

APPEAL NO. 022268-S
FILED OCTOBER 30, 2002

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 July 25, 2002. The hearing officer determined that the respondent (claimant) did sustain a compensable injury on or about _____, because the appellant (self-insured) waived its right to contest the compensability of the claimed injury; that the self-insured was the claimant's employer for purposes of the 1989 Act; that the claimant had disability from November 6, 2001, through April 8, 2002; that the claimant failed to timely notify the self-insured of a work-related injury, but the self-insured is not relieved of liability because it failed to timely dispute the claim; that the claimant failed to timely file a claim for compensation with the Texas Workers' Compensation Commission (Commission) and did not have good cause for failing to do so; however, the self-insured is not relieved of liability for the claim because it failed to timely dispute the compensability of the claim; and that the claimant's average weekly wage (AWW) is \$420.00.

The self-insured appealed the hearing officer's determination that the self-insured had waived its right to contest compensability. The self-insured pointed out that the claimant asserted a date of injury of _____, right up until the CCH, when a new (new date of injury) date of injury was asserted. The self-insured argues that because the claimant was not an employee on _____, it was not under an obligation to dispute a claimed injury of that date within 60 days. There is no response from the claimant. The hearing officer's determinations that the claimant did not sustain an injury in the course and scope of employment in either August or (new date of injury); that he failed to timely report an injury to the self-insured; that he failed to timely file a claim for compensation with the Commission and no good cause exists for failing to do so; and that the claimant's AWW is \$420.00 are unappealed and have become final. Section 410.169.

DECISION

Reversed and rendered.

The claimant was represented by an attorney at the time of the benefit review conference (BRC) but was not represented at the time of the CCH. In two Employee's Notice of Injury or Occupational Disease and Claim for Compensation (TWCC-41) forms that had been filed (the second one by his attorney), filed December 10, 2001, and February 25, 2002, and through the benefit review conference, the claimant contended that his date of injury was _____, and that he had been first employed by the self-insured on August 10, 2000. He maintained this position even after the self-insured contested compensability on the basis that the claimant was not an employee on the date of the alleged injury. The alleged injury was a lifting incident that the claimant said injured his back and hip, and resulted in a total hip replacement surgery in November

2001; it was not until after that date that the claimant activated a claim at the Texas Workers Compensation Commission (TWCC).

The issue from the BRC concerning whether the claimant sustained a compensable injury “on or about _____” was agreed to by the parties at the beginning of the CCH without any qualification or motion to expand the issue. However, during opening statement at the CCH, the ombudsman who assisted the claimant argued that the evidence would show that the date of the injury was “more likely” (new date of injury); the self-insured’s attorney responded to this by pointing out that this was the first time that the carrier had heard an alternative theory that the injury actually occurred on (new date of injury). The representative pointed out that the date of injury was not an issue at the BRC and that the issues specifically revolved around an asserted _____, date of injury.

The claimant said that he was self-employed prior to working for the self-insured. His personnel file showed that he was employed by the self-insured on September 13, 2000. The claimant said he first went to Dr. C about his hip and groin pain within three days to a week after the injury occurred. The evidence showed that the first visit to Dr. C for pain in the affected regions was August 26, 2000; his second visit was on October 20, 2000. Other medical records from other doctors report a history of pain since (new date of injury). After further medical consultation, during which a possible lumbar injury was pursued, it was determined that the claimant had aseptic necrosis of the hip bone. There is no medical evidence explaining how such a condition would have resulted from a lifting injury. The claimant said that he did not report the injury until February 2001 because he feared for his job; however, he admitted he continued to work for the employer thereafter until his surgery in November 2001. According to the witness for the self-insured, the injury was not reported until correspondence was received from the claimant’s attorney in March 2002.

The claimant testified at the CCH that he couldn’t really remember the date of injury, and the _____, date was his best recollection. On the reported waiver issue, there is only a Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) in evidence which indicated that first written notice of the _____, injury was received by the self-insured on March 19, 2002, although the record is silent on the form such notice took. The TWCC-21 is dated March 26, 2002, but is not date-stamped by the Commission field office until May 23, 2002. No explanation for an apparent two month delay in filing is included in the record. The grounds for defense is that the claimant was not employed on the reported day of injury, that a claim was not timely filed within a year of that date, and that the injury was not timely reported to the employer. There is no evidence that the self-insured received a notice of a (new date of injury), injury at any time prior to the claimant’s opening statement at the CCH.

Although the hearing officer found that “the incident” giving rise to the alleged injury occurred in (new date of injury), he found that no injury occurred in the course and scope of employment in either August or (new date of injury). He found that the claimant first began work for the self-insured on September 13, 2000. However, as a

conclusion of law, the hearing officer determined that the fact that the self-insured did not timely file a TWCC-21 in response to the written notice about the _____, injury equated to a waiver making the “_____,” injury compensable. We find that this was error.

Although the self-insured argues that the decision in Continental Casualty Co. v. Williamson, 971 S.W.2d 108 (Tex. App.-Tyler 1998, no pet. h.) applies to vitiate the waiver, we observe that it is the case of Houston General Insurance Co. v. Association Casualty Insurance Co., 977 S.W.2d 634 (Tex. App.-Tyler 1998, no pet. h.) (Houston General case) that more nearly applies. As that case held, in effectively reversing an Appeals Panel decision to the contrary, a carrier cannot waive into “coverage” for a person not employed by its insured on the date of injury by failing to observe the timely defense provisions of Section 409.021. As that case makes clear, the status of being an employee of an insured for which a carrier is liable is an issue of “coverage” not compensability. Although the facts in that case involved determining between two carriers as to who had coverage on the date of injury, the rationale is the same when electing between an uninsured self-employed status and a carrier. We further observe that in the 1989 Act, Section 406.031, Liability for Compensation, is located in the “coverage requirements” subchapter. This section provides that the carrier is liable for compensation for an “employee” that is subject to the subtitle and for an injury that arises out of the course and scope of employment. As the self-insured points out, the status of being an employee (or borrowed servant) on the date of injury is a threshold requirement for liability of a carrier or self-insured and as that status was not enjoyed by the claimant on _____, there can be no liability conferred on the carrier for this injury because of a late-filed TWCC-21. See also Texas Workers' Compensation Commission Appeal No. 990209, decided March 10, 1999.

We reverse and render an opinion that the carrier is not liable for coverage of an asserted _____, injury, and therefore, based on the failure to timely file a claim or give timely notice of injury to the employer, and the unappealed fact findings of the hearing officer regarding the nonexistence of any injury that occurred on any date in the course and scope of employment, we render the decision that the claimant did not sustain a compensable injury or have disability as defined in the 1989 Act.

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

**INSURANCE COMPANY
(ADDRESS)
(CITY), TEXAS (ZIP CODE).**

Susan M. Kelley
Appeals Judge

CONCUR:

Elaine M. Chaney
Appeals Judge

Margaret L. Turner
Appeals Judge