

APPEAL NO. 230808  
FILED AUGUST 24, 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 April 25, 2023, with the record closing on May 2, 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) respondent 1 (claimant) sustained a compensable injury on (date of injury); (2) the claimant had disability from December 16, 2022, through the date of the CCH, but not from (date of injury), through December 15, 2022; and (3) appellant (carrier 1) is liable for the payment of accrued benefits pursuant to 28 Tex. Admin. Code § 124.3 (Rule 124.3) resulting from its failure to dispute or initiate the payment of benefits within 15 days of the date it received written notice of the injury. The ALJ also determined that carrier 1 has waived the right to contest compensability for the claimed injury by not timely contesting the injury in accordance with Section 409.021. The ALJ added the carrier waiver issue after the CCH because she found it was actually litigated.

Carrier 1 appealed, disputing the ALJ's determinations in favor of the claimant. Carrier 1 contends that the ALJ abused her discretion in adding the issue of carrier waiver under Section 409.021 because that issue was not actually litigated by the parties. The appeal file does not contain a response from the claimant or respondent 2 (carrier 2). The ALJ's determination that the claimant did not have disability from (date of injury), through December 15, 2022, was not appealed and has become final pursuant to Section 410.169.

**DECISION**

Reversed and remanded.

The parties stipulated, in part, that on (date of injury), the employer provided workers' compensation insurance with carrier 1 and carrier 2. The claimant testified he was injured on (date of injury), while unloading cases of water bottles from a truck. The claimant testified each case was a 24-pack of 16-to-20-ounce water bottles, and that he had lifted 25 boxes in total. As the claimant was lifting one of the boxes, he felt pain and a burning sensation in his groin area.

**ISSUE ADDED BY ALJ**

The ALJ added the issue of whether carrier 1 waived the right to contest compensability of the claimed injury by not timely contesting the injury in accordance with Section 409.021 because she found that issue was actually litigated by the parties.

Carrier 1 contends on appeal that this issue was not actually litigated and the ALJ abused her discretion in adding the issue. Under the facts of this case the ALJ did not abuse her discretion in adding this issue. See Appeals Panel Decision (APD) 081665-s, decided January 29, 2009.

### **CARRIER 1 LIABILITY FOR PAYMENT OF BENEFITS AND CARRIER WAIVER**

Section 409.021(a) provides, in part, 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 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.

Rule 124.3(a)(1) provides in pertinent part that if the carrier does not file a Notice of Denial by the 15th day after receipt of the written notice of the injury, the carrier is liable for any benefits that accrue and shall initiate benefits in accordance with this section. Rule 124.3(a)(2) provides that if the carrier files a Notice of Denial of Compensability/Liability and Refusal to Pay Benefits (PLN-1) after the 15th day but on or before the 60th day after receipt of written notice of the injury: (A) the carrier is liable for and shall pay all income benefits that had accrued and were payable prior to the date the carrier filed the Notice of Denial and only then is it permitted to suspend payment of benefits; and (B) the carrier is liable for and shall pay for all medical services, in accordance with the 1989 Act and Division rules, provided prior to the filing of the Notice of Denial. Rule 124.3(a)(3) provides that the carrier shall not file notice with the Division that benefits will be paid as and when they accrue with the Division. Rule 124.3(a)(4) provides in pertinent part that a carrier's failure to file a Notice of Denial by the 15th day after it receives written notice of an injury constitutes the carrier's acceptance of the claim as a compensable injury, subject to the carrier's ability to contest compensability on or before the 60th day after receipt of written notice of the injury, and that a carrier's failure to do so results in the carrier being liable for all accrued income and medical benefits. Finally, Rule 124.3(a)(5) provides in pertinent part that a carrier commits an administrative violation if, not later than the 15th day after it receives written notice of the injury, it does not begin to pay benefits as required or file a Notice of Denial of the compensability of a claim.

Rule 124.3 further provides:

(b) Except as provided by subsection (c), the carrier waives the right to contest compensability of or liability for the injury, if it does not contest compensability on

or before the 60th day after the date on which the insurance carrier receives written notice of the injury.

(c) If the carrier wants to deny compensability of or liability for the injury after the 60th day after it received written notice of the injury:

(1) the carrier must establish that it is basing its denial on evidence that could not have reasonably been discovered earlier; and

(2) the carrier is liable for and shall pay all benefits that were payable prior to and after filing the notice of denial until the [Division] has made a finding that the evidence could not have been reasonably discovered earlier.

