APPEAL NO. 101265
FILED OCTOBER 25, 2010

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 July 28, 2010. The hearing officer resolved the disputed issues before her by determining that: (1) the appellant (claimant) was not in the course and scope of employment when involved in a motor vehicle accident (MVA) on _____; (2) the respondent (carrier) is relieved of liability under Section 409.002 because of the claimant's failure to timely notify his employer pursuant to Section 409.001; (3) the carrier is relieved of 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 injury as required by Section 409.003; and (4) the claimant is barred from pursuing Texas workers' compensation benefits because of an election to receive benefits under a group insurance policy. The claimant appealed the hearing officer's determinations. The carrier responded, urging affirmance.

DECISION

Affirmed in part and reversed and rendered in part.

It was undisputed that the claimant was injured in a MVA on Saturday, _____.

COURSE AND SCOPE OF EMPLOYMENT, TIMELY NOTICE TO EMPLOYER, AND TIMELY FILING OF CLAIM FOR COMPENSATION

The hearing officer's decision that the claimant was not in the course and scope of employment when involved in a MVA on _____, is supported by sufficient evidence and is affirmed.

The hearing officer's decision that the carrier is relieved from liability under Section 409.002 because of the claimant's failure to timely notify his employer pursuant to Section 409.001 is supported by sufficient evidence and is affirmed.

The hearing officer's decision that 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 Division within one year of injury as required by Section 409.003 is supported by sufficient evidence and is affirmed.

ELECTION OF REMEDIES

Election of remedies is an affirmative defense raised by the carrier to the claimant's claim under the Act. *See* Allstate Ins. Co. v. Perez, 783 S.W.2d 779 (Tex.

App.—Corpus Christi 1990, no writ). The carrier has the burden of proof on this issue. *See* Am. Cas. Co. v. Martin, 97 S.W.3d 679 (Tex. App.—Dallas 2003); Appeals Panel Decision (APD) 032585, decided November 6, 2003.

In Bocanegra v. Aetna Life Insurance Company, 605 S.W.2d 848 (Tex. 1980), the Texas Supreme Court held that an election of remedies is only made as a result of an (1) informed choice (2) between two rights, remedies, or states of fact that (3) are so inconsistent (4) as to constitute manifest injustice. Also, the Bocanegra case makes clear that an election of remedies defense should be imposed sparingly, reserved for instances where the "assertion of a remedy, right, or state of facts is so unconscionable, dishonest, contrary to fair dealing, or so stultifies the legal process or trifles with justice or the courts as to be manifestly unjust." *Id.* at 851. *See* APD 990525, decided April 16, 1999.

In Valley Forge Insurance Company v. Austin, 65 S.W.3d 371 (Tex. App.—Dallas 2001, pet. denied with per curiam opinion), the court of appeals held the election of remedies affirmative defense was abolished by Section 409.009 because it permitted subclaims by insurance carriers and health care providers as a means to prevent double recoveries. The Texas Supreme Court affirmed the underlying decision on the merits for other reasons and stated it left open the question of whether Section 409.009 abolished the election of remedies affirmative defense. *See* Valley Forge Insurance Company v. Austin, 105 S.W.3d 609 (Tex. 2003). *See also* APD 030473, decided April 15, 2003.

The claimant testified that on the Monday, following the weekend MVA, he went into the office and told the general manager and assistant general manager that he had been hurt and needed to see the doctor. However, there was conflicting evidence from the employer that although the claimant stated that he was hurt in a MVA over the weekend, the claimant did not tell the employer it was a work-related injury.

The claimant testified that he was told by his employer to go to the hospital emergency room and that when he asked how he would pay for the visit, was told by his employer to use his group health insurance and that it would all be sorted out later. The claimant further testified that he paid for his medical treatment with his group health insurance although he objected to doing so many times with his employer. The claimant also testified that the assistant general manager told him "[d]on't worry. We'll work it out . . . . You just take care of your health first. That's all that matters. All this will work out in the end . . . . He just kept telling me that."

The claimant testified, which was supported by his answers to the carrier's interrogatories, that he obtained a civil suit settlement from the insurance carrier of the driver of the pickup truck that rear-ended him. He stated that an amount of $7,920.00 each was paid to his attorney handling the claim, to his group health insurance carrier, and to him.

We hold that the evidence in this case does not meet the standards set forth in Bocanegra, *supra*, for imposing a binding election, and we accordingly reverse the hearing officer's decision that the claimant is barred from pursuing Texas workers' compensation benefits based on an election to receive benefits under a group health insurance policy, and we render a decision that the claimant is not barred from pursuing Texas workers' compensation benefits based on an election of remedies.

SUMMARY

We affirm the hearing officer's decision that the claimant was not in the course and scope of employment when involved in a MVA on _____.

We affirm the hearing officer's decision that the carrier is 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 decision that 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 Division within one year of injury as required by Section 409.003.

We reverse the hearing officer's decision that the claimant is barred from pursuing Texas workers' compensation benefits because of an election to receive benefits under a group insurance policy and render a new decision that the claimant is not barred from pursuing Texas workers' compensation benefits because of an election to receive benefits under a group insurance policy.

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
350 NORTH ST. PAUL STREET
DALLAS, TEXAS 75201.

_____
Cynthia A. Brown
Appeals Judge

CONCUR:

_____
Thomas A. Knapp
Appeals Judge

_____
Margaret L. Turner
Appeals Judge