

APPEAL NO. 230503
FILED JUNE 12, 2023

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 February 23, 2023, in (city), Texas, with (administrative law judge) presiding as the administrative law judge (ALJ). The ALJ resolved the disputed issues by deciding that: (1) the respondent (claimant) sustained a compensable injury on (date of injury); (2) the appellant (carrier) is not relieved of liability under Section 409.002 because the claimant timely notified the employer of his injury pursuant to Section 409.001; (3) the carrier waived the right to contest compensability of the claimed injury by not timely contesting the injury in accordance with Section 409.021; and (4) the claimant had disability from September 1, 2022, through January 9, 2023, resulting from the compensable injury. The carrier appealed, disputing the ALJ's determinations. The appeal file does not contain a response from the claimant to the carrier's appeal.

DECISION

Affirmed in part and reversed and rendered in part.

The claimant, a material handler for the employer, asserted he was injured on (date of injury), while working on a stacking station. The claimant was removing bags of insulation from a conveyor belt and then stacking the bags onto a pallet. The claimant testified that he was going three times his normal speed and was not watching his movements, and felt a sharp pain in his lower back when he put a bag on the pallet.

The ALJ is the sole judge of the weight and credibility of the evidence (Section 410.165(a)) and, as the trier of fact, resolves the conflicts and inconsistencies in the evidence. *Texas Employers Insurance Association v. Campos*, 666 S.W.2d 286 (Tex. App.—Houston [14th Dist.] 1984, no writ). As an appellate reviewing tribunal, the Appeals Panel will not disturb challenged factual findings of an ALJ absent legal error, unless they are so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. *Cain v. Bain*, 709 S.W.2d 175, 176 (Tex. 1986); *In re King's Estate*, 150 Tex. 662, 244 S.W.2d 660 (1951).

ABUSE OF DISCRETION

The carrier contends that the ALJ abused his discretion in failing to rule on its motion to add the issue of the date of injury in this case, as well as not consolidating another claim with the case on appeal. In determining whether there has been an abuse of discretion, the Appeals Panel looks to see whether the ALJ acted without reference to any guiding rules or principles. *Morrow v. H.E.B., Inc.*, 714 S.W.2d 297

(Tex. 1986). Under the circumstances of this case, we do not find the ALJ's actions an abuse of discretion.

COMPENSABLE INJURY

The ALJ's determination that the claimant sustained a compensable injury on (date of injury), is supported by sufficient evidence and is affirmed.

TIMELY NOTICE TO EMPLOYER

The ALJ's determination that the carrier is not relieved of liability under Section 409.002 because the claimant timely notified the employer of his injury pursuant to Section 409.001 is supported by sufficient evidence and is affirmed.

DISABILITY

The ALJ's determination that the claimant had disability from September 1, 2022, through January 9, 2023, is supported by sufficient evidence and is affirmed.

CARRIER WAIVER

Section 409.021(a) provides in part that not 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 Texas Department of Insurance, Division of Workers' Compensation (Division) and the employee in writing of its refusal to pay. Section 409.021(c) provides in part 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. 28 Tex. Admin. Code § 124.2(d) (Rule 124.2(d)) provides that a carrier shall notify the Division and the claimant of a denial of a claim based on non-compensability or lack of coverage in accordance with this section and as otherwise provided by this title. Rule 124.2(i) provides in part that notification to the claimant requires the carrier to use plain language notices in the form and manner prescribed by the Division, and that the notice shall provide a full and complete statement describing the carrier's action and rationale. The statement must contain sufficient claim-specific substantive information to enable the claimant to understand the carrier's position or action taken on the claim.

In evidence is a written statement from the claimant dated September 6, 2022, in which he alleged a work-related injury that occurred on (additional date). The claimant testified at the CCH that the injury actually occurred on (date of injury), and that his written statement contained a typographical error regarding the date of injury. The claimant further testified that no injury occurred on (additional date). However, based

on the claimant's written statement the employer provided an Employer's First Report of Injury or Illness (DWC-1) dated September 26, 2022, to the carrier specifying (additional date), as the date of injury.

The evidence reflects the carrier received first written notice of an injury on September 26, 2022, for a (additional date), date of injury, and that the carrier filed a Notice of Denial of Compensability/Liability and Refusal to Pay Benefits (PLN-1) dated October 14, 2022, which was within the 60 days the carrier had to contest compensability, that was sent to both the Division and the claimant. The PLN-1 references the date of injury as (additional date), and identifies the injury as a strain to the upper and lower back areas. The body of the PLN-1 states the following:

