

APPEAL NO. 031719
FILED AUGUST 11, 2003

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 June 2, 2003. The hearing officer resolved the disputed issues by deciding: (1) that the respondent/cross-appellant (claimant) sustained a compensable injury on _____; (2) that the appellant/cross-respondent (carrier) is not relieved from liability under Section 409.002 because of the claimant's alleged failure to notify his employer pursuant to Section 409.001; (3) 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 Texas Workers' Compensation Commission (Commission) within one year of the injury as required by Section 409.003; and (4) that the carrier waived the right to dispute the injury with the defense of the claimant's failure to file a claim for compensation with the Commission within one year of the injury as required by Section 409.003. The carrier appealed all of the hearing officer's determinations and asserted that the hearing officer erred in finding good cause to add the carrier waiver issue at the CCH. The claimant submitted a request for review that asserts that the hearing officer erred in making certain statements in the Statement of the Evidence, and asks that the Appeals Panel "reverse the Hearing Officer's finding" as to those matters, and otherwise affirm the decision and order. The carrier responds that the claimant's appeal is insufficient to constitute an appeal, and objects to the claimant's "numerous insupportable and unprofessional comments about the employer, the employer's representatives, and the Carrier." The claimant responded with a letter indicating that he did not intend to file anything further.

DECISION

Affirmed.

FACTUAL SUMMARIZATION

The claimant contends that he sustained an injury to his back when he slipped and fell at work on _____. The claimant contends that he reported his injury to his manager; however, the employer never filed an accident report. The claimant continued to work until he was terminated from his employment in December 2001. The carrier does not dispute that it received written notice of the claimed injury on December 7, 2001, and filed its Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) contesting compensability with the Commission on December 13, 2001. The TWCC-21 reflects that the date of injury (DOI) is _____. The claimant does not dispute that he filed an Employee's Notice of Injury or Occupational Disease and Claim for Compensation (TWCC-41) on December 3, 2002, a year and two months after the injury of _____. At issue was whether the carrier is relieved from liability under Section 409.004 because of the claimant's failure to timely file a claim for compensation with the Commission within one

year of the injury as required by Section 409.003. The claimant contends that the carrier waived the right to contest compensability because it did not raise a defense of failure to file a claim for compensation within one year of the DOI as required by Section 409.003. The carrier contends that the waiver provision does not apply to Section 409.003 or 409.004.

MOTION GRANTED TO ADD CARRIER WAIVER ISSUE

The carrier asserts that the hearing officer erred in finding good cause to add the carrier waiver issue. Section 410.151(b) provides, in part, that an issue not raised at a benefit review conference (BRC) may not be considered unless the parties consent or, if the issue was not raised, the Commission determines that good cause exists for not requesting the issue at the BRC. It is undisputed that the BRC was held on April 3, 2003, and that Hearing Officer's Exhibit No. 3, a letter dated May 6, 2003, reflects that the claimant requested that the carrier waiver issued be added. The hearing officer found that there was good cause for failure to raise the issue. The hearing officer explained that the carrier raised the defense to liability under Section 409.004, and that in response to that defense at the BRC, the claimant's attorney acted as a "reasonable prudent counsel" in researching the issue before requesting that the issue be added at the CCH. We review such action on an abuse-of-discretion standard. Texas Workers' Compensation Commission Appeal No. 991851, decided October 12, 1999. We find that the hearing officer did not err in adding the carrier waiver. Under these facts, we perceive no abuse of discretion on the part of the hearing officer granting the motion to add the additional issue. Downer v. Aquamarine Operations, Inc., 701 S.W.2d 238 (Tex. 1985); Morrow v. H.E.B., Inc., 714 S.W.2d 297 (Tex. 1986).

