

APPEAL NO. 162591  
FILED FEBRUARY 16, 2017

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 November 8, 2016, in (city), Texas, with (hearing officer) presiding as hearing officer. The hearing officer resolved the issues by determining that: (1) the appellant/cross-respondent (claimant) did not sustain a compensable repetitive trauma injury; (2) the date of the claimant's claimed injury pursuant to Section 408.007, the date the claimant knew or should have known the disease may be related to the employment, is (date of injury); (3) the respondent/cross-appellant (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; (4) 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; (5) the carrier is not relieved from liability under Section 409.004 because of the claimant's failure to 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; and (6) the claimant did not have disability from May 1, 2015, and continuing through the date of the CCH.

The claimant appealed the hearing officer's determinations on compensability, date of injury, carrier waiver of the right to contest compensability under Section 409.021, as well as the hearing officer's finding of fact that the work injury was not a producing cause of the claimant's inability to obtain and retain employment at wages equivalent to his pre-injury wage from May 1, 2015, through the date of the CCH. The claimant contends the hearing officer's determinations are against the great weight and preponderance of the evidence. The carrier responded, urging affirmance of the determinations appealed by the claimant. The carrier cross-appealed the hearing officer's determinations on the date of injury, timely notice to the employer, and timely filing a claim with the Division. The carrier contends the evidence does not support the appealed determinations. The appeal file does not contain a response from the claimant to the carrier's cross-appeal.

DECISION

Affirmed in part, reversed and rendered in part, and reversed and remanded in part.

The claimant testified he worked for the employer as a store manager and that he repetitively lifted, stooped, picked up inventory, and pulled a heavy pallet jack by

hand for many years for the employer. The claimant testified that he injured his neck and low back in the performance of his duties.

### **DATE OF INJURY**

The hearing officer's determination that the claimant's date of injury is (date of injury), is supported by sufficient evidence and is affirmed.

### **WAIVER OF COMPENSABILITY UNDER SECTION 409.021**

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 [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 found that the carrier was notified of the claimed injury on July 7, 2015, and filed its dispute of the claimed injury with the Division on October 8, 2015. In evidence is a Notice to Carrier of Injury (Notice) from the Division dated July 6, 2015, that was placed in the carrier's Austin representative's box on that same date, so pursuant to 28 TEX. ADMIN. CODE § 102.5(d) (Rule 102.5(d)), the carrier was deemed to have received the Notice on July 7, 2015. Also in evidence is a Notice of Denial of Compensability/Liability and Refusal to Pay Benefits (PLN-1) dated October 7, 2015, and file stamped as received by the Division on October 8, 2015, in which the carrier disputed the claimed injury. The hearing officer's finding that the carrier was notified of the claimed injury on July 7, 2015, and filed its dispute of the injury on October 8, 2015, is supported by sufficient evidence. The hearing officer correctly noted in her Discussion that the carrier did not file a dispute within 60 days of written notice of the claimed injury.

However, the hearing officer determined 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 under the reasoning found in *Continental Casualty Company v. Williamson*, 971 S.W.2d 108 (Tex. App.-Tyler 1998, no pet.), because she found that the claimant did not show that he sustained damage or harm to the physical structure of his body as a result of repetitious, physically traumatic activities that occurred over time and arose out of and in the course and scope of his employment. We note that the hearing officer stated in the Discussion that the claimant "did show that he sustained damage or harm to the physical structure of his body as a result of

repetitious, physically traumatic activities that occurred over time and arose out of and in the course and scope of his employment.”

If the hearing officer believed that there was no injury, that is no damage or harm to the physical structure of the body, she could not have found liability pursuant to Section 409.021. 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.” Applying the rationale in *Williamson*, carrier waiver cannot create an injury that does not exist. Appeals Panel Decision (APD) 070903-s, decided July 27, 2007. See also APD 120090, decided March 22, 2012.

