

APPEAL NO. 080576-s
FILED JULY 2, 2008

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 2, 2008. The issues before the hearing officer were:

- (1) Did the respondent 2 (claimant) sustain a compensable injury?
- (2) What is the date of injury?
- (3) Is the respondent 1/cross-appellant (self-insured) relieved from liability under Section 409.002 because of the claimant's failure to timely notify her employer pursuant to Section 409.001?
- (4) Is the self-insured relieved from liability under Section 409.004 because of the claimant's failure without good cause 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?
- (5) Is the appellant/cross-respondent (subclaimant) the proper subclaimant under Section 409.0091?
- (6) Does the subclaimant have legal standing to seek adjudication of this dispute pursuant to Section 409.0091?

The hearing officer determined that: (1) the claimant sustained a work-related injury, which was not a compensable injury because she failed without good cause to file a claim for compensation with the Division, within one year of the date of injury; (2) the date of injury is _____; (3) the self-insured is not relieved of liability under Section 409.002 because the claimant gave timely notice of her injury to her employer pursuant to Section 409.001; (4) the self-insured is relieved of liability to the claimant and to the subclaimant for benefits for the claimant's work-related injury of _____, because the claimant failed to timely file a claim for compensation with the Division as required by Section 409.003; (5) the subclaimant is a proper subclaimant under Section 409.0091 (resolved by agreement of the parties); and (6) the subclaimant has legal standing to seek adjudication of this dispute pursuant to Section 409.0091.

The subclaimant appeals "the decision on the issues of compensability of reimbursement sought by [s]ubclaimant, and relief from liability of [the self-insured] pursuant to [Section] 409.004." We read the subclaimant's appeal as appealing the hearing officer's compensability and timely claim filing determinations. Additionally, the subclaimant states in its appeal that Section 409.0091 does not apply to this subclaim, rather it "is expressly controlled by [Section] 409.009, the law applicable to this

subclaim.” The self-insured cross-appealed the hearing officer’s determinations on the issues of the date of injury, timely notice to the employer, and standing of the subclaimant under Section 409.0091, and also appealed the determination that the claimant sustained a work-related injury. Both the subclaimant and the self-insured filed responses to the other party’s appeal. The appeal file does not contain a response to either appeal from the claimant. The hearing officer’s determination that CFHP is a proper subclaimant under Section 409.0091 was not appealed and has become final pursuant to Section 410.169.

DECISION

Affirmed in part and reversed and rendered in part.

FACTUAL SUMMARY

The claimant testified that she fell down some stairs at work and injured her left knee on _____,¹ and she reported her injury to her employer on January 13, 2005. The claimant received medical treatment for her left knee injury, which was paid for by the subclaimant, a health care insurer. In evidence is a Notice of Denial of Compensability/Liability and Refusal to Pay Benefits (PLN-1) from the self-insured dated January 24, 2005, denying “compensability of the entire claim” and asserting that the claimant did not timely report the injury to the employer. The claimant testified that she did not file, and does not intend to pursue, a workers’ compensation claim for her work-related injury because her injury has resolved and it has been paid for by the subclaimant.

The subclaimant’s attorney testified as a witness as the President of “Company” that the subclaimant received information about this claim from the Division under Section 402.084(c-3) after January 1, 2007. The subclaimant requested reimbursement of medical expenses from the self-insured on August 28, 2007, and subsequently in September 2007; and the self-insured denied the request for reimbursement on November 20, 2007. The subclaimant requested a benefit review conference (BRC) on December 24, 2007.

COMPENSABILITY, DATE OF INJURY, TIMELY NOTICE AND TIMELY CLAIM FILING

The hearing officer’s determinations on the issues of compensability, date of injury, timely notice to the employer, and timely claim filing are supported by sufficient evidence and are affirmed. We agree with and affirm the hearing officer’s determination that under Section 409.004 the self-insured is relieved of liability to the claimant and to the subclaimant for benefits for the claimant’s work-related injury of _____, because the claimant failed without good cause to timely file a claim for compensation

¹ Claimant had initially asserted a date of injury of (incorrect date of injury); however, at the BRC she asserted a date of injury of _____, which was the day before the self-insured’s school winter/holiday break for Christmas.

with the Division as required by Section 409.003. In Krueger v. Atascosa County, 155 S.W.3d 614 (Tex. App.-San Antonio 2004, no pet.), the court held that the claimant's failure without good cause to timely file her claim for compensation time-barred her claim and thus she did not have a compensable injury. In Tex. Mut. Ins. Co. v. Sonic Sys. Int'l, Inc., 214 S.W.3d 469 (Tex. App. Houston [14th Dist.] 2007, pet. denied), the court held that where a claimant is barred from recovering benefits under the 1989 Act, it follows that a subclaimant is similarly barred.²

STANDING

The hearing officer erred in determining that the subclaimant has legal standing to seek adjudication of this dispute pursuant to Section 409.0091. The parties agreed that the subclaimant is a proper subclaimant under Section 409.0091, and that determination was not appealed; however there was a separate issue on whether the subclaimant has legal standing under Section 409.0091.