The Appeals Panel has held that where timeliness or sufficiency of a carrier's Notice of Denial of Compensability/Liability and Refusal to Pay Benefits (PLN-1) is in issue, the ALJ should take official notice of that form and the date it was filed, if necessary, to ensure full development of the facts in accordance with Section 410.163(b). APD 100203, decided April 16, 2010; see *also* APD 012101-s, decided October 22, 2001; and APD 941171, decided October 17, 1994.

Although the ALJ in the case on appeal found the PLN-1 filed by carrier 1 showed carrier 1 received notice of the injury on December 3, 2022, and that carrier 1 filed its PLN-1 on February 2, 2023, the PLN-1 in evidence does not show when or if carrier 1 filed a PLN-1. Because the timeliness of carrier 1's PLN-1 is in issue, we reverse the ALJ's determination that carrier 1 is liable for the payment of accrued benefits pursuant to Rule 124.3 resulting from its failure to dispute or initiate the payment of benefits within 15 days of the date it received written notice of the injury. We also reverse the ALJ's determination that carrier 1 has waived the right to contest compensability for the claimed injury by not timely contesting the injury in accordance with Section 409.021. We remand this case for the ALJ to take official notice of the date carrier 1's PLN-1 was filed with the Division.

### **COMPENSABILITY AND DISABILITY**

The ALJ noted in the discussion portion of her decision that while the evidence supported symptoms of an injury began while the claimant was at work, the injury was not caused by the claimant's workplace activities. However, the ALJ determined the claimant sustained a compensable injury on (date of injury), based on her determination that carrier 1 waived the right to contest compensability for the claimed injury by not timely contesting the injury in accordance with Section 409.021. Given that we have remanded this case for the ALJ to take official notice of when carrier 1 filed its PLN-1, we reverse the ALJ's determinations that the claimant sustained a compensable injury

on (date of injury), and that the claimant had disability from December 16, 2022, through the date of the CCH. We remand the issues of compensability and disability from December 16, 2022, through the date of the CCH to the ALJ for further action consistent with this decision.

### **SUMMARY**

We reverse the ALJ's determination that carrier 1 is liable for the payment of accrued benefits pursuant to Rule 124.3 resulting from its failure to dispute or initiate the payment of benefits within 15 days of the date it received written notice of the injury, and we remand this issue to the ALJ for further action consistent with this decision.

We reverse the ALJ's determination that carrier 1 has waived the right to contest compensability for the claimed injury by not timely contesting the injury in accordance with Section 409.021, and we remand this issue to the ALJ for further action consistent with this decision.

We reverse the ALJ's determination that the claimant sustained a compensable injury on (date of injury), and we remand this issue to the ALJ for further action consistent with this decision.

We reverse the ALJ's determination that the claimant had disability from December 16, 2022, through the date of the CCH, and we remand this issue to the ALJ for further action consistent with this decision.

### **REMAND INSTRUCTIONS**

On remand, the ALJ is to take official notice of when carrier 1 filed its PLN-1 disputing the (date of injury), injury with the Division, and make the PLN-1 that is officially noticed an ALJ exhibit. The parties are to be allowed an opportunity to review and respond to the officially noticed PLN-1. The ALJ is to make findings of fact, conclusions of law, and a decision on the disputed issues of whether carrier 1 is liable for the payment of accrued benefits pursuant to Rule 124.3 resulting from its failure to dispute or initiate the payment of benefits within 15 days of the date it received written notice of the injury; whether carrier 1 has waived the right to contest compensability for the claimed injury by not timely contesting the injury in accordance with Section 409.021; whether the claimant sustained a compensable injury on (date of injury); and whether the claimant had disability from December 16, 2022, through the date of the CCH.

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 ALJ, 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 APD 060721, decided June 12, 2006.

The true corporate name of carrier 1 is **mitsui sumitomo insurance company of america** 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.**

The true corporate name of carrier 2 is **wellfleet 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 75201-4284.**

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Carisa Space-Beam  
Appeals Judge

CONCUR:

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Cristina Beceiro  
Appeals Judge

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Margaret L. Turner  
Appeals Judge