APPEAL NO. 041322
FILED JULY 16, 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 (CCH) was held on April 26, 2004 The hearing officer decided that: (1) the compensable injury of _____, does not extend to and include a herniated disc at C4-5, a herniated disc at L4-5, or a herniated disc at L5-S1; and (2) the respondent (self-insured) has not waived the right to contest the compensability of the cervical disc syndrome, herniated disc at C4-5, lumbar disc syndrome, and the herniated discs at L4-5 and L5-S1. The appellant (claimant) appeals on sufficiency of the evidence grounds. The self-insured urges affirmance. We note that representatives of (Hospital) and (Orthopedic Center) (subclaimants) were present at the hearing below. The subclaimants were not active participants in the CCH, and they did not file briefs on appeal.

DECISION

Reversed and rendered.

The claimant admitted that she had a prior compensable injury to her neck and low back on (prior date of injury). MRIs indicated that the claimant had disc herniations at L4-5 and L5-S1 at that time. The claimant testified that she was a candidate for spinal surgery but that surgery was denied as not medically necessary.

On _____, the claimant, who was employed as a custodian, went to check the boys' restroom. One of the sinks was clogged and there was soapy water on the floor. The claimant testified that she slipped and fell onto her back, when trying to turn off the faucet. She tried to get up while holding onto the sink, but fell onto her knees and hurt her arm and shoulder. She testified that she felt pain in her back, neck, knee, and shoulder. The evidence shows that the claimant sought medical treatment on February 22, 2000, "with a chief complaint of pain to the cervical spine with radiculopathy to both upper extremities and pain to the lumbosacral spine as well as the left knee and left shoulder." The claimant was diagnosed with cervical syndrome and thoracic/lumbosacral syndrome. Subsequent MRIs showed the existence of disc herniations at C4-5, L4-5, and L5-S1. A report from the self-insured's peer review doctor corroborates that the original claimed injury included the neck and low back.

In a written statement, the claimant's supervisor states, "[claimant] reported that she had injured her left shoulder, left knee, neck and back…an accident report was filed (which at this time is lost)." It is undisputed that the self-insured received first written notice of the injury on February 22, 2000, and initiated the payment of temporary income benefits on March 8, 2000. The self-insured first disputed an injury to the claimant's spine on August 20, 2002.

The hearing officer erred in making the complained-of determinations. 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 self-insured 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, shows that the primary claimed injury included the claimant's cervical and lumbar spine. As such, the self-insured was obligated to dispute the compensability of the alleged cervical and lumbar spine injuries in accordance with Section 409.021.

Section 409.021(a), applicable to claims based on an injury which occurred before September 1, 2003, provides that an insurance carrier shall, not later than the seventh day after the receipt of written notice of an injury, begin the payment of benefits as required by the 1989 Act or notify the Texas Workers' Compensation Commission (Commission) and the employee in writing of its refusal to pay benefits. In Texas Workers' Compensation Commission Appeal No. 030380-s, decided April 10, 2003, citing Continental Cas. Co. v. Downs, 81 S.W.3d 803 (Tex. 2002), we interpreted this requirement to mean that a carrier must take some action within seven days of receiving written notice of an injury, and we admonished that a carrier which does nothing and later asserts that it "intended to pay in accordance with the 1989 Act [when benefits accrued]," does so at its own risk. *See also* Texas Workers' Compensation Commission Appeal No. 040874, decided June 10, 2004 (holding that the carrier must satisfy Section 409.021, even if the claimed condition was previously found compensable with regard to another date of injury). The evidence, in this case, shows that the self-insured failed to take the requisite action within seven days of receiving written notice of the injury. Accordingly, the self-insured waived its right to dispute the primary claimed injury in this case, which included the claimant's cervical and lumbar spine.

For the reasons stated above, we reverse the hearing officer's decision and order and render a new decision that the self-insured waived its right to dispute the primary claimed injuries, including cervical disc syndrome, a herniated disc at C4-5, lumbar disc syndrome, and the herniated discs at L4-5 and L5-S1, and that such injuries are compensable as a matter of law.

The true corporate name of the insurance carrier is **(a self-insured governmental entity)** and the name and address of its registered agent for service of process is

SUPERINTENDENT
(ADDRESS)
(CITY), TEXAS (ZIP CODE).

_____
Edward Vilano
Appeals Judge

CONCUR:

_____
Daniel R. Barry
Appeals Judge

DISSENTING OPINION:

I respectfully dissent. I would affirm the hearing officer's decision on both the extent of injury and waiver determinations. In my opinion the evidence presented at the CCH does not support a reversal of the hearing officer's decision.

_____
Margaret L. Turner
Appeals Judge