CARRIER WAIVER

The carrier asserts that it cannot waive a defense to liability under Section 409.004, by not asserting that defense pursuant to Sections 409.021 and 409.022. We have held to the contrary. In Texas Workers' Compensation Commission Appeal No. 022027-s, decided September 30, 2002, we held that by waiving its right to contest compensability under Section 409.021, the carrier also loses the right to assert a defense under Section 409.004. Under the facts of this case, the carrier filed a TWCC-21 on December 13, 2001, contesting compensability of the claimed injury in accordance with Sections 409.021 and 409.022, and it was not required to assert a defense under Section 409.004 as the one-year anniversary of the DOI, _____, had not occurred at the time of filing the TWCC-21. However, the carrier should have obviously been aware after _____, that the claimant did not file a claim for compensation within one year. We note that the carrier did not raise a defense of failure to file a claim from _____, through December 3, 2002, the date that the claimant filed his TWCC-41. The carrier first raised the defense at the BRC on April 3, 2003.

The carrier asserts that it raised a timely defense to liability under Section 409.004 at the BRC and that the defense was raised within reasonable time. Section

409.022(b) provides that the grounds for the refusal specified in the notice constitute the only basis for the insurance carrier's defense on the issue of compensability in a subsequent proceeding, **unless the defense is based on newly discovered evidence that could not reasonably have been discovered at an earlier date.** The hearing officer commented that the carrier should have asserted that the claimant's filing of a claim for compensation was untimely within a reasonable time after it was filed in December 3, 2002, and that the carrier first raised the defense of a failure to timely file at the BRC on April 3, 2003. In support of his determination the hearing officer cites Texas Workers' Compensation Commission Appeal No. 012360, decided November 26, 2001, in which the Appeals Panel reversed the hearing officer's decision and rendered a decision that the carrier's raising of a defense to liability under Section 409.004 was not based upon newly discovered evidence at the time that it was raised (at the BRC) and consequently, it was not discharged from liability. In that case the DOI was _____; the TWCC-21 was filed contesting compensability on December 15, 1999, prior to the one-year anniversary DOI; the claimant did not file a claim for compensation within one year of the DOI; and the carrier raised a defense under Section 409.004 at the BRC in June 2001. The Appeals Panels held "that disputing a matter at a June 2001 BRC on grounds that would have been apparent within a short time after _____ [one year anniversary of the DOI] was not a reasonable amount of time for raising the dispute." The failure of the claimant to file a claim within one year does not automatically relieve the carrier of liability, because the defense under Section 409.004(2) must itself be raised. See Appeal No. 012360, *supra*. We perceive no error in the hearing officer's determination that the carrier did not assert the defense of the claimant's failure to file a claim with the Commission within one year within a reasonable time.

INJURY AND TIMELY NOTICE

Injury and timely notice are factual questions for the hearing officer to resolve. There was conflicting evidence presented on these issues. The hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). As the finder of fact, the hearing officer resolves the conflicts in the evidence and determines what facts have been established. We conclude that the hearing officer's determinations on the injury and notice issues are supported by sufficient evidence and are not so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175 (Tex. 1986).

The claimant essentially takes issue with the hearing officer's statements "that the claimant did not miss any time from work," "that the employer was not required to file a notice with the [Commission] soon thereafter," and "that the one year filing deadline for the claimant was not tolled." These statements were summarizations of the hearing officer's view of the evidence, and provided the factual underpinnings for his findings of fact and conclusions of law. As noted above, the hearing officer resolves the conflicts in the evidence and determines what facts have been established. The Appeals Panel will not fact find in the hearing officer's place or substitute its own judgment. To the extent that the claimant asserts that the hearing officer imposed an

improper standard of proof denying him due process and equal protection under the Texas and United States Constitutions, we perceive no error.

The hearing officer's decision and order are affirmed.

The true corporate name of the insurance carrier is **LUMBERMENS UNDERWRITING ALLIANCE** and the name and address of its registered agent for service of process is

**DEBRA S. MATHEWS-BUDET
12200 FORD ROAD, SUITE 344
DALLAS, TEXAS 75234.**

Veronica Lopez-Ruberto
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Robert W. Potts
Appeals Judge