

APPEAL NO. 041097  
FILED JUNE 23, 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 April 26, 2004. The hearing officer decided that: (1) the compensable injury of \_\_\_\_\_, extends to include a herniated disc at L3-4 but does not extend to include herniated discs at L2-3 or L4-5; and (2) the appellant/cross-respondent (carrier) waived its right to contest compensability of the low back injury by not timely disputing the injury in accordance with Section 409.021, but it did not waive the right to dispute the extent of injury. The carrier appeals the extent-of-injury determination with regard to L3-4, on sufficiency of the evidence grounds. The respondent/cross-appellant (claimant) cross-appeals, essentially asserting that the dispute in this case presented a waiver issue, not an extent-of-injury issue. In the alternative, the claimant urges affirmance of the hearing officer's extent-of-injury determination with regard to L3-4. The carrier urges affirmance of the hearing officer's waiver determination, citing TIG Premier Insurance Company v. Pemberton and Texas Workers' Compensation Commission, 127 S.W.3d 270, 274 (Tex. App.-Waco 2003, pet. denied). The hearing officer's determination that the "carrier waived the right to contest compensability of the low back injury by not timely contesting it" was not appealed and has become final. Section 410.169.

DECISION

Reversed and rendered.

The claimant was a delivery driver. The claimant testified that on \_\_\_\_\_, he picked up a case of beer to be delivered, turned, and his low back tightened to where he "could barely even move." The claimant sought medical care on July 15, 2002, with the company doctor. The initial medical reports, dated July 15, 2002, indicate that the claimant was suffering from pain in the low back radiating down the right leg. The claimant was diagnosed with a lumbosacral strain. Notwithstanding, the report indicated that a lumbar MRI would be necessary, "[i]f he is not a lot better in one week...." The report of the following week, dated July 23, 2002, assessed "possible lumbar stenosis; lesion possibly at L3-L4." An MRI of the lumbosacral spine was ordered at that time. The MRI report, dated July 26, 2002, revealed large disc herniations at L2-3, L3-4, and L4-5, with significant extrusion of the disc material resulting in central canal stenosis at the L4 level. The claimant returned for a follow-up examination on July 31, 2002. The doctor opined that the claimant's condition was "due to an old injury and is not an acute finding." The claimant denied any prior low back injury, except for occasional soreness and stiffness. The claimant testified that he only began to experience radicular pain following his work-related injury. A subsequent CT myelogram confirmed the earlier MRI results and revealed significant right lateral recess stenosis at L4.

The evidence shows that the carrier received first written notice of the injury on July 22, 2002. The carrier filed its initial Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) on August 25, 2003, in which it accepted a lumbar strain injury but disputed compensability of the lumbar disc herniations. In view of this evidence, the hearing officer determined that the carrier waived its right to contest compensability of the claimant's low back injury. This determination was not appealed by either party and has become final. The hearing officer went on to determine that the carrier could, nonetheless, dispute the disc herniations at L2-3, L3-4, and L4-5, as an extent-of-injury issue. The hearing officer, then, determined that the disc herniation at L3-4 was compensable, while the disc injuries at L2-3 and L4-5 were not compensable.

As stated above, the claimant argues that the dispute with regard to the lumbar disc herniations presented a waiver issue, not an extent-of-injury issue as asserted by the carrier. 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. Notwithstanding, we have held that the 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. See Texas Workers' Compensation Commission Appeal No. 022454, decided November 18, 2002; Texas Workers' Compensation Commission Appeal No. 021907, decided September 16, 2002; Texas Workers' Compensation Commission Appeal No. 021569, decided August 12, 2002; and Texas Workers' Compensation Commission Appeal No. 022183, decided October 9, 2002. The evidence, in this case, clearly shows that the primary claimed injury included the claimant's low back/lumbar spine. As such, the carrier was obligated to dispute the compensability of the claimed lumbar injuries in accordance with Section 409.021. The carrier failed to do this. Accordingly, the claimant's lumbar injuries became compensable as a matter of law, and it was error for the hearing officer to treat such injuries as an extent-of-injury issue.

We distinguish this case from the recent Texas Court of Appeals decision in Pemberton, *supra*. The Pemberton case involved a clear extent-of-injury issue, *viz.*, deep vein thrombosis which developed several months after the original injury. Under those circumstances, 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 hold that the claimant's lumbar injury was part of the "overall injury," and that the waiver provision of Section 409.021 applies. See Texas Workers' Compensation Commission Appeal No. 040918, decided June 10, 2004.

For the reasons stated above, we reverse the hearing officer's decision and order and render a new decision that the carrier waived its right to dispute the primary claimed injuries at L2-3, L3-4, and L4-5, and that such injuries are compensable as a matter of law.

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

**CORPORATION SERVICE COMPANY  
800 BRAZOS, COMMODORE 1, SUITE 750  
AUSTIN, TEXAS 78701.**

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Edward Vilano  
Appeals Judge

CONCUR:

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Thomas A. Knapp  
Appeals Judge

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Robert W. Potts  
Appeals Judge