

APPEAL NO. 230665
FILED JULY 6, 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 was held on April 4, 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 injury sustained on (date of injury), did not arise out of voluntary participation in an off-duty athletic activity not constituting part of the claimant's work-related duties; (3) the appellant (self-insured) is not relieved from liability under Section 409.002 because the claimant timely notified his employer pursuant to Section 409.001; and (4) the self-insured did specifically contest compensability on the issue of liability pursuant to Section 409.022 and 28 Tex. Admin. Code § 124.2(f) (Rule 124.2(f)). The self-insured appealed, disputing the ALJ's determinations regarding compensability, timely notice to the employer, and voluntary participation in an off-duty athletic activity. The claimant responded, urging affirmance of the appealed determinations.

The ALJ's determination that the self-insured did specifically contest compensability on the issue of liability pursuant to Section 409.022 and Rule 124.2(f) was not appealed and has become final pursuant to Section 410.169.

DECISION

Affirmed in part and reversed and rendered in part.

The claimant, a sheriff's deputy assigned to the self-insured's detention bureau, was injured on (date of injury), while participating in an off-duty agility test in order to be eligible for transfer or promotion to different positions within the department. While running with a 200-pound dummy, the claimant felt his left knee pop in and out. He was later diagnosed with a ruptured patellar tendon.

The ALJ is the sole judge of the weight and credibility to 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).

TIMELY NOTICE TO THE EMPLOYER

The ALJ'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 is supported by sufficient evidence and is affirmed.

VOLUNTARY PARTICIPATION IN AN OFF-DUTY ATHLETIC ACTIVITY AND COMPENSABILITY

Section 401.011(12) defines course and scope of employment as:

[A]n activity of any kind or character that has to do with and originates in the work, business, trade, or profession of the employer and that is performed by an employee while engaged in or about the furtherance of the affairs or business of the employer. The term includes an activity conducted on the premises of the employer or at other locations.

Section 406.032(1)(D) states that an insurance carrier is not liable for compensation if the injury arose out of voluntary participation in an off-duty recreational, social, or athletic activity that did not constitute part of the employee's work-related duties, unless the activity is a reasonable expectancy of or is expressly or impliedly required by the employment.

The claimant in this case elected to participate in a physical agility test on (date of injury), in order to be eligible for a transfer or promotion to a different job position with the employer. The ALJ noted in his decision that the employer advertised the opportunity through the email system to all employees as well as posting it on a bulletin board. The evidence reflects that participation in the agility test was not mandatory for the claimant's job as a sheriff's deputy but for consideration for transfer or promotion to another position.

Appeals Panel Decision (APD) 140388, decided April 25, 2014, is a similar case in which a detention service officer (DSO) participated in a mandatory pre-physical readiness assessment in order to apply for a deputy position. In that case, the Appeals Panel, citing APD 961159, decided July 29, 1996, reversed the determination of the ALJ that the claimant sustained a compensable injury and stated that the claimant was not directed to take the test but voluntarily underwent the physical readiness assessment, just as any other candidate did, and not as part of her employment as a DSO.

Likewise in the current case, the claimant was not directed by the employer to take the physical agility test but elected to do so in order to be eligible for transfer or promotion to a different job position and not as part of his employment duties as a sheriff's deputy. Accordingly, we reverse the ALJ's determination that the injury sustained on (date of injury), did not arise out of voluntary participation in an off-duty

athletic activity not constituting part of the claimant's work-related duties, and render a new decision that the injury sustained on (date of injury), did arise out of voluntary participation in an off-duty athletic activity not constituting part of the claimant's work-related duties.

As we have rendered a new decision that the claimant's injury arose out of an off-duty athletic activity not constituting part of the claimant's work-related duties, we also reverse the ALJ's determination that the claimant sustained a compensable injury on (date of injury), and we render a new decision that the claimant did not sustain a compensable injury on (date of injury).

SUMMARY

We affirm the ALJ'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 reverse the ALJ's determination that the injury sustained on (date of injury), did not arise out of voluntary participation in an off-duty athletic activity not constituting part of the claimant's work-related duties, and render a new decision that the injury sustained on (date of injury), did arise out of voluntary participation in an off-duty athletic activity not constituting part of the claimant's work-related duties.

We reverse the ALJ's determination that the claimant sustained a compensable injury on (date of injury), and we render a new decision that the claimant did not sustain a compensable injury on (date of injury).

The true corporate name of the insurance carrier is **(a self-insured governmental entity)** and the name and address of its registered agent for service of process is

(NAME)
(ADDRESS)
(CITY), TEXAS (ZIP CODE).

Cristina Beceiro
Appeals Judge

CONCUR:

Carisa Space-Beam
Appeals Judge

Margaret L. Turner
Appeals Judge