

APPEAL NO. 160580
FILED MAY 26, 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 was held on March 8, 2016, in Austin, Texas, with (hearing officer) presiding as hearing officer. The hearing officer resolved the disputed issues by deciding that: (1) the appellant (claimant) did not sustain a compensable injury on (date of injury); (2) the respondent (carrier) did not waive the right to contest compensability of the claimed injury by not timely contesting the injury in accordance with Section 409.021; and (3) the carrier is relieved from liability under Section 409.002 because of the claimant's failure to timely notify her employer pursuant to Section 409.001.

The claimant appealed all of the hearing officer's determinations, contending that the evidence established she did sustain a compensable injury, that she timely notified her employer of her injury, and that the carrier failed to timely contest compensability in accordance with Section 409.021. The carrier responded, urging affirmance of the hearing officer's determinations.

DECISION

Reversed and remanded.

The claimant testified she was injured on (date of injury), when a very large patient requiring an x-ray grabbed the claimant's left arm and pulled on it while attempting to sit up.

CARRIER WAIVER

Section 409.021(a) provides 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 [Texas Department of Insurance, Division of Workers' Compensation (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 the right to contest compensability.

The hearing officer determined that the carrier did not waive the right to contest compensability of the claimed injury by not timely contesting the injury in accordance

with Section 409.021. However, the hearing officer made no findings of fact or any discussion as to when the carrier received first written notice of the injury. The claimant has the burden to prove when the carrier received the first written notice of injury and, once that is done, the burden shifts to the carrier to prove that it timely filed a dispute. See Appeals Panel Decision (APD) 051656, decided September 14, 2005. Without a finding as to when the 60-day period began, it cannot be determined whether or not the carrier timely contested compensability of the injury in accordance with Section 409.021. Because the hearing officer's decision is legally incomplete regarding the waiver issue, we reverse the hearing officer's determination that the carrier did not waive 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.

COMPENSABLE INJURY

Because we have reversed the hearing officer's determination that the carrier did not waive the right to contest compensability of the claimed injury by not timely contesting the injury in accordance with Section 409.021 as being incomplete, we also reverse the hearing officer's determination that the claimant did not sustain a compensable injury on (date of injury), and we remand this issue to the hearing officer for further action consistent with this decision.

We note that the carrier argued *Continental Casualty Company v. Williamson*, 971 S.W.2d 108 (Tex. App.-Tyler 1998, no pet.) applies in this case, and the hearing officer stated in the discussion that the "[c]arrier's argument was persuasive." The court stated in *Williamson* 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." In evidence is a medical record dated December 26, 2013, from (Dr. C), noting that the claimant presented with left shoulder pain and reported that her left arm was suddenly grabbed by a patient at work causing her to feel a sharp pulling pain in her left shoulder, and diagnosing the claimant with left shoulder impingement syndrome, synovitis/tenosynovitis, and partial thickness rotator cuff tear. Also in evidence is a medical record dated March 21, 2014, from (Dr. A) noting the claimant stated she was at work on (date of injury), and a patient requiring assistance in getting off a table grabbed and pulled the claimant's left arm. Dr. A noted the claimant had been diagnosed with a shoulder sprain/strain in December 2013. Also in evidence is an MRI taken of the claimant's left shoulder on February 6, 2014, which lists an impression of a small partial tear of the rotator cuff.

TIMELY NOTICE TO THE EMPLOYER

The hearing officer found in Finding of Fact No. 4 that the claimant notified the employer or an employee holding a supervisory or management position of the injury on December 5, 2013, a date more than 30 days after the date of the claimed injury. Finding of Fact No. 4 is supported by sufficient evidence and is affirmed.

It is a defense to compensability and entitlement to benefits that a claimant has failed to timely notify his or her employer pursuant to Section 409.001. Section 409.002 provides in part that if a claimant fails to timely notify his or her employer pursuant to Section 409.001, the employer and the carrier are relieved of liability unless the employer or the carrier does not contest the claim. The Appeals Panel has held that a carrier that has waived its right to contest compensability under Section 409.021 has also waived its right to assert a defense under Section 409.002 based upon the claimant's failure to timely notify his or her employer of an injury pursuant to Section 409.001. See APD 022027-s, decided September 30, 2002; APD 041810, decided September 14, 2004. Because we have reversed the hearing officer's determination that the carrier did not waive the right to contest compensability of the claimed injury by not timely contesting the injury in accordance with Section 409.021 as being incomplete, we also reverse the hearing officer's determination that the carrier is relieved from liability under Section 409.002 because of the claimant's failure to timely notify her employer pursuant to Section 409.001, and we remand this issue to the hearing officer for further action consistent with this decision.

SUMMARY

We reverse the hearing officer's determination that the carrier did not waive the right to contest compensability of the claimed injury by not timely contesting the injury in accordance with Section 409.021 as being incomplete, 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 claimant did not sustain a compensable injury on (date of 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 is relieved from liability under Section 409.002 because of the claimant's failure to timely notify her employer pursuant to Section 409.001, 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 make a finding of fact as to when the carrier received first written notice of the claimed injury. The hearing officer is then to

determine: (1) 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; (2) whether the claimant sustained a compensable injury on (date of injury); and (3) whether the carrier is relieved from liability under Section 409.002 because of the claimant's failure to timely notify her employer pursuant to Section 409.001. No new evidence is to be taken on remand.

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 APD 060721, decided June 12, 2006.

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

**CT CORPORATION SYSTEM
1999 BRYAN STREET, SUITE 900
DALLAS, TEXAS 75201-3136.**

Carisa Space-Beam
Appeals Judge

CONCUR:

K. Eugene Kraft
Appeals Judge

Margaret L. Turner
Appeals Judge