

APPEAL NO. 000784

Following a contested case hearing (CCH) held on February 29, 2000, pursuant to the Texas Workers=Compensation Act, TEX. LAB. CODE ANN. ' 401.001 *et seq.* (1989 Act), the hearing officer, resolved the two disputed issues by concluding that the respondent-s (claimant) compensable injury does not extend to and include the bowel, bladder, and erectile dysfunction conditions and that the appellant (carrier) waived the right to contest the compensability of the claimed bowel and erectile dysfunction conditions by not contesting them within 60 days of being notified of the claimed injury. The carrier requests our review, asserting error in the hearing officer-s legal conclusion and two underlying factual findings on the waiver issue. The carrier first contends that a new Texas Workers= Compensation Commission (Commission) rule, namely, Tex. W.C. Comm=n, 28 TEX. ADMIN. CODE ' 124.3 (Rule 124.3), provides that the waiver provision in Section 409.021(c) does not apply to an extent-of-injury issue. The carrier next contends that it did not receive any writing concerning the claimed bowel and erectile dysfunction conditions which were sufficient to constitute written notice of injury pursuant to Rule 124.1(a)(3). Claimant-s response first asserts that the new Rule 124.3 should not be considered because it was not in effect at the time of the carrier-s waiver and, secondly, that the carrier had sufficient notice of the assertion of compensability and waited over a year to file any formal dispute of the extent of claimant-s injuries.

DECISION

Reversed and a new decision rendered as a matter of law.

The parties stipulated that on _____, claimant sustained a compensable injury while employed by (employer). Not appealed is the legal conclusion that the compensable injury does not extend to and include the bowel, bladder, and erectile dysfunction conditions, and factual findings that on _____, claimant sustained a compensable injury that resulted i n a low back strain and a small cervical herniated disc, and that claimant-s bowel and erectile dysfunction problems were not the direct and natural result of the compensable injury of _____.

The hearing officer-s Decision and Order contains a detailed recitation of the evidence with which neither party takes issue. Accordingly, we will set out only so much of the evidence as is necessary for this decision.

Claimant testified that on _____, while employed as a maintenance supervisor for the employer, he carried a compressor up a ladder for a rooftop air conditioner unit and realized when he got to the top that he had injured himself. He said he had back pain and that later that day, at home, he also had neck and shoulder pain. Claimant said he was first treated by Dr. M; that the next doctor who treated him was Dr. P; that he was next treated by Dr. HB and still later by Dr. NB; that the carrier had him see Dr. C in December 1998; that he was also evaluated by a designated doctor; and that he has also been seen by many other doctors.

Claimant twice stated in his testimony that, in addition to his erectile dysfunction, he had a bowel problem, but not a bladder problem. Dr. C's report reflects that he determined that claimant had reached maximum medical improvement and that he assigned a nine percent impairment rating (IR) for claimant's cervical and lumbar spine regions. The January 12, 1999, report of Dr. D, the designated doctor, assigned a 14% IR for claimant's cervical and lumbosacral regions.

Dr. HB's note of April 2, 1998, states the mechanism of injury as claimant's lifting and carrying over his shoulder a 220-pound air conditioner unit on _____; apparently refers to the chief complaint as the "back"; and states the present illnesses as low back with radiation to right leg, also complaining of neck pain with radiation to right arm, positive for numbness, and positive for decreased erections and sphincter control. Dr. HB wrote on June 18, 1998, that claimant continues with pain; that he can only work for an hour at a time before having to lie down; that he continues with groin numbness which affects his sexual activity; and that he had an appointment with a neurologist and has been taken off work. These and two other reports of Dr. HB contain no information on their face showing receipt by the carrier and no evidence independent of these records was adduced to show the date of receipt by the carrier.

