

APPEAL NO. 170666
FILED MAY 9, 2017

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 November 29, 2016, with the record closing on February 9, 2017, in (city), Texas, with (hearing officer) presiding as hearing officer. The hearing officer resolved the disputed issues by deciding that: (1) the appellant/cross-respondent (self-insured) did not waive the right to contest compensability of the claimed injury by not timely contesting the injury in accordance with Section 409.021; (2) the self-insured is not relieved from liability under Section 409.002 because the respondent/cross-appellant (claimant) timely notified his employer pursuant to Section 409.001; (3) the claimant timely filed 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; and (4) the claimant did not sustain a compensable injury in the form of an occupational disease.

The self-insured appealed the hearing officer's determinations that the claimant timely notified his employer pursuant to Section 409.001 and that the claimant timely filed a claim for compensation as required by Section 409.003. The claimant responded, urging affirmance of the determinations disputed by the self-insured. The claimant cross-appealed, disputing the hearing officer's determinations that he did not sustain a compensable injury and that the self-insured did not waive its right to contest compensability of the claimed injury pursuant to Section 409.021. The self-insured responded to the claimant's appeal, urging affirmance for the issues on which it prevailed.

DECISION

Affirmed in part and reversed and remanded in part.

It is undisputed that the claimant was employed as a firefighter for the city of Austin from 1985 to his retirement in 2007. The evidence reflects that in 2002 the claimant was diagnosed with gastric adenocarcinoma and on July 23, 2002, underwent a total gastrectomy, splenectomy, and distal pancreatectomy. In evidence at the CCH was the Benefit Review Conference (BRC) Report which reflected that the parties agreed that the date of injury is (date of injury). No stipulation was made regarding the date of the injury at the CCH. We note that the issue regarding compensability in the Decision and Order incorrectly listed the date of injury as (date), rather than (date of injury), the date of injury listed in the BRC Report and agreed to by the parties as part of the issue. Section 408.007 provides that the date of injury for an occupational disease is the date on which the employee knew or should have known that the disease may be

related to the employment. The hearing officer states in her discussion that the claimant testified that he became aware that he could file a claim in January 2015, subsequent to changes in Texas law.

The hearing officer did not add the date of injury as a disputed issue. However, in Finding of Fact No. 9 the hearing officer found that on January 26, 2015, the claimant knew or should have known that the condition may be related to the employment. Accordingly, we reverse the hearing officer's decision and remand to the hearing officer to add the date of injury as a disputed issue or have the parties stipulate as to the date of injury.

CARRIER WAIVER

Section 409.021 provides that for claims based on a compensable injury that occurred on or after September 1, 2003, that no later than the 15th day after the date on which an insurance carrier receives written notice of an injury, the insurance carrier shall: (1) begin the payment of benefits as required by the 1989 Act; or (2) notify the Division and the employee in writing of its refusal to pay. Section 409.021(c) provides that if an insurance carrier does not contest the compensability of an injury on or before the 60th day after the date on which the insurance carrier is notified of the injury, the insurance carrier waives its right to contest compensability.

The hearing officer found that the self-insured received written notice of the claimed injury on March 11, 2015, and that the self-insured failed to file a Notice of Denial of Compensability/Liability and Refusal to Pay Benefits (PLN-1) disputing the injury on March 25, 2015. The hearing officer's determination that the self-insured did not waive the right to contest compensability of the claimed injury by not timely contesting the injury in accordance with Section 409.021 is supported by sufficient evidence and is affirmed.

