APPEAL NO. 052857-s
FILED FEBRUARY 8, 2006

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 21, 2005. The hearing officer resolved the disputed issues by deciding: (1) Clarendon National Insurance Company/respondent 1 (carrier 1) provided workers' compensation coverage for the employer on ___; (2) that carrier 1 is not relieved from liability under Sections 409.003 and 409.004; (3) that Fairfield Insurance Company/appellant (carrier 2) does not have standing as a subclaimant in accordance with Section 409.009; and (4) that the Texas Department of Insurance, Division of Workers' Compensation (Division) does not have authority to determine whether carrier 2 is entitled to reimbursement from carrier 1 for benefits paid. Carrier 2 appealed, disputing the determination that it does not have standing as a subclaimant in accordance with Section 409.009 and that the Division does not have authority to determine whether carrier 2 is entitled to reimbursement from carrier 1 for benefits paid. Carrier 1 responded, urging affirmance. The determinations that carrier 1 provided workers' compensation insurance for the employer on ___, and that carrier 1 is not relieved from liability under Sections 409.003 and 409.004 have not been appealed, and have become final pursuant to Section 410.169.

DECISION

Reversed and rendered in part and reversed and remanded in part.

The parties stipulated that the respondent 2 (claimant) sustained an injury in the course and scope of his employment on ___; that carrier 1 provided workers' compensation coverage for the employer on ___; and that on (date of claimant's death), the claimant died. It was undisputed that the claimant's death was not a result of the injury sustained in the course and scope of his employment. The evidence reflected that carrier 2 had provided coverage for the employer but that such coverage was terminated prior to the date the claimant sustained the injury. However, despite the termination of coverage, carrier 2 mistakenly paid benefits and subsequently requested reimbursement from carrier 1. In correspondence dated January 7, 2005, carrier 1 refused the request from carrier 2 for reimbursement of benefits mistakenly paid to the claimant for injury sustained on ___.

SUBCLAIMANTS STATUS

The hearing officer determined that carrier 2 did not have standing as a subclaimant in accordance with Section 409.009. Section 409.009, effective for the time period at issue, is entitled "Subclaims" and provides:

A person may file a written claim with the commission as a subclaimant if the person has:

(1) provided compensation, including health care provided by a health care insurer, directly or indirectly, to or for an employee or legal beneficiary, and

(2) sought and been refused reimbursement from the insurance carrier.

Texas Government Code Section 311.005(2) defines "person" as follows: includes corporation, organization, government or governmental subdivision or agency, business trust, estate, trust, partnership, association, and any other legal entity.

Section 401.011(11) defines "compensation" as payment of a benefit. Section 401.011(5) defines "benefit" as a medical benefit, an income benefit, a death benefit, or a burial benefit based on a compensable injury.

In evidence was an affidavit from a claims representative from carrier 2 which stated that carrier 2 had paid a total of $94,605.57 in workers' compensation benefits to or on behalf of the claimant in connection with the injury he sustained in the course and scope of his employment. There was also documentation in evidence which reflected that carrier 2 had requested reimbursement from carrier 1 and that such request was denied. Applying the plain meaning of the applicable statutes, carrier 2 is a person who would be allowed to file a written claim with the Division as a subclaimant, therefore meeting each element set forth in Section 409.009.

Further, statutory support for authorizing a carrier to be a subclaimant can be found in Section 402.084. Section 402.084(b)(8), effective September 1, 2001, provides that information on a claim may be released as provided by subsection (a) *to a subclaimant under Section 409.009 that is an insurance carrier* that has adopted an antifraud plan under Article 3.97-3, Insurance Code, or the authorized representative of such a subclaimant. [Emphasis added.] This provision recognizes by its express provision the potential of a carrier becoming a subclaimant. Although this provision was amended in 2005, the bill analysis in House Bill 251 evidences the intent of the legislature to continue the practice. The analysis provides in part that "House Bill No. 251 amends the Labor Code to require TWCC to release to an insurance carrier certain data that will allow the carrier to identify potential subclaims and pursue recovery that is already allowed under Section 409.009…." Business & Industry Comm., Bill Analysis, Tex. H.B. 251, 79th Leg., R.S. (2005).

