APPEAL NO. 101449
FILED DECEMBER 13, 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 (CCH) was held on September 1, 2010. The issues before the hearing officer to be decided were:

(1) Did the respondent/cross-appellant (claimant) sustain a compensable injury on _____?

(2) Was the claimant's horseplay a producing cause of the claimed injury, thereby relieving the appellant/cross-respondent (carrier) of liability for compensation?

(3) Did the carrier contest compensability in accordance with Sections 409.021 and 409.022, and if not, is the carrier's contest based on newly discovered evidence that could not reasonably have been discovered at an earlier date?

(4) Does the claimant have disability as a result of his compensable injury, and if so, for what periods?

The hearing officer determined that:

(1) The claimant did not sustain a compensable injury on _____;

(2) Because the claimant did not sustain a compensable injury, he had no disability;

(3) The claimant's horseplay was a producing cause of the claimed injury, thereby relieving the carrier of liability for compensation, save and except for the payment of temporary income benefits (TIBs) that occurred prior to July 19, 2010, and for medical services provided to the claimant prior to that date;

(4) The carrier has not waived the right to contest the compensability of the injury within the 60-day period for contest provided in Sections 409.021 and 409.022 and had no good cause for a contest after that date based on newly discovered evidence that could not reasonably have been discovered at an earlier date, subject to a liability for the TIBs that accrued prior to its July 19, 2010, filing of a denial based upon the horseplay defense, and a liability for all medical services provided for the claimant's injury prior to July 19, 2010;

(5) Since the carrier did not, within 15 days of written notice of the injury, notify the Texas Department of Insurance, Division of Workers' Compensation (Division) and the employee of the initiation of benefits in the manner prescribed by Sections 409.022(a) and 409.022(b), therefore the horseplay ground for refusal specified within that period was the only basis that can constitute the carrier's defense of compensability for that 15-day period; and

(6) Because the carrier did not have a valid ground for defense of compensability within the 15-day period as required by Sections 409.022(a) and 409.022(b), the carrier is liable under 28 TEX. ADMIN. CODE § 124.3(2)(A) and (B) (Rule 124.3(2)(A) and (B)) for payment of all TIBs accrued prior to July 19, 2010, and is liable for all medical services rendered as treatment for the _____, injury provided to the claimant prior to July 19, 2010.

The carrier requested a clerical correction as to the dates the two Notices of Denial of Compensability/Liability and Refusal to Pay Benefits (PLN-1) were filed with the Division. In the alternative, if there is not a clerical correction, the carrier appealed, alleging that the filing dates of the PLN-1s determined by the hearing officer were not supported by the evidence. The carrier further appealed the hearing officer's determinations that the carrier was liable for TIBs and medical benefits accrued as of July 19, 2010, and that there was no good cause based on newly discovered evidence for the supplemental filing of the horseplay defense. The appeal file does not contain a response from the claimant.

The claimant cross-appealed the hearing officer's determinations on compensability, disability, and carrier waiver. The claimant also cross-appealed the determination that horseplay was a producing cause of the claimed injury and the determination that the carrier can assert the horseplay as a defense. The carrier responded, urging affirmance on the matters raised by the claimant's cross-appeal.

DECISION

Affirmed as reformed in part and reversed and rendered in part.

In an unappealed finding of fact, the hearing officer determined that the carrier first received written notice of the claimant's claimed injury on June 25, 2010.

FILING DATES OF THE PLN-1s

In reviewing a "great weight" challenge, we must examine the entire record to determine if: (1) there is only "slight" evidence to support the finding; (2) the finding is so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust; or (3) the great weight and preponderance of the evidence supports its nonexistence. *See* Cain v. Bain, 709 S.W.2d 175 (Tex. 1986).

In evidence is the carrier's PLN-1 dated June 29, 2010 (initial PLN-1). In the claimant's exhibits is a copy of the initial PLN-1 that reflects a date stamp of July 2, 2010. There is no evidence that this is the date that the carrier filed the initial PLN-1 with the Division. There is no evidence as to whom or what entity affixed the date to that document or under what circumstances.

In the carrier's exhibits is a copy of the initial PLN-1, which reflects by date stamp that it was filed with the Division on July 1, 2010. Accordingly, the hearing officer erred in the Background Information section of his decision, as well as in the Findings of Fact, Conclusions of Law, and Decision in determining that the initial PLN-1 was filed by the carrier with the Division on July 2, 2010, because that filing date is so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust. Therefore, we reverse and render a new decision that the filing date of the initial PLN-1 is July 1, 2010.