Standing is defined as "a party's right to make a legal claim or seek judicial enforcement of a duty or right." (Black's Law Dictionary, 7th edition). The general test for standing in Texas requires that there "(a) shall be a real controversy between the parties, which (b) will be actually determined by the judicial declaration sought." See Tex. Ass'n of Bus. v. Tex. Air Control Bd., 852 S.W.2d 440, 446 (Tex. 1993), citing Board of Water Engineers v. City of San Antonio, 283 S.W.2d 722, 724 (Tex. 1955). At issue in this case is whether the subclaimant has legal standing to seek adjudication of this dispute pursuant to Section 409.0091. We believe that what the parties wanted resolved under the standing issue is whether the subclaimant met the requirements of Section 409.0091 to seek adjudication of the compensability issue. We conclude that the subclaimant did not meet those requirements.

Section 8 of House Bill (HB) 724 amended Subchapter A, Chapter 409, Labor Code, by adding Section 409.0091 entitled Reimbursement Procedures for Certain Entities, to establish reimbursement procedures. (Acts 2007, 80th Leg., R.S., Ch. 1007 (HB 724) § 8 effective September 1, 2007 (presently codified at Tex. Labor Code § 409.0091)). Section 409.0091(m) provides as follows:

(m) In a dispute filed under Chapter 410 that arises from a subclaim under this section, a hearing officer may issue an order regarding compensability or eligibility for benefits and order the workers' compensation insurance carrier to reimburse health care services paid by the health care insurer as appropriate under this subtitle. Any dispute over the amount of medical benefits owed under this section, including

² While we recognize that the Tex. Mut. Ins. Co. v. Sonic Sys. Int'l, Inc. case addressed an employer's subclaim under Section 409.009 and that the claimant in that case was barred from recovery under the 1989 Act because of an election under Section 406.075, we believe the holding in that case that where a claimant is barred from recovering benefits under the 1989 Act, the subclaimant is similarly barred, applies to the subclaimant in the instant case.

medical necessity issues, shall be determined by medical dispute resolution under Sections 413.031 and 413.032.

Section 11 of HB 724 states as follows:

Section 11. The change in law made by this Act applies only to a subclaim based on a compensable injury that occurred on or after September 1, 2007, and to reimbursement requests and subclaims pursuant to Section 409.0091(s), Labor Code, as added by this Act. The changes made by this Act apply only to subclaims based on an injury that has not been denied for compensability or that has been determined by the [D]ivision to be compensable. (Acts 2007, 80th Leg., R.S., Ch. 1007 (HB 724) § 11 effective September 1, 2007.)

In the instant case, Section 409.0091 does not apply because the date of injury was _____, a date prior to September 1, 2007.

Next, Section 409.0091(s) does not apply because the subclaimant was provided with information after January 1, 2007, under Section 402.084(c-3). Section 409.0091(s) provides that:

On or after September 1, 2007, from information provided to a health care insurer before January 1, 2007, under Section 402.084(c-3), the health care insurer may file not later than March 1, 2008 (*Emphasis added*):

- (1) a subclaim with the [D]ivision under Subsection (l) if a request for reimbursement has been presented and denied by a workers' compensation insurance carrier; or
- (2) a request for reimbursement under Subsection (f) if a request for reimbursement has not previously been presented and denied by the workers' compensation insurance carrier.

In the instant case, the hearing officer erred in finding that (Company) received information about this claim from the Division under Section 402.084(c-3) before January 1, 2007. The hearing officer states in the Background Information of his Decision that in November 2006, (Company) (subclaimant's agent/representative) became a partner with the subclaimant for sharing claims data pursuant to Section 402.084(b)(8).³ In evidence is a copy of a Division EDI Trading Partner Application and Profile (DWC-EDI-01) (signed by the subclaimant on November 6, 2006, and by the

³ In unappealed Finding of Fact No. 7, the hearing officer determined that the subclaimant appointed TTG as its agent and representative to pursue reimbursement of expenses for medical care rendered to the claimant in connection with her injury of _____.

data collection agent (Company) on November 2, 2006) which shows that (Company) as the subclaimant's agent/representative may receive data from the Division regarding information pursuant to Section 402.084 (Record Check; Release of Information). Section 402.084(c-3) provides, in part, that if a claims record exists for a listed person, the Division promptly shall provide information on each workers' compensation claim filed by that person to the carrier or the carrier's representative in an electronic format. The subclaimant's attorney testified that on November 2, 2006, (Company) was approved as a "trading partner" by the Division (as evidenced by the DWC-EDI-01), and that the subclaimant received information about this claim from the Division under Section 402.084(c-3) after January 1, 2007. There was no evidence that either the subclaimant or its agent/representative, (Company), received information about this claim under Section 402.084(c-3) before January 1, 2007. The subclaimant's attorney's testimony is the only evidence regarding when the subclaimant received information about this claim from the Division under Section 402.084(c-3). Therefore, because the subclaimant was provided with information after January 1, 2007, under Section 402.084(c-3), Section 409.0091(s) does not apply to the facts of this case.

