

APPEAL NO. 050833
FILED JUNE 2, 2005

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 March 3, 2005. The disputed issues were: (1) whether the appellant's (claimant) compensable injury of _____, includes the left knee, left arm and wrist, right elbow and right shoulder; (2) whether the claimant had disability resulting from the compensable injury sustained on _____, and if so, for what period; and (3) whether the respondent (carrier) "waived the right to dispute compensability of the claimed injury by not timely contesting the injury in accordance with TEX. LABOR CODE ANN §409.021 and §409.022." The hearing officer determined that: (1) the compensable injury of _____, does not extend to or include the left knee, left arm and wrist, right elbow, or right shoulder; (2) the claimant had disability resulting from the compensable injury sustained on _____, from December 26, 2003, up to February 21, 2004; and (3) the carrier has not waived the right to contest compensability of the claimed injuries by failing to timely contest the injuries in accordance with Section 409.021. The claimant appeals the hearing officer's determinations on the extent and waiver issues. The carrier requests affirmance. There is no appeal of the hearing officer's determination on the disability issue.

DECISION

Affirmed in part and reversed and remanded in part.

BACKGROUND INFORMATION

The parties stipulated that the claimant sustained a compensable injury on _____. The claimant testified that she was at work unloading boxes of merchandise from a cart, with the boxes stacked above the level of her head, when the boxes fell on her and she fell down on both knees. The claimant said that she had bruises on her hands and legs and that her primary complaints were about her hands, knees, shoulder, and arms. The claimant said that there was talk about doing surgery on both knees, but surgery has not been done. The claimant said that she is currently having problems with knees, hands, arms, and shoulders.

The claimant went to a medical clinic on December 16, 2003, and was diagnosed as having a strain of the right upper extremity and lower extremity. The claimant continued treatment at the medical clinic through at least February 3, 2004. Most of the complaints noted in the daily medical notes have to do with the claimant's right hand, right wrist, and right knee, but there are some references to other body parts. On December 17, 2003, x-rays were taken of the claimant's right and left elbows, right and left wrists, right and left humerus, right and left legs, right and left knees, right and left femurs, and right and left ankles. The x-rays were unremarkable except for the right ankle, which had a subtle bony irregularity consistent with an avulsive fracture. A

December 24, 2003, medical note provides a diagnosis of right upper extremity/lower extremity strain, but in the notes section mentions, in addition to right knee and right hand problems, left shoulder pain with bruises to the left anterior deltoid. The next sentence in the notes section mentions something about a fibers shoulder w/sprain. A December 29, 2003, medical note provides a diagnosis of right upper extremity/lower extremity strain, but appears to state in the notes that the claimant also had pain in the left knee.

An x-ray of the right hand done on December 31, 2003, showed minimal interphalangeal joints degenerative arthrosis changes. An x-ray of the left knee done on December 31, 2003, was unremarkable. A medical form from the clinic dated January 21, 2004, and entitled "Workers' Compensation – Follow-up," contains assessments of neuritis of the right hand, left and right wrist strain, and right and left knee strain. Subsequent daily medical notes continue to provide a diagnosis of right upper extremity/lower extremity strain, with notation of complaints of the right hand, wrist, forearm, and knee. A report of a January 22, 2004, MRI of the right knee gave an impression of tiny baker's cyst and degenerative appearing signal changes of the menisci. A report of a January 22, 2004, MRI of the right wrist noted a probable defect of the fibrocartilage, fluid suggestive of tenosynovitis, and osteoarthritis.

(Dr. F), who had been treating the claimant at the medical clinic, provided a diagnosis of right upper extremity/lower extremity strain in January 2004 work status reports. In a letter to the carrier dated January 8, 2004, Dr. F noted that he was providing information that was requested by the carrier. In that letter, Dr. F wrote that the claimant told him that boxes of notebook paper fell on her right arm and leg. With regard to diagnosis and clinical findings, Dr. F wrote in the January 8, 2004, letter to the carrier: "DX-R elbow/forearm, wrist, shoulder, knee strain; Findings-ecchymosis and edema of R UE/LE."

Dr. F referred the claimant to (Dr. N), who reported on January 29, 2004, that the injury at work occurred when a box hit the claimant's wrist, hand, and knee and that the claimant was complaining of right wrist, hand, and knee pain. Dr. N noted that the claimant described no symptoms on the left side. Dr. N provided an impression of posttraumatic injury to the wrist and hand on the right side, with no evidence of nerve entrapment, and a traumatic injury to the right knee, with no evidence of nerve entrapment.

The claimant was evaluated by (Dr. M) on February 24, 2004. Dr. M noted that he was the designated doctor for determination of maximum medical improvement (MMI) and impairment rating. Dr. M noted that on the day of injury, heavy boxes fell on the claimant's right arm and leg. With regard to the claimant's right arm, Dr. M noted pain in the right hand and forearm, but that examination of the elbow and shoulder was normal, as was an inspection of the right knee. Dr. M reported that the claimant was not at MMI because she needed to see a hand surgeon.

The claimant began seeing (Dr. K) in February 2004 and his reports through August 24, 2004, are in evidence. Dr. K noted that the claimant was injured at work when boxes fell on her right wrist, hand, and leg. In a report dated February 18, 2004, Dr. K diagnosed traumatic injury to the right hand/wrist and traumatic injury to the right leg/knee. A report of an April 27, 2004, MRI of the right wrist noted a suggestion of tearing of the fibrocartilage. A June 2, 2004, report of a bone scan of the claimant's wrists noted a mild tracer uptake of the first carpometacarpal articulation of the wrists and hands bilaterally, likely degenerative. A report of a July 12, 2004, MRI of the left knee provided conclusions of a tear of the posterior horn of the lateral meniscus, that may be on the basis of an acute injury, and a possibly acute injury to the quadriceps tendon. In an addendum to the left knee MRI report, the radiologist noted that the tear of the lateral meniscus and the injury to the quadriceps tendon may be on the basis of either acute or chronic injury. On July 26, 2004, Dr. K noted that both of the claimant's knees were bothering her and diagnosed a post on-the-job injury of traumatic injury bilateral knees/legs, ankles, and right wrist/hand. On August 24, 2004, Dr. K noted that (Dr. B) had requested approval to do an arthroscopy of the left knee.