In evidence is the carrier's PLN-1 dated July 14, 2010 (supplemental PLN-1). In the claimant's exhibits is a copy of the supplemental PLN-1 that reflects a date stamp of July 19, 2010. There is no evidence that this is the date that the carrier filed the supplemental PLN-1 with the Division. There is no evidence as to whom or what entity affixed the date to the document or under what circumstances.

In the carrier's exhibits is a copy of the supplemental PLN-1, which reflects by date stamp that it was filed with the Division on July 14, 2010. Accordingly, the hearing officer erred in his Background Information section of his decision, as well as in his Findings of Fact, Conclusions of Law, and Decision in determining that the supplemental PLN-1 was filed by the carrier with the Division on July 19, 2010, because that filing date is so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust. Therefore, we reverse and render a new decision that the filing date of the supplemental PLN-1 is July 14, 2010.

Because we have reversed and rendered a new decision that the filing date of the supplemental PLN-1 is July 14, 2010, we also reverse that portion of the hearing officer's Finding of Fact No. 8, which states that the "[s]upplemental PLN-1" was filed 7 days after the extended 15th day[1] after the carrier's receipt of first written notice and reform Finding of Fact No. 8 to read that the "[s]upplemental PLN-1" was filed 2 days after the extended 15th day after the carrier received first written notice of the claimed injury.

CARRIER WAIVER AND NEWLY DISCOVERED EVIDENCE

That portion of the hearing officer's decision that the carrier has not waived the right to contest the compensability of the injury within the 60-day period for contest provided in Sections 409.021 and 409.022 and had no good cause for a contest after

[1] We note that the 15th day after the carrier's first written notice of the injury was on Saturday, July 10, 2010, and that the 15-day deadline was extended to Monday, July 12, 2010.

that date based on newly discovered evidence that could not reasonably have been discovered at an earlier date is supported by sufficient evidence and is affirmed.

HORSEPLAY

In evidence is the carrier's initial PLN-1, which was filed with the Division on July 1, 2010, asserting a general defense and stating:

> Carrier is disputing compensability of the workers' comp claim dated [_____]. Carrier's investigation of claim reveals that the employee injured his right ankle/leg working on roof of his home. Carrier is disputing the injury occurred in course and scope of his employment with [employer].

Also in evidence is the carrier's supplemental PLN-1, which was filed with the Division after the 15 days but before the 60th day after the receipt of first written notice of the claimed injury, asserting the affirmative defense of horseplay and stating:

> If the employee was injured at work on [_____], it is because the employee's horseplay was a producing cause of the injury. (See 406.032(2). Carrier [is] not liable for compensation.

Section 406.032(2) provides that a carrier is not liable for compensation if "the employee's horseplay was a producing cause of the injury." The Appeals Panel has held that the exceptions listed in Section 406.032, which include horseplay, must be raised by the carrier as an affirmative defense. Section 409.022(a) provides that a carrier's notice of refusal to pay benefits under Section 409.021 must specify the grounds for refusal and pursuant to Section 409.022(b) the grounds for the refusal specified in the notice constitute the only basis for the carrier's defense unless the defense is based on newly discovered evidence.

The Appeals Panel has held that generally "the carrier is limited to and bound by the grounds set forth in the Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21)[2] it files, unless the new defense is based on newly discovered evidence." *See* Appeals Panel Decision (APD) 060631-s, decided May 30, 2006; APD 030098, decided March 10, 2003; APD 023060-s decided January 21, 2003; APD 960612, decided May 9, 1996; and APD 931131, decided January 26, 1994.

As discussed earlier, we have affirmed the hearing officer's decision that there was no good cause for a contest of compensability based on newly discovered evidence that could not have reasonably been discovered earlier. There is no evidence in the record that the carrier initiated the payment of benefits. The carrier having failed to initiate payment of benefits was limited to the defenses stated in its initial PLN-1 unless it could show that the untimely defense it later raised was premised on newly discovered evidence which could not reasonably have been discovered at an earlier

[2] We note that the PLN-1 is the replacement for the TWCC-21.

date notwithstanding that the supplemental PLN-1 was filed before the expiration of the 60th day of its receipt of first written notice of the claimed injury.

