

APPEAL NO. 110420
FILED JUNE 21, 2011

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 March 22, 2011.

The unresolved issues from the benefit review conference report were:

1. Did the appellant/cross-respondent (claimant) sustain a compensable injury on _____?
2. Did the claimant have disability resulting from an injury sustained on _____, from April 24, 2010, through the present?
3. Is the respondent/cross-appellant (carrier) relieved from liability under Section 409.002 because of the claimant's failure to timely notify his employer pursuant to Section 409.001?
4. Has the carrier waived the right to contest compensability of the claimed injury by not timely contesting the injury in accordance with Sections 409.021 and 409.022?

The hearing officer, at the CCH, announced that the last issue "is withdrawn by the parties," but in the decision and order indicated that the timely notice to the employer issue was withdrawn by agreement of the parties and failed to list carrier waiver as the last disputed issue.

The hearing officer determined that the claimant did not sustain a compensable injury on _____, and that because the claimant did not sustain a compensable injury, he does not have disability. The hearing officer did not make a finding of fact or conclusion of law regarding timely notice to the employer pursuant to Section 409.001.

The claimant appealed the hearing officer's decision on the compensability and disability issues and noted that issue three (timely notice to the employer) had not been withdrawn but rather the issue of carrier waiver had been withdrawn.

The carrier responded and agreed the timely notice issue had not been withdrawn. Although the carrier may not have intended for the document labeled as a response to be construed as an appeal, since they have prevailed on the merits, we regard a portion of the carrier's response as a cross-appeal.

The carrier is deemed to have received the hearing officer's decision on March 28, 2011. Pursuant to Section 410.202(a) a request for appeal must be filed within 15 days of the date of receipt of the hearing officer's decision. The 15th day after March

28, 2011, excluding Saturdays and Sundays and holidays listed in Government Code Section 662.003, is Monday, April 18, 2011. The cover letter of the carrier's pleading is dated April 22, 2011, and was sent by facsimile transmission on April 22, 2011 (Good Friday, an optional holiday) and received by the Texas Department of Insurance, Division of Workers' Compensation (Division) on April 25, 2011. The carrier's pleading is timely as a response to the claimant's appeal but is untimely as a cross-appeal because it was not mailed or filed on or before April 18, 2011.

DECISION

Affirmed in part and reversed and remanded in part.

The claimant testified that he was a truck driver and contends that he sustained a work-related neck injury and bilateral shoulder injuries placing a tarp on his truck on _____.

COMPENSABLE INJURY AND DISABILITY

The hearing officer's determination that the claimant did not sustain a compensable injury on _____, and that because the claimant did not sustain a compensable injury, he does not have disability, is supported by sufficient evidence and is affirmed.

TIMELY NOTICE TO THE EMPLOYER

The hearing officer erred in failing to address whether 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. That issue was not withdrawn by agreement of the parties and was in fact litigated. Accordingly, we reverse the hearing officer's decision as being incomplete and remand the case for the hearing officer to consider and make findings of fact, conclusions of law and a decision on whether the claimant had timely notified his employer of the claimed injury pursuant to Section 409.001. No further evidence is necessary.

A review of the record reflects that the parties agreed to withdraw the carrier waiver issue and the hearing officer correctly did not make a determination on that issue.

SUMMARY

We affirm the hearing officer's determinations that the claimant did not sustain a compensable injury on _____, and that because the claimant did not sustain a compensable injury, he does not have disability. We reverse the hearing officer's decision as being incomplete and remand this case for the hearing officer to make a determination on the issue of whether 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.

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 hearing officer, 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 Appeals Panel Decision 060721, decided June 12, 2006.

The true corporate name of the insurance carrier is **COMMERCE AND INDUSTRY 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 78701-3218.**

Thomas A. Knapp
Appeals Judge

CONCUR:

Cynthia A. Brown
Appeals Judge

Margaret L. Turner
Appeals Judge