Both carriers at the CCH as well as the hearing officer acknowledged that prior Appeals Panel decisions have been conflicting regarding both subclaimant status of carriers as well as jurisdiction regarding cases where the issue is carrier to carrier reimbursement.

In Appeals Panel Decision (APD) 941124, decided October 6, 1994, the Appeals Panel affirmed a hearing officer's decision that the injured employee was the borrowed servant of the client company and that the client company's workers' compensation insurance carrier was the liable carrier, but reversed the hearing officer's decision that the client company's carrier had to reimburse the workers' compensation insurance carrier of the employer who had hired the injured employee and assigned her to work at the client company for workers' compensation benefits paid by that carrier to the claimant. The Appeals Panel cited Section 410.033 and noted that there was some support for the proposition that reimbursement between multiple carriers may be made in the absence of an interlocutory order, but concluded that the decision in Associated Indemnity Company v. Hartford Accident & Indemnity Company, 524 S.W.2d 373 (Tex. Civ. App.-Dallas 1975, no writ), was controlling and rendered a decision that the client company's carrier was not required to reimburse the other carrier, who had accepted premiums collected by its insured from the client company and paid benefits to the injured employee.

In APD 961448, decided September 9, 1996, the Appeals Panel affirmed a hearing officer's decision that the injured employee was the employee of the self-insured city under the borrowed servant doctrine; reversed the hearing officer's decision that he did not have jurisdiction to decide the carrier reimbursement issue; and after explaining that the hearing officer determined that the carrier for the leasing company would be entitled to reimbursement if he had jurisdiction to determine the reimbursement issue and that such determination was not appealed, added a sentence to the hearing officer's decision that the carrier for the leasing company was entitled to reimbursement for benefits paid to the injured employee. APD 961448, *supra*, considered the language in APD 941124, *supra*, regarding there being some support for the proposition that reimbursement between multiple carriers may be made in the absence of an interlocutory order.

In APD 992012, decided November 4, 1999, the Appeals Panel affirmed a hearing officer's determination that she did not have jurisdiction to decide whether carrier B should reimburse carrier A for benefits it paid to the injured employee. The compensable injury occurred on the day that carrier B's workers' compensation insurance for the employer became effective, but carrier A mistakenly paid benefits. The Appeals Panel held that notwithstanding language in APD 961448 and APD 941124, a review of the language in Sections 410.032 and 410.033 revealed that the Division does not have the authority to order reimbursement in a situation where the "overpayment" was not made under an interlocutory order. The Appeals Panel noted that carrier A mistakenly paid benefits to the injured employee and that such benefit payments were not made pursuant to an interlocutory order. The Appeals Panel also noted that in Houston General Insurance Co. v. Association Casualty Insurance Company, 977 S.W.2d 634 (Tex. App.-Tyler 1998, no pet.), the court had characterized a claim for reimbursement, such as made by carrier A, as a claim for equitable subrogation, which the Appeals Panel said did not fall within the express or implied powers of the Division.

In APD 992487, decided December 22, 1999, the Appeals Panel affirmed the hearing officer's decision that the injured employee was the borrowed servant of the motel he was assigned to work at as a security guard and that carrier A, the workers' compensation insurer for the security guard company, was not entitled to reimbursement from carrier B, the motel's workers' compensation insurer, for workers' compensation benefits paid to and for the injured employee. No interlocutory order had been issued for carrier A to pay benefits to the injured employee. Carrier A did pay medical and income benefits to the injured employee. The Appeals Panel applied the decision in APD 992012, *supra*, in determining that the hearing officer did not err in not ordering reimbursement from carrier B to carrier A. In addressing carrier A's assertion that it was entitled to reimbursement as a subclaimant under Section 409.009, the Appeals Panel said "we do not view either of two or more carriers disputing the amounts of their respective liability to a claimant or their liability to one other [*sic*] for amounts paid to a claimant as subclaimants."