In his closing argument below claimant contended that the June 24, 1998, report of Dr. NB, which is addressed to the carrier, provided the carrier with written notice of his claimed additional injuries and pointed to a date stamp on the document reflecting that it was received by the carrier on July 1, 1998. The carrier did not dispute the contention that this report was received on July 1, 1998. This report states that claimant was seen in neurological consultation on June 22, 1998; that his chief complain is low back pain; that his mid-back area pain radiates to his right leg and groin; that he also complains of some fecal incontinence but admits it is diarrhea and more a matter of urgency; and that "[h]e tells me he has gained 38 pounds and complains of impotence." Dr. NB also noted claimant's mention of his snoring. Dr. NB stated the impression as follows: "1. Low back pain. 2. Possible obstructive sleep apnea syndrome, unrelated to injury." Dr. NB further stated, "I am not certain if his impotence is related to his injury."

Dr. H's August 4, 1998, report reflects that he did not examine claimant but did review certain information. Dr. H answered in the negative the question whether claimant's current complaints of numbness in the right groin area related to the back strain of May 28, 1987. Dr. H further stated that claimant's MRI showed no herniation at the L5-S1 or any other level; that an EMG/nerve conduction study showed the usual denervation potential in the paraspinous and lower lumbar levels which were nonspecific and indicated no more than lumbar spasm; that no information shows claimant to have any hernia; that there is a complaint of "impotence"; that claimant most definitely has sleep apnea with excessive snoring; and that other medical problems such as impotence are often seen in individuals with sleep apnea. Dr. H concluded that he found no information whatsoever "that would relate claimant's present symptoms of

groin pain and impotence to the back strain alleged in 5/97." This report does not mention bowel or bladder problems.

The carrier's Payment of Compensation or Notice of Refused or Disputed Claim (TWCC-21) dated August 13, 1998, states, in part, as follows: "Carrier denies that claimant's current medical condition is related to his compensable injury of 05/28/97. Claimant lost time from work for other medical condition. TIBs is currently being paid pending BRC."

In evidence is the affidavit of Mr. D, stating that he is an attorney who represented claimant at a benefit review conference (BRC) on or about December 14, 1998, and that at that BRC, the carrier did not express its dispute with claimant's impotence, bladder, or bowel problems and that the only issues were the extent of disability and claimant's date of maximum medical improvement and his IR. A Commission Dispute Resolution Information System note of August 19, 1998, states, in part, that a Commission employee spoke with adjuster Dr. R in response to an August 13, 1998, request for a BRC and that the carrier is disputing disability. The only BRC report in evidence reflects that a BRC was held on November 10, 1999, to consider the two disputed issues considered at the CCH, namely, extent of injury to include bowel, bladder and erectile dysfunction, and carrier waiver.

Also in evidence are the records of Dr. DB who provided claimant with chiropractic treatment commencing on August 27, 1998, and continuing through August 17, 1999. As with Dr. HB's records, Dr. DB's records do not on their face reflect when they were received by the carrier.

Dr. H reported further on September 21, 1996, that he reviewed information on claimant; that, as stated previously, the documentation clearly relates that this is a lumbar strain event; and that "[i]t is with strong reasonable medical probability that [he opines that] the tingling in his feet and the urological symptoms, as well as the groin pain and decreased erection are not related to the alleged injury of _____, which by documentation is a simple isolated sprain/strain event."

The carrier's TWCC -21 dated October 7, 1999, states, in part, as follows: "Carrier disputes that claimant's compensable injury of _____ includes or extents [sic] to bowel, bladder and impotence problems. Compensable injury includes chronic lumbar strain and small disc herniation of C5-C6."

The carrier appeals the following findings and conclusion:

FINDINGS OF FACT

4. The Carrier was fairly informed that the Claimant was alleging the bowel and erectile dysfunction problems as part of his compensable injury of _____, on or about August 1 [sic], 1998.

5. The Carrier did not contest compensability of the claimed bowel and erectile dysfunction problems within sixty days of being fairly informed of those conditions.

CONCLUSION OF LAW

4. The Carrier waived the right to contest the compensability of the claimed bowel and erectile dysfunction conditions by not contesting within sixty days of being notified of the claimed injury.

