

APPEAL NO. 021569
FILED AUGUST 12, 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 May 31, 2002. The appellant (carrier) appeals the hearing officer's determinations that the respondent (claimant) sustained a compensable repetitive trauma injury with a date of injury of _____; that the appellant (carrier) waived the right to contest the compensability of the "claimed injury" by not timely contesting the injury; and that the claimant had disability from the compensable injury beginning on _____ and continuing through the date of the CCH. He also held that the injury did not extend to bilateral carpal tunnel syndrome (CTS).

The carrier has appealed and argues that there was no waiver because the claim was timely disputed within 60 days of the date that the carrier became aware that the claimant had a prior claim, asserting that a "reasonable adjuster" could not have been put on notice earlier of the prior worker's compensation injury. The carrier argues that there is a fatal conflict between the hearing officer's determination of a new compensable injury and the determination that the injury does not extend to bilateral CTS; as part of its argument, the carrier asserts that CTS was "the chief diagnosis of any and all doctors" that treated the claimant after her date of injury. The carrier further argues that because any inability to work was related to CTS and its treatment, the hearing officer erred by finding such a long period of disability. There is no response from the claimant contained in our file nor does the claimant appeal any aspect of the decision.

DECISION

Affirmed in part; reversed and rendered in part.

The claimant, in this case claimed a repetitive trauma CTS injury with the date of injury of _____. She worked for the employer for two months, and asserted that extensive typing of her reports, most of it after hours, lead to the problem. It was undisputed that the claimant had an October 1998 compensable upper extremity injury, diagnosed eventually as CTS and cubital tunnel syndrome for which she was paid impairment income benefits based upon an 11% impairment rating and a June 29, 1999, maximum medical improvement date. She did not have surgery but continued with conservative treatment, although surgery had been recommended. The claimant said that this condition resolved, in part because she performed jobs that did not require typing. In October 2000, she began her work for the employer and said she first noticed pain and tingling in her hands near the end of December 2000. She reported this around January 5, 2001, and began medical treatment. There are no records emanating from the claimant that seek to limit her claim to only a wrist strain. The claimant presented medical evidence that she sustained a new injury rather than a continuation of her prior CTS.

The evidence includes numerous medical records that show the adjusting firm's perforation date-stamp of February 20, 2001, and several of these include findings suggestive of CTS. Although carrier argues that "the first" medical record showed only a wrist strain, this report was received also on February 20 and is in fact dated after records opining the probable existence of CTS. One medical report in this group noted that she had performed similar duties prior to her current employment, and the employer for her previous compensable injury was named. However, the hearing officer found that first written notice of injury was received by the carrier on January 22, 2001; this apparently refers to the Employer's First Report of injury or Illness (TWCC-1), date-stamped on that date, which reports pain in the wrists, elbows, and thumbs, and notes that the claimant was typing on a laptop. The first Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) dated May 18, 2001 (although the date of filing with the Texas Workers' Compensation Commission was not proven), listed the date of written notice as January 22, 2001, the injury as CTS, and the basis for defense was that the claimant had only a continuation of her prior compensable injury and did not report her injury within thirty days. It was not until a second TWCC-21, dated July 24, 2001, and describing the injury as "wrist," that the carrier raised the alternative argument that any injury was limited to a bilateral wrist strain/sprain. (It may be the second TWCC-21 that caused the otherwise unexplained casting of the CTS injury into an "extent of injury" issue.)

It is the first written notice of an injury, not discovery of facts constituting a defense, which begins the 7- and 60-day deadlines set out in Section 409.021. Texas Workers' Compensation Commission Appeal No. 93967, decided December 9, 1993. The Appeals Panel has held that the TWCC-1 is, by definition, the first written notice of injury, and it is the carrier's active investigation that should supply the diagnoses and scope of that injury. Texas Workers' Compensation Commission Appeal No. 962210, decided December 18, 1996 (Undecided). Although Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 124.3(c) (Rule 124.3(c)) states that 409.021 does not apply to an "extent of injury" dispute, the rule cannot be interpreted in a way that would simply allow a dilatory carrier to recast the primary claimed injury issue as an "extent issue" and thereby read the mandates of Section 409.021 out of existence entirely. As the preamble to the Rule notes:

Section 409.021 is intended to apply to compensability of the injury itself or the carrier's liability for the claim as a whole, not individual aspects of a claim.

However, characterization and acceptance of an injury as a strain will not serve to convert the primary injury into an "individual aspect" for purposes of circumventing the requirements of Section 409.021. See Texas Workers' Compensation Commission Appeal No. 93491, decided August 2, 1993. We observe that this provision of subsection (c) is the first sentence in the portion of the rule having to do with conditions that don't appear related to the compensable injury . . . in short, situations where the original injury has grown to include additional conditions that were not apparent within the first 60 days. That is not the case here.

As the carrier itself emphasizes in its appeal, CTS was the “chief diagnosis,” and the heart of the claimed injury and period of disability in this case. The hearing officer has found a waiver of the “claimed injury.” This decision is readily affirmable. Although he says the waiver issue is “moot” in light of his agreement that there was a repetitive trauma injury, it is the waiver issue that moots further inquiry into the defense asserted in the first untimely TWCC-21: that the CTS was preexisting. Section 409.021(c). We cannot intelligently review the record on the appealed issues of injury, waiver, and disability without confronting the recasting of the primary injury in this case as an “extent” issue, because whether CTS is the claimed injury undercuts all these issues. Because we do agree in this case that the “claimed injury” clearly included CTS, the carrier was therefore obligated to dispute the compensability of CTS in 60 days but waived such dispute. The legal consequence of the hearing officer’s waiver finding is that he was precluded from adjudicating the merits of the untimely TWCC-21s, in this case the assertion that the CTS was the continuation of a preexisting injury. To resolve the “fatal conflict” in the decision, we therefore reverse the conclusion of law (unsupported by findings of fact) that the compensable injury did not “extend” to CTS and render a decision that the waived and therefore compensable injury includes CTS. The hearing officer’s determination that the claimant had disability from the compensable injury is affirmed as supported by sufficient evidence.

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

**CT CORPORATION
350 NORTH ST. PAUL
DALLAS, TEXAS 75201.**

Susan M. Kelley
Appeals Panel

CONCUR:

Judy L. S. Barnes
Appeals Judge

Robert Potts
Appeals Panel