

APPEAL NO. 190915  
FILED JULY 19, 2019

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 April 3, 2019, in (city), Texas, with (administrative law judge), presiding as the administrative law judge (ALJ). The ALJ resolved the disputed issues by deciding that: (1) the respondent (claimant) sustained a compensable injury on (date of injury); (2) the compensable injury of (date of injury), extends to a left knee medial meniscus tear; (3) the appellant (carrier) is not relieved of liability under Section 409.002 because the claimant timely notified his employer pursuant to Section 409.001; and (4) the carrier is not relieved of liability under Section 409.004 because of the claimant's failure to timely file a claim with the Texas Department of Insurance, Division of Workers' Compensation (Division) within one year of the injury as required by Section 409.003. The ALJ also determined that the carrier did not specifically contest compensability on the issue of relief of liability because of the claimant's failure to timely file a claim for compensation with the Division within one year of the injury pursuant to Section 409.022 and 28 TEX. ADMIN. CODE § 124.2(f) (Rule 124.2(f)), because the ALJ found that issue was actually litigated.

The carrier appealed, disputing all the ALJ's determinations. The carrier contends that the ALJ abused his discretion in adding the issue of whether the carrier specifically contested compensability on the grounds of the claimant's failure to timely file a claim for compensation with the Division within one year pursuant to Section 409.022 and Rule 124.2(f), because that issue was not actually litigated by the parties. The appeal file does not contain a response to the carrier's appeal.

DECISION

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

The claimant, a funeral director for the employer, testified that on (date of injury), he was carrying a box of flowers after a funeral when he tripped over a parking barrier. The claimant testified he threw the box of flowers and fell on his left knee then rolled onto his right forearm and sustained bruising to his left knee and right forearm. The claimant also testified he kept working, occasionally using a knee support sleeve. The claimant further testified that in March 2017 he went on a trip with his wife that involved a lot of walking and noticed an increase in his left knee pain. The claimant underwent an MRI on March 23, 2017, which revealed a left knee medial meniscal tear. The evidence reflects that on March 29, 2017, his employer prepared an Employer's First Report of Injury or Illness (DWC-1) indicating that he had tripped and fallen on (date of

injury), which resulted in an injury that he reported to the employer on (date of injury). The DWC-1 was sent to the carrier, and on April 21, 2017, the carrier prepared and filed with the Division a Notice of Denial of Compensability/Liability and Refusal to Pay Benefits (PLN-1), in which the carrier stated it accepts an incident occurred on (date of injury), that was reported timely to the employer but the incident did not result in an injury. In evidence is an Employee's Claim for Compensation for a Work-Related Injury or Occupational Disease (DWC-41) dated May 22, 2017, that indicates it was filed with the Division on June 5, 2017, which is more than one year after the date of injury.

The ALJ is the sole judge of the weight and credibility of the evidence (Section 410.165(a)) and, as the trier of fact, resolves the conflicts and inconsistencies in the evidence. *Texas Employers Insurance Association v. Campos*, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). As an appellate reviewing tribunal, the Appeals Panel will not disturb challenged factual findings of an ALJ absent legal error, unless they are so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. *Cain v. Bain*, 709 S.W.2d 175, 176 (Tex. 1986); *In re King's Estate*, 150 Tex. 662, 244 S.W.2d 660 (1951).

#### **TIMELY NOTICE TO THE EMPLOYER**

The ALJ's determination that the carrier is not relieved of liability under Section 409.002 because the claimant timely notified his employer pursuant to Section 409.001 is supported by sufficient evidence and is affirmed.

#### **ISSUE ADDED BY THE ALJ**

The Benefit Review Conference (BRC) Report does not mention an issue of carrier waiver of the defense of the claimant's failure to file a claim within one year. Section 410.151(b) provides, in part, that an issue not raised at the BRC may not be considered at a CCH except in limited circumstances. Rule 142.7(a) states, in part, that disputes not expressly included in the statement of disputes will not be considered by the ALJ. Rule 142.7(c) provides, in part, that a party may submit a response to the disputes identified as unresolved in the BRC Report. Rule 142.7(d) is a provision for adding disputes by unanimous consent. Rule 142.7(e) is a provision for adding disputes by permission of the ALJ. None of these provisions were applicable in this case.

As previously noted the ALJ added the issue of whether the carrier specifically contested compensability on the grounds of the claimant's failure to timely file a claim for compensation with the Division within one year pursuant to Section 409.022 and Rule 124.2(f) because he found that issue was actually litigated. The carrier contends on appeal that this issue was not actually litigated and the ALJ abused his discretion in

adding the issue. A review of the record reflects the timeliness of the carrier's raising of the one-year limitation as a defense was not requested to be added by either party and in fact was not ever mentioned at the CCH. The ALJ added the issue in the decision and order after the CCH without notifying the parties that he was doing so. The only evidence relating to this issue is the DWC-41 and the carrier's PLN-1. We do not believe this issue was actually litigated, and we hold that it was an abuse of discretion to add the issue. See Appeals Panel Decision (APD) 111095, decided October 13, 2011; see also APD 013100, decided February 6, 2002. Accordingly, we reverse the ALJ's determination that the carrier did not specifically contest compensability on the issue of relief of liability because of the claimant's failure to timely file a claim for compensation with the Division within one year of the injury pursuant to Section 409.022 and Rule 124.2(f), and we render a new decision by striking that determination.

