

APPEAL NO. 060631-s
FILED MAY 30, 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 February 27, 2006. The issues at the CCH were:

1. Did [appellant (Claimant)] sustain a compensable injury in the course and scope of employment on ___?
2. Does Claimant have disability, and if so, for what period?
3. Is [respondent (Carrier)] relieved from liability under Texas Labor Code Section 409.002 because of Claimant's failure to timely notify Employer pursuant to Section 409.001?
4. Is Carrier relieved from liability under Texas Labor Code Section 409.004 because of Claimant's failure to file a claim for compensation with the [Texas Department of Insurance, Division of Workers' Compensation (Division)] within one year of the injury as required by Texas Labor Code Section 409.003?

The hearing officer determined that the claimant sustained a compensable injury in the course and scope of employment; that the claimant had disability from March 22, 2005, through the date of the CCH; that the claimant timely reported the injury to her supervisor on ___ (the date of injury) and that the carrier is relieved from liability under Section 409.004 because of the claimant's failure to file a claim with the Division within one year of the injury as required by Section 409.003. The hearing officer's determinations regarding an injury in the course and scope, disability and timely notice to the employer have not been appealed.

The claimant appeals the determination regarding the failure to file a claim within one year, contending that the hearing officer erred by failing to add an issue that the carrier did not timely raise the one year filing defense or that the carrier's failure to raise the one year filing defense was "subsumed" in the failure to file a claim within one year issue and that the hearing officer erred in failing to make or find a good cause determination as provided for in Section 409.004(1). The carrier responds, urging affirmance.

DECISION

Reversed and rendered.

The parties stipulated that the claimant was an employee (custodian) of the employer on _____. The hearing officer's determinations that the claimant fell at work on _____, sustained an injury and reported the injury to a supervisor on the same day have not been appealed. It is undisputed that the claimant continued working at her regular job (the claimant testified that she received help from her coworkers), saw a doctor in (State) on July 4, 2003, then saw (Dr. H) on January 26, 2004, and was eventually taken off work by Dr. H on March 22, 2005. The claimant testified that when she was hired she was told that she would not "have any benefits with this job" and that "there was no insurance coverage" (transcript page 29). The claimant said that she believed that the statement that she would not have insurance included workers' compensation insurance coverage. The claimant testified that because she thought the employer did not have workers' compensation insurance she paid for her own medical treatment (and failed to file a claim) until Dr. H wanted to send her to a specialist in 2005. The claimant testified that she could not afford a specialist and that her sister-in-law suggested she go to "a company . . . that helps workers" (transcript page 37) which turns out to be a Division field office.

A Dispute Resolution Information System note indicates that a "TWCC-41" was faxed to the carrier on June 16, 2005. The hearing officer also found that the carrier's "first written notice of the injury was on 6/16/05 when DWC faxed a copy of the TWCC-41 to Carrier." (Finding of Fact No. 5.) The Employee's Notice of Injury or Occupational Disease and Claim for Compensation (TWCC-41) is not in evidence. The hearing officer took "Official Notice" of a Carrier PLN-1 dated August 23, 2005. (The PLN-1 has a Division field office date stamp of September 14, 2005, however the hearing officer in Finding of Fact No. 6 determined that the carrier "first filed a dispute/contest of injury on 08/14/05 in a PLN-1.") The PLN denied benefits because:

CARRIER DISPUTES INJURY IN THE COURSE AND SCOPE OF EMPLOYMENT. CARRIER CONTENDS THAT EMPLOYEE FAILED TO TIMELY REPORT INJURY AS MANDATED BY THE TWCC. FURTHER CARRIER CONTENDS THAT THERE IS NOT MEDICAL TO DIRECTLY RELATE THE CONDITION [sic] IS DIRECTLY RELATED TO THE ON THE JOB DUTIES. ALSO, CLMT IS NOT AN EMPLOYEE OF THE EMPLOYER NATURE AND EXTENT OF INJURY NOT DIRECTLY RELATED TO WORK.