In evidence is a medical record dated (date of injury), discussing an office visit with the claimant’s surgeon, (Dr. P), and notes complaints that include neck pain with pain radiating down the claimant’s left arm and numbness and tingling and recommending an MRI of the claimant’s cervical spine. Also in evidence are medical records in May 2015, assessing cervical myelopathy secondary to severe cervical stenosis, among other conditions. *Williamson, supra*, does not apply in this case because the medical records reflected that there was damage or harm to the physical structure of the claimant’s body on (date of injury). Because the carrier in this case did not dispute the claimed injury within 60 days of written notice of the claimed injury and *Williamson* does not apply, 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 render a new decision 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.

### **TIMELY NOTICE TO EMPLOYER AND TIMELY FILING CLAIM WITH THE DIVISION**

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. It is also a defense to compensability and entitlement to benefits that a claimant has failed to timely file a claim for compensation in accordance with Section 409.003. Section 409.004 provides, in part, that if a claimant fails to timely file a claim for compensation with the Division pursuant to Section 409.003, 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, as well as the defense under Section 409.004 based upon the claimant's failure to timely file a claim for compensation pursuant to Section 409.003. See APD 022027-s, decided September 30, 2002; APD 041810, decided September 14, 2004; APD 160580, decided May 26, 2016; APD 022091-s, decided October 7, 2002. 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 and have rendered a new decision 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, the carrier has also waived its right to assert the defenses under Sections 409.002 and 409.004. 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, and we also affirm the hearing officer's determination that the carrier is not relieved from liability under Section 409.004 because of the claimant's failure to timely file a claim for compensation with the Division within one year of the injury as required by Section 409.003.

### **COMPENSABLE INJURY**

Given that 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, and we have affirmed the hearing officer's determinations that the carrier is not relieved from liability under Sections 409.002 and 409.004, we reverse the hearing officer's determination that the claimant did not sustain a compensable repetitive trauma injury, and we render a new decision that the claimant sustained a compensable repetitive trauma injury based on the carrier's waiver of the right to contest compensability of the claimed injury by not timely contesting the injury in accordance with Section 409.021.

### **DISABILITY**

Section 401.011(16) defines disability as the inability because of a compensable injury to obtain and retain employment at wages equivalent to the pre-injury wage. The hearing officer determined that the claimant did not have disability resulting from the claimed injury from May 1, 2015, through the date of the CCH. However, we have reversed the hearing officer's determinations 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 have rendered a new decision 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. We have also reversed the hearing

officer's determination that the claimant did not sustain a compensable repetitive trauma injury and have rendered a new decision that the claimant did sustain a compensable repetitive trauma injury based on the carrier's waiver under Section 409.021. Given the above, we reverse the hearing officer's determination that the claimant did not have disability from May 1, 2015, through the date of the CCH, and we remand the issue of disability to the hearing officer for further action consistent with this decision.

### **SUMMARY**

We affirm the hearing officer's determination that the date of the claimed injury is (date of injury).

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 carrier is not relieved from liability under Section 409.004 because of the claimant's failure to timely file a claim for compensation with the Division within one year of the injury as required by Section 409.003.

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 render a new decision 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.

We reverse the hearing officer's determination that the claimant did not sustain a compensable repetitive trauma injury, and we render a new decision that the claimant sustained a compensable repetitive trauma injury based on the carrier's waiver of the right to contest compensability of the claimed injury by not timely contesting the injury in accordance with Section 409.021.

We reverse the hearing officer's determination that the claimant did not have disability from May 1, 2015, and continuing through the date of the CCH, and we remand the issue of disability to the hearing officer for further action consistent with this decision.

### **REMAND INSTRUCTIONS**

On remand the hearing officer is to make findings of fact, conclusions of law, and a decision as to whether the claimant had disability resulting from the (date of injury), compensable injury. No new evidence is to be taken.

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 **INDEMNITY INSURANCE COMPANY OF NORTH AMERICA** 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.**

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Carisa Space-Beam  
Appeals Judge

CONCUR:

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K. Eugene Kraft  
Appeals Judge

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Margaret L. Turner  
Appeals Judge