### **TIMELY FILING CLAIM WITH THE DIVISION**

The ALJ determined the carrier is not relieved of liability under Section 409.004 because of the claimant's failure to timely file a claim with the Division within one year of the injury as required by Section 409.003. The ALJ based this determination on his determination that the carrier did not specifically contest compensability on the issue of relief of liability because of the claimant's failure to timely file a claim for compensation with the Division within one year of the injury pursuant to Section 409.022 and Rule 124.2(f). However, given that we have reversed and rendered a new decision striking that determination, the ALJ erred in determining the carrier is not relieved of liability under Section 409.004 on that basis.

The ALJ found in Finding of Fact No. 9 that the DWC-1 dated March 29, 2017, and filed with the carrier that same day contains sufficient information to qualify as a claim for compensation in this case. Rule 122.2(a) provides, in part, that an injured employee, or a person acting on the injured employee's behalf, shall file with the Division a written claim for compensation within one year after the date of the injury's occurrence. Rule 122.2(c) lays out the information that should be contained in that written claim for compensation. Neither party disputes that a claim for compensation does not necessarily have to be on a DWC-41 if the claim contains the information listed in Rule 122.2(c). However, the evidence did not establish that the employer filed the March 29, 2017, DWC-1 with the Division on behalf of the claimant. Furthermore, the DWC-1 may not be used as substantive evidence against a carrier or employer. See Section 409.005(f) and APD 012728, decided December 31, 2001. The ALJ's finding that the DWC-1 qualifies as a claim for compensation in this case is not supported by the evidence. The ALJ found that the claimant first filed his DWC-41 with the Division on June 5, 2017, which was not within one year of the date of the claimed injury. This finding was not appealed. Therefore, the evidence established that the claimant did not

file a claim with the Division within one year of the injury as required by Section 409.003.

Rule 122.2(d) provides, in part, that failure to file a claim for compensation with the Division no later than one year from the incident shall relieve the employer and the employer's carrier from liability under the Act unless good cause exists for failure to file a claim in a timely manner. The decision and order does not contain a discussion, finding of fact, conclusion of law, or a decision as to whether the claimant had good cause for not timely filing a claim for compensation with the Division within one year of the date of injury as required by Section 409.004, which is necessary to make a determination on this issue. Therefore, we reverse the ALJ's determination that the carrier is not relieved of liability under Section 409.004 because of the claimant's failure to timely file a claim with the Division within one year of the injury as required by Section 409.003, and we remand this issue to the ALJ for further action consistent with this decision.

### **COMPENSABILITY AND EXTENT OF INJURY**

Given that we have reversed the ALJ's determination that the carrier is not relieved of liability under Section 409.004 because of the claimant's failure to timely file a claim with the Division within one year of the injury as required by Section 409.003, we reverse the ALJ's determinations that the claimant sustained a compensable injury on (date of injury), and that the compensable injury of (date of injury), extends to a left knee medial meniscus tear. We remand these issues to the ALJ for further action consistent with this decision.

### **SUMMARY**

We affirm the ALJ's determination that the carrier is not relieved of liability under Section 409.002 because the claimant timely notified his employer pursuant to Section 409.001.

We reverse the ALJ's determination that the carrier did not specifically contest compensability on the issue of relief of liability because of the claimant's failure to timely file a claim for compensation with the Division within one year of the injury pursuant to Section 409.022 and Rule 124.2(f), and we render a new decision by striking that determination.

We reverse the ALJ's determination that the carrier is not relieved of liability under Section 409.004 because of the claimant's failure to timely file a claim with the Division within one year of the injury as required by Section 409.003, and we remand this issue to the ALJ for further action consistent with this decision.

We reverse the ALJ's determination that the claimant sustained a compensable injury on (date of injury), and we remand this issue to the ALJ for further action consistent with this decision.

We reverse the ALJ's determination that the compensable injury of (date of injury), extends to a left knee medial meniscus tear, and we remand this issue to the ALJ for further action consistent with this decision.

### **REMAND INSTRUCTIONS**

On remand the ALJ is to make findings of fact, conclusions of law, and a decision whether the claimant had good cause for failing to timely file a claim with the Division within one year of the injury as required by Section 409.004. The ALJ is then to make a determination whether the carrier is relieved of liability under Section 409.004 because of the claimant's failure to timely file a claim with the Division within one year of the injury as required by Section 409.003. The ALJ is then to determine whether the claimant sustained a compensable injury on (date of injury), and whether the compensable injury of (date of injury), extends to a left knee medial meniscus tear.

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 ALJ, 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 **EMPLOYERS PREFERRED INSURANCE COMPANY** and the name and address of its registered agent for service of process is

**CORPORATION SERVICE COMPANY  
211 EAST 7TH STREET, SUITE 620  
AUSTIN, TEXAS 78701.**

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Carisa Space-Beam  
Appeals Judge

CONCUR:

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Cristina Beceiro  
Appeals Judge

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Margaret L. Turner  
Appeals Judge