A benefit review conference (BRC) was held on January 10, 2006. On the issue of the claimant's failure to file a claim within one year of the injury as required by Section 409.003 the parties positions were:

Claimant's Position: [Claimant] will claim that the Insurance Carrier never raised this as an issue on the PLN-1 that was dated August 23, 2005. Because the Carrier never raised this issue within the 60 days of being notified of a claimed injury, [claimant] believes the Carrier has waived this issue at this. [Sic]

Carrier's Position: The Insurance Carrier will point out that the Claimant did not file a claim for compensation with the Division until April 20, 2005. Because the Claimant's date of injury is ____, the Carrier believes the Claimant is outside the one-year reporting provision of this Act and is asking to be relieved of any liability for this claimed accident based on the late reporting.

The hearing officer, in Finding of Fact No. 8 determined:

8. Although Claimant contended at the [CCH] that Carrier had waived the defense of Claimant's untimely filing for compensation within one year by not raising that defense in its PLN-1, that issue was not contained in the [BRC] report, was not requested in a response to the BRC report was not requested as an issue to be added at the [CCH], and was not actually litigated by both parties so as to added by consent.

We hold that the hearing officer's determination in Finding of Fact No. 8 is not supported by the evidence particularly regarding the portion that the issue was not actually litigated. The claimant clearly raised this matter in her position at the BRC quoted previously. At the CCH, in the opening statement, the ombudsman states: "our position is that the Carrier has waived [the right] to raise that as a defense. If you take official notice of the PLN 1, that was not an issue [a defense] that was raised." The ombudsman asserted that the carrier is "bound by the grounds that they raised on that first PLN 1." The hearing officer commented that he did not have the PLN-1 and a copy was produced and placed in the file with the notation "Took Official Notice." We note that the carrier raised no objection to either claimant's argument, the official notice of the PLN-1 or raised an objection that the failure to timely raise the one year claim filing defense had never been requested to be added as an issue. Again in closing the claimant argues that the timely filing of the claim was not raised in the PLN-1 and that the "Carrier is bound by the grounds set forth in the PLN 1 [unless it is] based on newly discovered evidence." The carrier's response to this argument is that the one year filing requirement had already passed before the carrier got notice and "you can't waive that." The carrier contends that once they received notice of the claim it "did contest it." We also note that the hearing officer's findings in Findings of Fact No. 5, 6 and 7, that the carrier received first written notice of the injury "on 06/16/05," that the carrier's "dispute/contest" on August 14, 2005, in a PLN-1 did not raise the defense of the one year claim filing requirement of Section 409.003 and that the carrier first attempted to raise the issue of the claimant's failure to file a claim within one year at the BRC on January 10, 2006, all support the claimant's contention that the defense was not timely raised.

Under the circumstances outlined above, the issue of whether the carrier had timely raised the defense of failure to timely file a claim was litigated. We also note that the hearing officer's request for the PLN-1 and agreeing to take official notice of that document, without objection from the carrier, could have reasonably led the claimant to believe that the matter had been raised and was going to be addressed by the hearing officer.

The Appeals Panel has recognized that an issue may be actually litigated by the parties at a hearing notwithstanding that it was not in the statement of disputes contemplated by 28 TEX. ADMIN. CODE § 142.7 (Rule 142.7). See Appeals Panel Decision (APD) 94269, decided April 20, 1994; APD 040340 decided April 8, 2004. We believe that is what the record reflects occurred in this case. We reverse the hearing officer's determination "that Carrier had waived the defense of Claimant's untimely filing for compensation within one year by not raising that defense in its PLN-1 . . . was not actually litigated by both parties" as being so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

Section 409.004 provides that the failure to file a claim for compensation with the Division as required by Section 409.003 (no later than one year after the date of injury) relieves the employer and the carrier from liability unless there was good cause for the failure to file the claim or the employer or carrier does not contest the claim. The Appeals Panel has held that the failure to timely file a claim must be raised by the carrier as an affirmative defense. APD 94224, decided April 1, 1994. Section 409.022(a) provides that a carrier's notice of refusal to pay benefits under Section 409.021 must specify the grounds for refusal and pursuant to Section 409.022(b) the grounds for the refusal specified in the notice constitute the only basis for the carrier's defense unless the defense is based on newly discovered evidence. See *also* APD 030098, decided March 10, 2003. In APD 023060-s decided January 21, 2003, the Appeals Panel held that generally "the carrier is limited to and bound by the grounds set forth in the Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) it files, unless the new defense is based on newly discovered evidence." We reject the carrier's contention that the timely filing requirement of Section 409.003 cannot be waived.