In APD 000129, decided March 6, 2000, there were two compensable injuries with a period of overlapping disability. The hearing officer determined that carrier 2 was a subclaimant entitled to reimbursement from carrier 1 for benefits paid to and for the injured employee. Carrier 1 cited APD 992012, *supra*, as prohibiting reimbursement between carriers unless based on an interlocutory order of the Division, but the Appeals Panel stated that APD 992012 was inapplicable because the hearing officer based reimbursement on carrier 2's status as a subclaimant. The Appeals Panel then stated that it was not holding that the subclaimant provisions of Section 409.009 do, or do not, apply to a carrier because that question was not before it because findings of fact that carrier 2 was a subclaimant and that a subclaimant is entitled to reimbursement were not appealed. The Appeals Panel stated that Section 409.009 does not limit subclaimants to reimbursement for payments the subclaimant was required to make and does not rule out voluntary compensation paid as being ineligible for reimbursement. The Appeals Panel also stated that "[p]resumably, if a carrier may use the general provisions of Section 409.009 which only say that a claim may be filed, then it may, in effect, expand the provisions of Section 410.033 to allow reimbursement whether or not there has been a Commission order involved." The Appeals Panel affirmed the hearing officer's determination for reimbursement to be paid by carrier 1 for benefits paid by carrier 2.

In APD 011531, decided August 16, 2001, the Appeals Panel affirmed the hearing officer's determination that the injured employee was the borrowed servant of the client company he was assigned to work at by the day labor service and reversed the hearing officer's decision that the workers' compensation insurance carrier for the day labor service was entitled to reimbursement from the workers' compensation insurance carrier for the client company. The carrier for the day labor service had paid medical and income benefits to and for the claimant. There was no interlocutory order for payment of benefits. The Appeals Panel stated that the hearing officer was without authority to order reimbursement to the day labor service carrier from the client company carrier, citing APD 992012, *supra*, that an interlocutory order was required and stating that Section 410.033 is the only statute addressing the situation of

reimbursement in the case of multiple carriers who may be liable for benefits. The Appeals Panel also said that APD 992012 had distinguished and essentially overruled APD 961448, *supra*. The Appeals Panel noted that although APD 000129, *supra*, had "muddied the waters" by allowing reimbursement where one carrier was cast by the hearing officer as a "subclaimant," no such finding or contention was made in the case before it.

In APD 030286, decided March 20, 2003, the Appeals Panel affirmed a hearing officer's determination that two carriers provided workers' compensation insurance for the injured employee's compensable injury and that the Division does not have authority to determine the amount of reimbursement to be paid to carrier 1 by carrier 2. The Appeals Panel noted that Section 410.033 was not applicable because carrier 1 did not pay benefits pursuant to an interlocutory order of a benefit review officer. The Appeals Panel also said that it agreed with the hearing officer that the Division does not have authority to order equitable reimbursement, citing APD 992012, *supra*. With regard to carrier 1's contention that it was entitled to reimbursement as a subclaimant under Section 409.009, the Appeals Panel cited APD 992487, *supra*, that it did not view either of two or more carriers disputing the amounts of their respective liability to a claimant, or their liability to one another for amounts paid to a claimant, to be subclaimants for the purposes of Section 409.009.

In APD 040412, decided April 14, 2004, the Appeals Panel affirmed a hearing officer's decision that carrier 1 did not have standing as a subclaimant in accordance with Section 409.009 and that carrier 1 was not entitled to reimbursement from carrier 2 for benefits paid. The Appeals Panel stated that assuming, arguendo, that carrier 1 is a subclaimant under Section 409.009, the Division is without authority to determine whether carrier 1 is entitled to reimbursement from carrier 2 for benefits paid. The Appeals Panel noted that the Division is given the authority to resolve benefit disputes, and that there was no benefit dispute presented in the case. The Appeals Panel noted that carrier 1 was asking the Division to order carrier 2 to reimburse it for benefits it mistakenly paid to the injured employee for an injury where it did not provide coverage and that carrier 1 had not pointed to any provision in the 1989 Act that authorizes the Division to award reimbursement in that situation. The Appeals Panel also noted that it did not appear that the case was covered by the reimbursement provisions contained in Sections 410.033 and 410.209 because payment was not made pursuant to an interlocutory order or Division decision. The Appeals Panel cited APD 992012, *supra*, in stating that it did not have either the express or implied authority to grant carrier 1 the relief it sought.

