

APPEAL NO. 042168  
FILED OCTOBER 18, 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 scheduled for May 12, 2003, but was continued to and held on October 7, 2003, with the record closing on April 19, 2004. In Texas Workers' Compensation Commission Appeal No. 041244, decided July 15, 2004, the Appeals Panel remanded the case back to the hearing officer for reconstruction of the record and inclusion of certain information referred to in the decision and order. The hearing officer, in this case, recites that the missing portions of the record had been located and included in the new decision and order on remand and that no further hearing was necessary.

With regard to the two issues before her, the hearing officer determined that the respondent's (claimant) compensable injury of \_\_\_\_\_, does extend to and includes "the current disc pathology at L3-L4 and L5-S1" and that the "[appellant (carrier)] waived the right to contest the compensability of the claimed injury at L3-L4 but has not waived the right to contest compensability of the claimed injury at L5-S1."

The carrier appeals, contending that the hearing officer was not impartial, that the hearing officer incorrectly determined that the compensable injury extends to and includes the current disc pathology at L3-4 and L5-S1 and that the carrier waived the right to contest compensability of the claimed injury at L3-4. The determination that the carrier has not waived the right to contest compensability of the claimed injury at L5-S1 has not been appealed and has become final pursuant to Section 410.169.

The claimant responds that the carrier has not properly appealed the hearing officer's Decision and Order on Remand because the carrier used the docket number for the decision and order in Texas Workers' Compensation Commission Appeal No. 041244, *supra*, and otherwise urges affirmance.

DECISION

Affirmed in part and reversed and rendered in part.

First we address the claimant's contention that the carrier failed to appeal the Decision and Order on Remand. In that the carrier's appeal is dated August 31, 2004, and has attached to it a copy of the hearing officer's Decision and Order on Remand, we consider the claimant's contention somewhat disingenuous. We consider the carrier's use of the wrong docket number as being merely a clerical error.

Next we address the carrier's contention that the hearing officer "was biased against Carrier" and the decision was "venomous," as being totally unfounded and without basis. The examples cited merely reflect disagreement with the hearing officer on the findings, not bias or prejudice.

On the merits, regarding the extent-of-injury issue, the record contains multiple medical reports, some of which the carrier summarizes. The hearing officer's Background Information Section of the decision and order recites the evidence that the hearing officer relied on in making her decision on this issue. With conflicting medical evidence it is the hearing officer, as the sole judge of the weight and credibility of the evidence, to determine what facts had been established. This is equally true of medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ)). The hearing officer's determination on this issue is supported by sufficient evidence and no sound basis exists for us to reverse this determination on appeal.

It is undisputed that the claimant sustained a compensable low back lifting injury on \_\_\_\_\_. The hearing officer, in an unappealed finding, determined that the carrier received the Employer's First Report of injury or Illness (TWCC-1) (first written notice) of the claimed injury on March 18, 1997. (There is also other documentation to support the determination that the carrier received its first written notice of the claimed injury on March 18, 1997.) The hearing officer then goes on to make detailed findings regarding a CT scan performed on April 16, 1997, and an MRI performed on May 9, 1997, and when those tests were billed and paid for by the carrier. The hearing officer apparently analyzes the case on the basis of what the carrier could have reasonably discovered in a diligent investigation during the 60 days after the carrier received its first written notice of the injury.

Prior to the March 13, 2000, change to Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 124.3 (Rule 124.3), a carrier had 60 days to dispute the compensability of an injury or waived the right to do so.<sup>1</sup> Based upon Appeals Panel decisions prior to March 13, 2000, every time the carrier was notified of a new diagnosis, condition, or claimed body part, the carrier had an additional 60 days from the date it received the notice to dispute the diagnosis, condition, or body part, or it again waived. See Texas Workers' Compensation Commission Appeal No. 980822, decided June 3, 1998; Texas Workers' Compensation Commission Appeal No. 962415, decided January 10, 1997. In other words, prior to the adoption of Rule 124.3, the carrier would waive the extent of injury if it failed to dispute the additionally claimed diagnosis, condition, or body part within 60 days of receiving notice. When Rule 124.3 was changed effective March 13, 2000, it provided that the waiver provision of Section 409.021 does not apply to issues of extent of injury.

Section 409.021 provides, in pertinent part, that for injuries occurring prior to September 1, 2003, an insurance carrier shall, not later than the 7th 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.

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<sup>1</sup> We note that this was prior to the Texas Supreme Court's holding in Continental Casualty Company v. Downs, 81 S.W.3d 803 (Tex. 2002), which held that the carrier only had 7 days to pay or dispute a claim before it waived the right to contest compensability.

The question then becomes what is the injury the carrier has waived (not necessarily what the carrier says it accepted in its Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) dated February 17, 2003).

Texas Workers' Compensation Commission Appeal No. 041738-s, decided September 8, 2004, established that when a carrier does not timely dispute the compensability of a claim, the compensable injury is defined by the information that could have been reasonably discovered by the carrier's investigation prior to the expiration of the waiver period, which in this case would be 7 days pursuant to Section 409.021 as interpreted by Downs, *supra*. There is no evidence what the injury was within the 7 days after the March 18, 1997, written notice to the carrier. Subsequently, in February 2003, the carrier accepted a compensable strain/sprain injury.

In the instant case the carrier would have had no way to discover "the current disc pathology at L3-4" within 7 days of March 18, 1997. Consequently the "current disc pathology" has become a question of extent of injury and waiver does not apply. Our decision in Appeal 041738-s, *supra*, was followed in Texas Workers' Compensation Commission Appeal No. 042048-s, decided October 11, 2004, where the Appeals Panel cited the Preamble to Rule 124.3 which states that Section 409.021 is intended to apply to the compensability of the injury itself or the carrier's liability for the claim as a whole, not individual aspects of the claims.

Accordingly, we reverse the hearing officer's decision that the carrier has waived the right to contest the compensability of the claimed injury at L3-4 and render a new decision that the carrier has not waived the right to contest the compensability of the claimed injury at L3-4. We affirm the hearing officer's decision and order on the extent-of-injury issue.

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

**JAMES H. MOODY II  
901 MAIN STREET  
DALLAS, TEXAS 75202.**

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Thomas A. Knapp  
Appeals Judge

CONCUR:

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Daniel R. Barry  
Appeals Judge

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Robert W. Potts  
Appeals Judge