

APPEAL NO. 040918
FILED JUNE 10, 2004

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on March 22, 2004. The hearing officer determined that the appellant's (claimant) _____, compensable injury does not extend to nor include injury to the neck, back, or any mental injury; and that the respondent (carrier) did not waive the right to contest compensability of the claimed injury by not timely contesting the injury in accordance with Sections 409.021 and 409.022. The claimant appealed the determination that the _____, compensable injury does not extend to the neck and the waiver determination. The carrier responded, urging affirmance. The hearing officer's determination that the _____, compensable injury does not extend to nor include the back or any mental injury has not been appealed and has become final. Section 410.169.

DECISION

Reversed and rendered.

The hearing officer erred in determining that the carrier did not waive the right to contest compensability of the claimed neck injury by not timely contesting the injury in accordance with Section 409.021. The hearing officer found that the carrier failed to file a dispute of the claimed injury within seven days of June 27, 2003. That determination has not been appealed by either party. In reaching his determination regarding waiver, the hearing officer stated the following:

On the issue of waiver, the claimant contended that the carrier was aware of the claimed neck injury from the first, and was therefore precluded from contesting its existence now in the guise of the "extent of injury" dispute. Even if that position were legally sound, it is not entirely clear that such was factually the case. The carrier indicated that it received first notice of the claimed injury on June 27, 2003; the employer's documentation from which that notice was gleaned indicates that only a shoulder injury was involved. There is some evidence that the carrier's adjuster was aware of at least a possible neck injury, and certainly of complaints of neck pain, by July 8, 2003; however, that is beyond the seven-day time period after notice of injury during which the carrier may mount its dispute. There is no clear, persuasive evidence to the effect that the carrier had notice of an actual cervical spine or neck injury during the seven day [sic] following June 27, 2003. Consequently, this must be regarded as a legitimate "extent" dispute that is not subject to carrier waiver.

The claimant testified that he sustained the injuries which make the basis of this claim on _____, when he was struck in the right shoulder by a piece of

machinery. The claimant testified that the blow knocked him into a cage, and that he injured his neck, along with his shoulder, at that time. In evidence is an emergency room report dated _____. The report indicates that the claimant's chief complaints involved pain in the right shoulder, neck, and left hip due to an injury at work. Also in evidence is an Employee's Notice of Injury or Occupational Disease and Claim for Compensation (TWCC-41) which was signed by the claimant on June 25, 2003, and stamped as being received by the Texas Workers' Compensation Commission (Commission) that same day. In the box which inquires about the nature of the injury, the claimant clearly states "neck." An Employer's First Report of Injury or Illness (TWCC-1) dated June 27, 2003, only lists a shoulder injury. We note that the box for the doctor's name lists Medical Center Hospital, the location where the claimant sought treatment on the date of injury. On July 8, 2003, the carrier submitted a Request for Designated Doctor (TWCC-32) to the Commission. Page two of that document indicates that the injury involved "RT. NECK-SHOULDER." Two Payment of Compensation or Notice of Refused/Disputed Claims (TWCC-21) dated July 17, 2003, were filled out by the carrier. Both indicate that the carrier received first written notice of the claimed injury on June 27, 2003, that the nature of the injury involved the shoulder, and that benefits would be paid as they accrued. On August 5, 2003, the carrier filled out a third TWCC-21 in which it disputed that the compensable injury extended to the claimant's neck, back, and psychological issues.

Based upon the record before us, we find that the carrier has waived the right to contest the compensability of the claimed neck injury. It is clear from the evidence that from the very outset of the injury, the claimant was claiming that he injured his neck on the date of injury. The emergency room report from the date of injury supports this. The claimant's TWCC-41 noted that the body parts affected are his right shoulder, mid back, and neck. While the employer's TWCC-1 is silent as to the neck, it does indicate the hospital where the claimant had received treatment, and that initial hospital report clearly indicates the claimant was claiming a work-related neck injury on that date. The claimant's TWCC-41 was filed with the Commission prior to the carrier receiving the TWCC-1 from the employer. The carrier's adjuster requested a designated doctor examination with the neck listed as an injury before it ever filed a TWCC-21.

In Texas Workers' Compensation Commission Appeal No. 030831, decided May 22, 2003, the Appeals Panel noted that Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 124.3(c) (Rule 124.3(c)) provides that Section 409.021, regarding the initiation of benefits and carrier waiver, does not apply to "extent of injury" disputes, but that the Appeals Panel has said that that rule cannot be interpreted in a way that would allow a dilatory carrier to recast the primary claimed injury issue as an "extent issue" and thereby avoid the mandates of Section 409.021. Based upon the above-mentioned evidence, all of which was in existence and readily discoverable at the time the carrier received its first written notice of this claim, it is clear in the instant case that the primary claimed injury included the neck, and had the carrier performed any kind of initial investigation of this claim, that would have been readily apparent. Since the carrier waived the right to contest compensability of the injury, the claimant's primary claimed injury to his neck became compensable as a matter of law, and it was error for the

hearing officer to treat the neck as an extent-of-injury issue. Appeal No. 030831, *supra*, Texas Workers' Compensation Commission Appeal No. 023101, decided January 30, 2003; and Texas Workers' Compensation Commission Appeal No. 022183, decided October 9, 2002.

While not raised by either party on appeal, we distinguish this case from the recent Texas Court of Appeals decision in TIG Premier Insurance Company v. Pemberton and Texas Workers' Compensation Commission, 127 S.W.3d 270, 274 (Tex. App.-Waco 2003, pet. denied). The issue in Pemberton was a clear extent-of-injury case, that is to say, the complained-of condition, deep vein thrombosis (DVT), developed some time after the original injury, and the issue was whether the DVT was causally related to the original compensable injury, and whether the carrier waived the right to dispute the compensability of the DVT. Under the circumstances of the Pemberton case, the Court of Appeals held that the waiver provision of Section 409.021(c) applied only to the carrier's initial response to a notice that an employee has been injured. In the instant case, we find that the claimant's neck injury was part of the "overall injury," and that the waiver provision of Section 409.021 applies. Pemberton, *supra*.

The hearing officer's decision that the _____, compensable injury does not extend to include an injury to the neck, and that the carrier did not waive the right to contest compensability of the claimed neck injury by not timely contesting the injury in accordance with Sections 409.021 and 409.022 is reversed and a new decision is rendered that the claimant's _____, compensable injury includes an injury to the neck as a matter of law because the carrier waived the right to contest compensability of the claimed neck injury by not timely contesting the injury in accordance with Sections 409.021 and 409.022.

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

**CORPORATION SERVICE COMPANY
800 BRAZOS
AUSTIN, TEXAS 78701.**

Daniel R. Barry
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Veronica L. Ruberto
Appeals Judge