In his discussion of the evidence relating to the waiver issue, the hearing officer states the following:

In this particular case, the Carrier requested peer reviews from Dr. H as early as August 4, 1998. [Dr. H] specifically addressed in his reports of August 4, 1998, and September 21, 1998, whether the Claimant's bowel, bladder, and erectile dysfunction conditions were related to the _____, compensable injury. Clearly, by August 4, 1998, the Carrier was fairly informed that the Claimant was alleging these conditions as a part of his compensable injury. The TWCC-21 [Payment of Compensation or Notice of Refused or Disputed Claim] filed on August 13, 1998, was not sufficient to contest the compensability of those conditions.

It seems apparent from the hearing officer's discussion that he is reasoning that because the carrier requested a "peer review" report from Dr. H and Dr. H wrote such report on August 4, 1998, the carrier had notice of claimant's claimed extent of injury by at least the date of August 4, 1998. Incidentally, we note that in Finding of Fact No. 4, the hearing officer refers to that date as August 1, 1998, and since that date appears to be a typographical error, we reform it to read August 4, 1998. The hearing officer did not specify the particular medical record or other writing he found to have provided the carrier with the required written notice that claimant was asserting that his compensable injury extended to his bowel and erectile dysfunction conditions.¹

Section 409.021(c) provides 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 carrier is notified of the injury, the carrier waives its right to contest compensability. Rule 124.3(c),

¹We note that new Rules 124.1 and 124.2 became effective August 29, 1999, and that Rule 124.6 was repealed effective March 13, 2000.

effective March 13, 2000, provides, in part, that Section 409.021 and subsection (a) of Rule 124.3 "do not apply to disputes of extent of injury" and that if a carrier receives a medical bill that involves treatment or services the carrier believes is not related to the compensable injury, the carrier shall file a notice of dispute of extent of injury not later than the earlier of the date the carrier denied the medical bill or the due date for the carrier to pay or deny the medical bill.

In Texas Workers=Compensation Commission Appeal No. 000713, decided May 17, 2000, the Appeals Panel affirmed the determination of the hearing officer that the carrier in that case did not waive the right to dispute the extent (pelvic tilt and right elbow) of that claimant=s injuries because it was not required to do so. We stated that the new Rule 124.3 "gives no guidance as to what event must occur on or after its effective date in order for the rule to be applicable in a given case" and we held that the new Rule124.3 "is applicable in those cases in which a CCH is convened on or after March 13, 2000, to address an issue of carrier waiver in the context of an extent of injury question because it precludes the Commission from imposing a waiver after that date."

Although the CCH in the case we consider was held on February 29, 2000, before the effective date of the new Rule 124.3, and although Appeal No. 000713 held that the new rule applies to cases in which a CCH is convened on or after March 13, 2000, the Appeals Panel itself cannot impose a waiver by affirming the hearing officer, given the essential rationale expressed by the Commission in the preamble of the new Rule 124.3 to the effect that the Commission construes Section 409.021 as not providing for waiver of extent of injury. The preamble states, in part, that "Texas Labor Code, ' Section 409.021 is intended to apply to the compensability of the injury itself or the carrier liability for the claim as a whole, not individual aspects of the claim" and that "[w]hen a carrier disputes the extent of an injury, it is not denying the compensability of the claim as a whole, it is disputing an aspect of the claim." The preamble further states as follows: "Though the rule gives a carrier a time frame to file the dispute of extent of injury, failure to do so timely is a compliance issue. It does not create liability."

Given the Commission=s construction of Section 409.021 of the 1989 Act, as set forth, in part, in the preamble to Rule 124.3, a construction we feel bound to accept notwithstanding that Rule 124.3 did not become effective until March 13, 2000, we reverse the challenged conclusion and findings of the hearing officer and render a new decision that the carrier did not waive its right to contest the compensability of the claimed bowel and erectile dysfunction conditions.

Philip F. O'Neill
Appeals Judge

CONCUR:

Robert W. Potts

Appeals Judge

Dorian E. Ramirez
Appeals Judge