[w]e denied your claim because: [the] [c]arrier disputes that you sustained a compensable injury in the course and scope of your employment on [(additional date),] for the reasons that follow. You did not report a work injury to your supervisor within [30] days as required by [Section 409.001], thereby relieving the [c]arrier of liability under [Section 409.002]. When you informed your employer of an injury, you initially did not specify that it was related to your work. Rather, you indicated that you did not know where it happened. To date, you have not provided any medical records that establish a work injury occurred on or around [(additional date),] and have been unable to specify how the alleged injury occurred. You also indicated that you felt discomfort from a work activity on [(additional date)], but pain and discomfort are not injuries. Moreover, you have asserted that a chiropractic manipulation after that date made your back worse, suggesting this as the possible true source of any injury you may now have. You have not provided said chiropractic records, and the first medical treatment in [the] [c]arrier's possession was not obtained until [September 6, 2022], more than two months following the date of claimed injury. [The] [c]arrier reserves the right to amend or supplant this notice as its investigation continues.

Also in evidence is a notice of injury dated October 4, 2022, from the Division to the carrier, indicating the Division received notice of an injury to the claimant with a date of injury of (date of injury).

On December 21, 2022, the carrier filed another PLN-1, which was outside 60 days of receiving the first written notice of the claim sent by the Division on October 4, 2022. This PLN-1 identifies the claimant's date of injury as (date of injury), and the injury as a strain to the lower back area. The PLN-1 does not contain a claim number, but does identify the claimant, the employer, and the employer's address. The body of

the PLN-1 is virtually identical to that found in the October 14, 2022, PLN-1, with minor exceptions, including identifying the date of injury as (date of injury), and that the claimant had originally claimed an injury dated (additional date).

In the discussion portion of the decision the ALJ noted the Division's October 4, 2022, notice of injury for the (date of injury), date of injury, and that the carrier filed a PLN-1 regarding that notice on December 21, 2022. The ALJ also discussed the carrier's PLN-1 filed on October 14, 2022, disputing the (additional date), date of injury. The ALJ stated the following:

The insurance carrier argued that there was no (additional date), injury, therefore, the October 14, 2022, notice of denial should apply to this claim. This argument was unpersuasive. The insurance carrier did not timely dispute compensability, and did waive the right to dispute compensability of this claim.

In Appeals Panel Decision (APD) 011090 and APD 011091, both decided July 2, 2001, there was a reported injury involving multiple upper extremities/hands/wrists/arms with a July date of injury. The carrier timely disputed this injury. Subsequently, the claims involving the left and right upper extremities were divided into two separate claims and the claimant alleged an injury/occupational disease, affecting only the left hand and wrist, with a May date of injury. The carrier filed no additional dispute in response to this later date of injury. The Appeals Panel reversed the ALJ's determination that the carrier waived the right to contest compensability of the May left upper extremity injury and held that the dispute filed by the carrier was intended to serve as a contest of the compensability of the claimed bilateral upper extremities injuries, which included a contest of compensability of the left upper extremity injury. The Appeals Panel stated that to require the carrier to dispute an injury, which it had previously disputed, simply because the initial claim had been divided into two claims and the claimant alleged a different date of injury for one of the claimed injuries, would represent an elevation of form over substance. See *also* APD 080678, decided June 25, 2008.

In the case on appeal, the typographical error contained in the claimant's written statement reflecting a date of injury of (additional date), rather than (date of injury), resulted in an incorrect date of injury on the carrier's first written notice of the claimant's injury. The carrier's PLN-1 dated October 14, 2022, contained sufficient claim-specific information, including a full and complete statement of the grounds for contesting compensability, to inform the claimant of the carrier's denial of his injury. Under these facts, to require the carrier in this case to again dispute the injury it had previously disputed simply because the claimant alleged a different date of injury due to a

typographical error would represent an elevation of form over substance. Therefore, we reverse the ALJ's determination that the carrier waived the right to contest compensability of the claimed injury by not timely contesting the injury in accordance with Section 409.021, and we render a new decision that the carrier did not waive the right to contest compensability of the claimed injury because the carrier timely contested the injury in accordance with Section 409.021.

SUMMARY

We affirm the ALJ's determination that the claimant sustained a compensable injury on (date of injury).

We affirm the ALJ's determination that the carrier is not relieved of liability under Section 409.002 because the claimant timely notified the employer of his injury pursuant to Section 409.001.

We affirm the ALJ's determination that the claimant had disability from September 1, 2022, through January 9, 2023, resulting from the compensable injury.

We reverse the ALJ's determination that the carrier waived the right to contest compensability of the claimed injury by not timely contesting the injury in accordance with Section 409.021, and we render a new decision that the carrier did not waive the right to contest compensability of the claimed injury because the carrier timely contested the injury in accordance with Section 409.021.

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

**CT CORPORATION SYSTEM
1999 BRYAN STREET, SUITE 900
DALLAS, TEXAS 75201.**

Carisa Space-Beam
Appeals Judge

CONCUR:

Cristina Beceiro
Appeals Judge

Margaret L. Turner
Appeals Judge