In the instant case, the hearing officer applied the most recent decision, APD 040412, *supra*, and determined that carrier 2 does not have standing as a subclaimant in accordance with Section 409.009 and that the Division does not have jurisdiction. Applying the plain meaning of Section 409.009 and considering the specific statutory provision that recognizes that an insurance carrier can be a subclaimant, we reverse the hearing officer's determination that carrier 2 does not have standing as a subclaimant in

accordance with Section 409.009 and render a new determination that carrier 2 does have standing as a subclaimant in accordance with Section 409.009.

JURISDICTION

28 TEX. ADMIN. CODE § 140.1 (Rule 140.1) provides that:

(1) Benefit dispute--A disputed issue arising under the Texas Workers' Compensation Act (the Act) in a workers' compensation claim regarding compensability or eligibility for, or the amount of, income or death benefits.

(2) Benefit proceeding--A proceeding pursuant to the Act, Chapter 410, conducted by a presiding officer to resolve one or more benefit disputes. Benefit proceedings include benefit review conferences, benefit contested case hearings, appeals, and, after January 1, 1992, arbitration.

Rule 141.1(a) provides that a request for a benefit review conference may be made by a claimant, a subclaimant, a carrier, or an employer who has contested compensability. The rules specifically recognize that a subclaimant may request a benefit review conference, the first step in initiating a compensation benefits claim.

The Workers' Compensation Act vests the power to award compensation benefits solely in the Workers' Compensation Commission (now known as the Division), subject to judicial review. Saenz V. Fidelity & Guaranty Insurance Underwriters, 925 S.W.2d 607 (Tex. 1996). The Division has jurisdiction of disputes over income benefits, preauthorization of medical care, and reimbursement of medical expenses. The legislature has granted the Division exclusive jurisdiction over claims for policy benefits. American Motorists Ins. Co. v. Fodge, 63 S.W.3d 801 (Tex. 2001). In adjudicating such claims, the Division will necessarily have to interpret compensation policies and determine the period in which coverage existed. *See* Gonzalez v. Cigna Ins. Co. of Tex., 924 S.W.2d 183, 184-87 (Tex. App.-San Antonio 1996, writ denied).

As noted in APD 000129, *supra*, Section 409.009 does not limit subclaimants to reimbursement for payments the subclaimant was required to make and does not rule out "voluntary" compensation paid as being ineligible for reimbursement. In comparison, we observe that Section 410.033 is much more specific in addressing two disputing carriers; it addresses the issuance of an order by the Commission and, based on that order, it then spells out that one carrier "is entitled to reimbursement" for the share it paid pursuant to the order when that order is later ruled to be incorrect. Presumably, if a carrier may use the general provisions of Section 409.009 which only say that a claim may be filed, then it may, in effect, expand the provisions of Section 410.033 to allow reimbursement whether or not there has been a Commission order involved. To the extent prior cases conflict with our decision in this case, they are overruled.

The hearing officer's determination that the Division does not have authority to determine whether carrier 2 is entitled to reimbursement from carrier 1 for benefits paid is reversed and a new decision rendered that the Division does have authority to determine whether carrier 2 is entitled to reimbursement from carrier 1 for benefits paid. Because the hearing officer determined that carrier 2 did not have standing as a subclaimant and that the Division did not have authority to determine reimbursement, he did not resolve the issues regarding whether carrier 2 is entitled to reimbursement from carrier 1 and if so in what amount. Therefore, this case is remanded back to the hearing officer to determine the amount of reimbursement, if any, that carrier 2 is entitled to from carrier 1.

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, as amended effective June 17, 2001, to exclude Saturdays and Sundays and holidays listed in Section 662.003 of the Texas Government Code in the computation of time in which a request for appeal or a response must be filed.

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

CT CORPORATION SYSTEM
350 NORTH ST. PAUL STREET
DALLAS, TEXAS 75201.

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

CT CORPORATION SYSTEM
350 NORTH ST. PAUL STREET, SUITE 2900
DALLAS, TEXAS 75201.

_____
Margaret L. Turner
Appeals Judge

CONCUR:

_____
Thomas A. Knapp
Appeals Judge

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Robert W. Potts
Appeals Judge