Accordingly, we reverse the hearing officer's decision that the claimant's horseplay was a producing cause of the claimed injury, thereby relieving the carrier of liability for compensation, save and except for the payment of TIBs that occurred prior to July 19, 2010, and for medical services provided to the claimant prior to that date. We render a new decision that the claimant's horseplay is not a producing cause of the claimed injury because the carrier was limited to the defenses set forth in its initial PLN-1 and the carrier is not relieved of liability for compensation.

COMPENSABILITY AND DISABILITY

The hearing officer found that on _____, the claimant sustained damage or harm to the physical structure of his body in the form of at least a right ankle fracture while engaged in a brief wrestling incident with a co-worker while on an employer worksite. This finding is supported by sufficient evidence.

The hearing officer further found that the claimant was involved in a horseplay incident when he was injured at work on _____. This finding is supported by sufficient evidence.

However, because we have reversed the hearing officer's determination that the claimant's horseplay was a producing cause of the claimed injury, thereby relieving the carrier of liability, we reverse the hearing officer's decision that the claimant did not sustain a compensable injury because we have held that the carrier cannot assert the defense of horseplay because it was not set forth as a defense in the initial PLN-1. The hearing officer specifically found that the claimant sustained an injury at work while engaged in horseplay. Since the affirmative defense of horseplay is not available to the carrier under the circumstances of this case, we render a new decision that the claimant sustained a compensable injury on _____.

The hearing officer found that the claimed injury was a cause of the claimant's inability to obtain and retain employment at wages equivalent to his pre-injury wage beginning on June 4, 2010, and continuing through the date of the CCH. This finding is supported by sufficient evidence.

Because we have reversed the hearing officer's determination that the claimant did not sustain a compensable injury on _____, and we rendered a new decision that the claimant sustained a compensable injury on _____, we reverse the hearing officer's determination that because the claimant did not sustain a compensable injury on _____, he had no disability and we render a new decision that the claimant had disability beginning June 4, 2010, and continuing through the date of the CCH.

SUMMARY

We affirm that portion of the hearing officer's decision that the carrier has not waived the right to contest the compensability of the injury within the 60-day period for contest provided in Sections 409.021 and 409.022 and had no good cause for a contest of compensability after that date based on newly discovered evidence that could not reasonably have been discovered at an earlier date.

We reverse the hearing officer's decision that the claimant's horseplay was a producing cause of the claimed injury, thereby relieving the carrier of liability for compensation, save and except for the payment of TIBs that occurred prior to July 19, 2010, and for medical services provided to the claimant prior to that date and we render a new decision that the claimant's horseplay is not a producing cause of the claimed injury because the carrier is limited to the defenses set forth in its initial PLN-1 and the carrier is not relieved of liability for compensation.

We reverse the hearing officer's decision that the claimant did not sustain a compensable injury on _____, and we render a new decision that the claimant sustained a compensable injury on _____.

We reverse the hearing officer's decision that because the claimant did not sustain a compensable injury on _____, he had no disability and we render a new decision that the claimant had disability beginning June 4, 2010, and continuing through the date of the CCH.

We reverse the hearing officer's decision by striking the language in Conclusion of Law No. 7 and the Decision which states, "[s]ince [the] [c]arrier did not, within 15 days of written notice of the injury, notify the Division and the employee of the initiation of benefits in the manner prescribed by Section 409.022(b), therefore the horseplay ground for refusal specified within that period was the only basis that can constitute [the] [c]arrier's defense of compensability for that 15-day period."

We reverse the hearing officer's decision by striking the language in Conclusion of Law No. 8 and the Decision, which states "[b]ecause [the] [c]arrier did not have a valid ground for defense of compensability within the 15-day period as required by Sections 409.022(a) and 409.022(b), the [c]arrier is liable under Division Rule 124.3(2)(A) and (B) for payment of all [TIBs] accrued prior to July 19, 2010, and is liable for all medical services rendered as treatment for the _____, injury provided to [the] [c]laimant prior to July 19, 2010."

The true corporate name of the insurance carrier is **NATIONAL AMERICAN INSURANCE COMPANY** and the name and address of its registered agent for service of process is

CT CORPORATION
350 NORTH ST. PAUL STREET
DALLAS, TEXAS 75201.

_____
Cynthia A. Brown
Appeals Judge

CONCUR:

_____
Thomas A. Knapp
Appeals Judge

_____
Margaret L. Turner
Appeals Judge