Company v. Austin*, *supra*, the court of appeals held the election of remedies affirmative defense was abolished by Section 409.009 because it permitted subclaims by insurance carriers and health care providers as a means to prevent double recoveries, the Texas Supreme Court affirmed the underlying decision on the

merits for other reasons and stated it left open the question of whether Section 409.009 abolished the election of remedies affirmative defense. See *Valley Forge Insurance Company v. Austin*, 105 S.W.3d 609 (Tex. 2003). See also Appeals Panel Decision 030473, decided April 15, 2003.

SUMMARY

We affirm the hearing officer's determination that the claimant did sustain a compensable injury on [date of injury].

We affirm the hearing officer's determination that the claimant did have disability resulting from an injury sustained on [date of injury], beginning August 28, 2012, and continuing through the date of the CCH.

We affirm the hearing officer's determination that the carrier is not relieved from liability under Section 409.002 because of the claimant's failure to timely notify his employer pursuant to Section 409.001.

We affirm the hearing officer's determination that the claimant is not barred from pursuing Texas workers' compensation benefits because of an election to receive benefits under his group health insurance.

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

**RICHARD J. GERGASKO, PRESIDENT
6210 HIGHWAY 290 EAST
AUSTIN, TEXAS 78723.**

Margaret L. Turner
Appeals Judge

CONCUR:

Veronica L. Ruberto
Appeals Judge

Carisa Space-Beam
Appeals Judge