Furthermore, Section 409.0091 does not apply because the self-insured denied compensability of the injury and the Division determined that the claimant did not sustain a compensable injury. In evidence is a PLN-1 dated January 24, 2005, which shows that the self-insured denied "compensability of the entire claim" and asserted that the claimant did not timely report her injury to her employer. Subsequently, after the subclaimant was provided with information about the claim in late January 2007, it requested reimbursement from the self-insured. In evidence is a letter dated August 28, 2007, and an undated Reimbursement Request For Payment Made By Health Care Insurer (DWC-026) (testimony indicated it was sent in September 2007) from the subclaimant requesting reimbursement from the self-insured, and a response dated November 20, 2007, from the self-insured denying the subclaimant's request for reimbursement because the "[c]laim is not compensable" and "[s]ervices were provided for body parts/conditions denied by an Extent of Injury dispute." Additionally, the hearing officer determined that the claimant did not sustain a compensable injury, and we have affirmed that determination in this Decision. See Section 11 of HB 724 stating in part that the changes made by the Act apply only to subclaims based on an injury that has not been denied for compensability or that has been determined by the Division to be compensable.

Under the facts of this case, Section 409.0091 does not apply because: (1) the claimant's date of injury is prior to September 1, 2007; (2) the subclaimant was provided information under Section 402.084(c-3) after January 1, 2007 (pertinent to the application of Section 409.0091(s)); (3) the self-insured has denied compensability of the claim; and (4) the Division has determined that the claimant does not have a compensable injury. Given that Section 409.0091 does not apply, the subclaimant does not have legal standing to seek adjudication of this dispute under Section 409.0091.

On appeal, the subclaimant states that Section 409.0091 does not apply to this case, rather Section 409.009 applies. We note that the subclaimant's written request

for reimbursement to the self-insured dated August 28, 2007, states that its request was pursuant to "Sections 409.009 and/or 409.0091," and the DWC-026 is the Division form for a Reimbursement Request For Payment Made By Health Care Insurer. Review of the record shows that the parties did not litigate that Section 409.009 applied. Rather, the parties agreed that the subclaimant was a proper subclaimant under Section 409.0091, and agreed that the issue in dispute was whether the subclaimant has legal standing under Section 409.0091. During closing arguments at the CCH, the subclaimant's position was that the "compensability issue" comes under Section 409.009 because of the date of injury and the application of Section 409.0091; and that once it is determined that the subclaimant paid a claim on a compensable injury, requested reimbursement from the self-insured and was denied reimbursement by the self-insured, then the subclaimant can come into this proceeding and file a subclaim under Section 409.0091. The subclaimant stated it followed the law and that it has standing. As previously mentioned the standing issue references Section 409.0091. There was no certified issue nor litigation at the CCH of whether the subclaimant had legal standing under Section 409.009. The Appeals Panel will generally not consider issues raised for the first time on appeal. Appeals Panel Decision 040259, decided March 18, 2004. We make no determination regarding whether the subclaimant has standing as a subclaimant under Section 409.009 because that was not an issue before the hearing officer and it was not litigated at the CCH.

Accordingly, we reverse the hearing officer's determination that the subclaimant has legal standing to seek adjudication of this dispute under Section 409.0091 and we render a new decision that the subclaimant does not have legal standing to seek adjudication of this dispute under Section 409.0091.

SUMMARY

We affirm the hearing officer's determinations on the issues of compensability, date of injury, timely notice to the employer, and timely claim filing, and that the self-insured is relieved of liability to the claimant and the subclaimant because the claimant failed without good cause to timely file her claim for compensation with the Division. We reverse the hearing officer's determination that the subclaimant has legal standing to seek adjudication of this dispute under Section 409.0091 and we render a new decision that the subclaimant does not have legal standing to seek adjudication of this dispute under Section 409.0091.

The true corporate name of the insurance carrier is **(a self-insured governmental entity)** and the name and address of its registered agent for service of process is

**SUPERINTENDENT
(ADDRESS)
(CITY), TEXAS (ZIP CODE).**

Veronica L. Ruberto
Appeals Judge

CONCUR:

Cynthia A. Brown
Appeals Judge

Margaret L. Turner
Appeals Judge