TIMELY NOTICE TO EMPLOYER

A "compensable injury" is defined in Section 401.011(10) and a "repetitive trauma injury" is defined in Section 401.011(36). An occupational disease includes a repetitive trauma injury. Section 401.011(34). Section 409.001(a) provides that if the injury is an occupational disease, an employee or a person acting on the employee's behalf shall notify the employer of the employee of an injury not later than the 30th day after the date on which the employee knew or should have known that the injury may be related to the employment. The BRC Report reflects that the parties agreed that the date of injury was (date of injury). However, as previously noted, the hearing officer made a specific finding on the date the claimant knew or should have known that the condition may be related to employment, which is defined as the date of injury, without specifically

adding the date of injury as a disputed issue or making a determination on the date of injury. The hearing officer therefore erred in failing to add the date of injury issue. Given that we have reversed the hearing officer's decision and remanded the decision to the hearing officer to make a determination or obtain a stipulation of the parties regarding the date of injury, we also reverse the hearing officer's determination that the self-insured is not relieved from liability under Section 409.002 because the claimant timely notified his employer pursuant to Section 409.001. We remand the issue of timely notice to the employer to the hearing officer to make a determination of the timely notice issue after making a determination of the date of injury.

TIMELY FILING OF A CLAIM

The claimant had the burden to prove that he filed his claim of injury within one year of the date of his injury pursuant to Section 409.003, or had good cause for not timely filing. Section 409.003 requires that a claimant file a claim for compensation with the Division not later than one year after the date of injury. Pursuant to Section 409.004, failure to do so, absent a showing of good cause or actual knowledge of the injury by the employer, relieves the carrier and employer of liability for the payment of benefits for the injury. The test for good cause is that of ordinary prudence; that is, whether the employee has prosecuted his or her claim with the degree of diligence that an ordinarily prudent person would have exercised under the same or similar circumstances. *Hawkins v. Safety Casualty Company*, 207 S.W.2d 370 (Tex. 1948).

Given that we have reversed the hearing officer's decision and remanded the decision to the hearing officer to make a determination or obtain a stipulation of the parties regarding date of injury, we also reverse the hearing officer's determination that the claimant timely filed a claim for compensation with the Division within one year of the injury as required by Section 409.003 and remand to the hearing officer for further action consistent with this decision.

COMPENSABLE INJURY

The hearing officer determined that the claimant did not sustain a compensable injury in the form of an occupational disease. However as noted above the date of injury is being remanded to the hearing officer to add and resolve as a disputed issue or resolve by stipulation of the parties. The date of injury will govern whether the presumption set forth in Texas Government Code Section 607.055 (effective September 1, 2005) potentially applies to the facts of this case. Consequently, we reverse the hearing officer's decision that the claimant did not sustain a compensable injury in the form of an occupational disease and remand to the hearing officer for further action consistent with this decision.

SUMMARY

We affirm the hearing officer's determination that the self-insured did not waive the right to contest compensability of the claimed injury by not timely contesting the injury in accordance with Section 409.021

We reverse the hearing officer's determination that the self-insured is not relieved from liability under Section 409.002 because the claimant timely notified his employer pursuant to Section 409.001 and remand to the hearing officer for further action consistent with this decision.

We reverse the hearing officer's determination that the claimant timely filed a claim for compensation with the Division within one year of the injury as required by Section 409.003 and remand to the hearing officer for further action consistent with this decision.

We reverse the hearing officer's decision that the claimant did not sustain a compensable injury in the form of an occupational disease and remand to the hearing officer for further action consistent with this decision.

REMAND INSTRUCTIONS

On remand the hearing officer is to add the date of injury as an issue and resolve by stipulation of the parties or make findings of fact, conclusions of law, and a decision on the date of injury. After resolving the date of injury, the hearing officer is to make findings of fact, conclusions of law, and a decision on the issues of timely notice to employer, timely filing of a claim, and compensability, applying the correct legal standard.

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 **CITY OF AUSTIN (a self-insured governmental entity)** and the name and address of its registered agent for service of process is

**LESLIE MILVO
505 BARTON SPRINGS ROAD, SUITE 600
AUSTIN, TEXAS 78704.**

Margaret L. Turner
Appeals Judge

CONCUR:

K. Eugene Kraft
Appeals Judge

Carisa Space-Beam
Appeals Judge