

APPEAL NO. 160298
FILED MAY 25, 2016

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 January 7, 2016, (we note that the decision incorrectly identifies the CCH date as November 3, 2015), in Tyler, Texas, with (hearing officer) presiding as hearing officer. The hearing officer determined that: (1) the deceased sustained a compensable injury on (date of injury) , resulting in his death as a result of the appellant/cross-respondent's (carrier) waiver of the right to contest compensability of the claimed injury; and (2) the carrier waived the right to contest compensability of the claimed injury by not timely contesting the injury in accordance with Section 409.021. We note that the decision identifies the deceased as the claimant.

The carrier appealed the hearing officer's determinations, contending that the deceased did not sustain a compensable injury on (date of injury) , as a result of waiver. The carrier also contended that the hearing officer abused his discretion in adding the issue of carrier waiver over its objection. The carrier further contended it did not waive the right to contest compensability of the claimed injury by not timely contesting the injury in accordance with Section 409.021. The respondent/cross-appellant (claimant beneficiary) responded to the carrier's appeal, urging affirmance of the hearing officer's determinations. In the same document the claimant beneficiary cross-appealed the hearing officer's finding of fact that on (date of injury) , the deceased was not injured in the course and scope of employment. The appeal file does not contain a response from the carrier to the claimant beneficiary's cross-appeal.

Records of the Texas Department of Insurance, Division of Workers' Compensation (Division) reflect that the hearing officer's decision was mailed to the claimant beneficiary at her correct address on January 27, 2016. Pursuant to 28 TEX. ADMIN. CODE § 102.5(d) (Rule 102.5(d)), unless the great weight of the evidence indicates otherwise, the claimant beneficiary was deemed to have received the hearing officer's decision 5 days later. The 5th day after January 27, 2016, was Monday, February 1, 2016.

Pursuant to Section 410.202(a) a request for appeal must be filed within 15 days of the date of deemed receipt of the hearing officer's decision. The 15th day after February 1, 2016, excluding Saturdays and Sundays and holidays listed in Government Code § 662.003, is Tuesday, February 23, 2016. We note that February 15, 2016, Presidents' Day, is a holiday listed in Government Code § 662.003, and was excluded in the computation of the 15-day period to file an appeal. Although the claimant

beneficiary's document is titled "Claimant's Response to Carrier's Request for Review," the claimant beneficiary specifically stated she disagreed with Finding of Fact No. 4, and therefore her response is also treated as an appeal. The claimant beneficiary's appeal is dated March 2, 2016, and was sent to and received by the Division on that same date via facsimile transmission. The claimant beneficiary's pleading is timely as a response to the carrier's appeal but is untimely as a cross-appeal because it was not mailed or filed on or before February 23, 2016. Therefore, the hearing officer's finding of fact that the deceased was not injured in the course and scope of employment has become final pursuant to Section 410.169.

DECISION

Reversed and remanded.

The carrier contends in its appeal that the hearing officer abused his discretion by adding the issue of whether the carrier waived the right to contest compensability of the claimed injury by not timely contesting the injury in accordance with Section 409.021. The carrier alleges in its appeal that the issue of carrier waiver was not discussed at the benefit review conference (BRC) held on September 18, 2015, and that the claimant beneficiary failed to make a timely request to add the issue under Section 410.151 and Rule 142.7(e) after receiving the BRC report. The carrier further alleges that the claimant beneficiary did not establish good cause for failing to timely request to add the issue.

The appeal file contains one compact disc (CD) of a CCH held on January 7, 2016. During this CCH the carrier noted on the record that it had previously objected to the addition of the carrier waiver issue and was overruled by the hearing officer. The carrier objected to the addition of this issue again at the January 7, 2016, CCH, but did not state the basis for his objection. The hearing officer responded that a proceeding was initially scheduled for November 3, 2015, and the claimant beneficiary first requested to add the waiver issue at that time. The hearing officer stated that during the previous proceeding he said he would allow the issue, and as the carrier indicated it was not prepared at that time to deal with that issue a motion for continuance was granted. There was no further discussion on the record of the carrier's objection or the claimant beneficiary's evidence of good cause for the addition of the carrier waiver issue. The appeal file did not contain a CD or transcript of a proceeding held on November 3, 2015, or any day other than January 7, 2016.

The hearing officer noted in the Statement of the Case that "[a]t the request of [the claimant beneficiary] and for good cause, the [carrier waiver] issue was added. . . ." However, the hearing officer did not specify in his decision what evidence established good cause to add the issue.

Without a record of the carrier's specific objection, the claimant beneficiary's evidence of good cause to add the carrier waiver issue, or a discussion of good cause by the hearing officer, we cannot determine whether or not there was good cause to add the waiver issue. Accordingly, we remand this case to the hearing officer to specify the carrier's objection to the addition of the carrier waiver issue. If the hearing officer determines that good cause exists to add the carrier waiver issue, the hearing officer is to provide a discussion of his determination.

SUMMARY

We reverse the hearing officer's determination that the deceased sustained a compensable injury on (date of injury) , resulting in his death as a result of the carrier's waiver of the right to contest compensability of the claimed injury, and we remand this issue to the hearing officer for further action consistent with this decision.

We reverse the hearing officer's determination that the carrier waived the right to contest compensability of the claimed injury by not timely contesting the injury in accordance with Section 409.021, and we remand this issue to the hearing officer for further action consistent with this decision.

REMAND INSTRUCTIONS

On remand the hearing officer is to specify the carrier's objection to the addition of the carrier waiver issue, and then make a determination of whether there was good cause to add the issue of carrier waiver. If the hearing officer determines there was good cause to add the carrier waiver issue he is to provide a discussion of his rationale, and then determine whether the carrier waived the right to contest compensability of the claimed injury in accordance with Section 409.021. The hearing officer is also to determine whether the deceased sustained a compensable injury on (date of injury) , resulting in his death.

Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Division, pursuant to Section 410.202 which was amended June 17, 2001, to exclude Saturdays and Sundays and holidays listed in Section 662.003 of the Texas Government Code in the computation of the 15-day appeal and response periods. See Appeals Panel Decision 060721, decided June 12, 2006.

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
6210 EAST HIGHWAY 290
AUSTIN, TEXAS 78723.**

Carisa Space-Beam
Appeals Judge

CONCUR:

K. Eugene Kraft
Appeals Judge

Margaret L. Turner
Appeals Judge