We do not address the timeliness of the filing of the PLN-1 because carrier waiver of compensability was not an issue before us and was not litigated. We only address the claimant's contention that the defense of failure to timely file a claim within one year pursuant to Sections 409.003 and 409.004 was not raised in the PLN-1 dated August 23, 2005.

Section 409.003 provides that for injuries other than occupational diseases an employee or a person acting on the employee's behalf shall file with the Division a claim for compensation for an injury not later than one year after the date on which the injury occurred. Section 409.004 provides, in pertinent part, that failure to file a claim for compensation with the Division as required under Section 409.003 relieves the

employer and the employer's insurance carrier of liability under this subtitle unless good cause exists for failure to file a claim in a timely manner. Section 409.005 provides that an employer shall report to the employer's insurance carrier if an injury results in the absence of an employee from work for more than one day. Section 409.008 provides that if the employer has notice of an injury and fails or neglects to report the injury to the carrier under Section 409.005 the period for filing a claim for compensation under Section 409.003 does not begin to run until the day on which the report required under Section 409.005 has been furnished. Applying the various cited provisions to the instant case, the date of injury was ____, and under Section 409.003 a claim must be filed within one year of the date of injury, i.e. on or before May 14, 2004, and failure to timely file the claim for compensation relieves the carrier of liability under Section 409.004 unless: "(1) good cause exists for failure to file a claim in a timely manner." The tolling provision of Section 409.008 does not apply because the employer was not required to file the report under Section 409.005 until 2005 because the claimant, in this case, did not miss work for more than one day until March 22, 2005.

As previously noted Section 409.004 provides that failure to file a claim for compensation with the Division as required by Section 409.003 (not later than one year after the date of injury) relieves the employer and the carrier of liability unless good cause exists for failure to timely file a claim or the employer or the carrier does not contest the claim. Whether good cause exists is a matter left up to the discretion of the hearing officer, and the determination will not be set aside unless the hearing officer acted without reference to any guiding rules or principles. APD 002816, decided January 17, 2001, citing Morrow v. H.E.B., Inc., 714 S.W.2d 297 (Tex. 1986). We have held that the appropriate test for the existence of good cause is whether the claimant acted as a reasonably prudent person would have acted under the same or similar circumstances. APD 94244, decided April 15, 1994. The claimant's position throughout has been that she thought the employer did not have workers' compensation insurance coverage because her supervisor had told her that the employer did not provide benefits and did not have insurance. In APD 033132, decided January 27, 2004, a hearing officer determined that the injured worker did not file a TWCC-41 with the Commission (now Division) within one year of the work-related injury because he relied on the employer's representation that it did not provide workers' compensation coverage, and as soon as the injured employee learned of his employer's workers' compensation coverage, he acted as a reasonably prudent person and filed his TWCC-41. Although the claimant had raised the good cause exception to Section 409.004(1) and the hearing officer had failed to make a finding on good cause, we decline to further address the issue in light of our holding that the carrier had not timely raised the affirmative defense of failure to timely file a claim pursuant to Sections 409.003 and 409.004.

In summary we reverse the hearing officer's determination that the carrier had not waived the defense of the claimant's untimely filing for compensation within one year by not raising that defense in its PLN-1 because that was not an issue before him and "was not actually litigated by both parties." We render a new decision that the claimant had raised the issue at the BRC in her position statement and that the issue

had actually been litigated. We also reverse the hearing officer's decision that the carrier is relieved of liability under Section 409.004 because of the claimant's failure to file a claim with the Division within one year of the date of injury as required by Section 409.003 and render a new decision that the carrier had failed to timely raise that affirmative defense and therefore, the carrier is not relieved from liability under Section 409.004 because of the claimant's failure to file a claim for compensation with the Division within one year of the injury as required by Section 409.003. We further acknowledge that the claimant had timely raised an exception of good cause for failing to timely file a claim with the Division within one year of the date of injury pursuant to Sections 409.003 and 409.004.

The true corporate name of the insurance carrier is **AMERICAN HOME ASSURANCE COMPANY** and the name and address of its registered agent for service of process is

**CORPORATION SERVICE COMPANY
701 BRAZOS STREET, SUITE 1050
AUSTIN, TEXAS 78701-3232.**

Thomas A. Knapp
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Margaret L. Turner
Appeals Judge