The claimant had a functional capacity evaluation done on February 26, 2004, and the results were reported to be invalid because of submaximal effort.

Dr. K referred the claimant to (Dr. W) for evaluation of the right wrist/hand. Dr. W reported on March 16, 2004, that the claimant's injury occurred when a stack of boxes fell on her right arm and leg. Dr. W noted problems with the claimant's right thumb and wrist.

Dr. K referred the claimant to Dr. B, who noted in an August 10, 2004, report that consideration should be given to having surgery done on both knees.

Dr. M reported on August 31, 2004, that the claimant was scheduled for knee surgery in September 2004 and that she was still not at MMI.

(Dr. DM) examined the claimant and reviewed medical records at the request of the carrier on November 12, 2004, and he reported that the claimant stated that she injured her right side, primarily her right upper extremity from the shoulder to the wrist and also the right knee and lower leg when boxes fell against her right side. Dr. DM also noted that the claimant stated she was having problems with both knees. Dr. DM reported that at most, the claimant sustained contusions to the right upper extremity and right knee, with no evidence of major structural injuries, and that her left knee condition is unrelated to her work injury.

EXTENT OF INJURY ISSUE

There is conflicting evidence with regard to whether the claimant's compensable injury includes the left knee, left arm, left wrist, right elbow, and right shoulder. Most of the medical records concern possible injury to the claimant's right hand, right wrist, and right knee from boxes falling on her right side at work. There is nothing in the medical

records that mentions the claimant falling down on her knees when she was hit by the boxes, as was testified to by the claimant, nor is there anything in the medical records about boxes hitting the claimant's left side. The hearing officer determined that the compensable injury does not extend to or include the left knee, left arm and wrist, right elbow, or right shoulder. The hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). As the finder of fact, the hearing officer resolves the conflicts in the evidence and determines what facts have been established. We conclude that the hearing officer's determination against the claimant on the issue of the extent of the compensable injury is supported by sufficient evidence and is not so against the great weight and preponderance of the evidence as to be clearly wrong and unjust

WAIVER ISSUE

As noted, one of the disputed issues was "Has the carrier waived the right to dispute compensability of the claimed injury by not timely contesting the injury in accordance with TEX. LABOR CODE ANN §409.021 and §409.022?"

In evidence is a Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) dated January 19, 2004, in which the nature of the injury is stated to be a contusion, without reference to a body part; the carrier's first written notice of injury is stated to have been received on _____; and the dispute is stated as follows:

Carrier disputing entitlement to medical treatment and or indemnity benefits as related to the left arm, left leg, right shoulder and right elbow. Carrier denies these injuries incited, accelerated or aggravated the condition. There is no causal relationship between this condition and the right hand and right leg of which the on the job injury is limited to and no other injury naturally resulted to any other part of the body.

The January 19, 2004, TWCC-21 does not contain a date stamp indicating receipt by the Texas Workers' Compensation Commission (Commission).

Because the compensable injury occurred on or after September 1, 2003, Section 409.021 as amended effective September 1, 2003, applies. Pursuant to Section 409.021(a-1), an insurance carrier's failure to comply with the 15-day pay or dispute provision of subsection (a) does not waive the carrier's right to contest compensability of the injury as provided by subsection (c), which provides that if an insurance carrier does not contest the compensability of an injury on or before the 60th day after the date on which the insurance carrier is notified of the injury, the insurance carrier waives its right to contest compensability, and that the initiation of payments by an insurance carrier does not affect the right of the insurance carrier to continue to investigate or deny the compensability of an injury during the 60-day period.

In the instant case, the hearing officer found that the carrier received notice of the injury on _____, which was the date of the injury, and which is reflected as

the date first written notice of injury was received by the carrier in the January 19, 2004, TWCC-21. The 60th day after _____, was Tuesday, (60th day after the date of injury).

Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 124.3(e) (Rule 124.3(e)) provides that Section 409.021 and subsection (a) of Rule 124.3 do not apply to disputes of extent of injury. In TIG Premier Insurance Company v. Pemberton, 127 S.W.3d 270 (Tex. App.-Waco 2003, pet. denied), the court stated that Section 409.021 pertains only to the "overall injury" and that Section 409.021(c)'s 60-day provision applies only to the carrier's initial response to a notice that an employee has been injured.

In Texas Workers' Compensation Commission Appeal No. 041738-s, decided September 8, 2004, the Appeals Panel considered the question of what is the nature of the injury that becomes compensable by virtue of carrier waiver and said that:

We hold that the injury that becomes compensable by virtue of waiver is not necessarily limited by the information listed on the first written notice of injury. Rather the nature of the injury will be defined by that information that could have been reasonably discovered in the carrier's investigation prior to the expiration of the waiver period.

In Texas Workers' Compensation Commission Appeal No. 042048-s, decided October 11, 2004, the Appeals Panel noted that "prior to deciding whether a case presents an issue of waiver or extent of injury, one must first define what the original injury was."

With regard to the waiver issue, the hearing officer stated in the Background Information section of his decision that:

Regarding the issue of carrier waiver, the state of the medical records, again, indicates that as of the time the carrier's 60-day limit for compensability disputes expired, the documented injuries extended only to the claimant's right knee and right hand and wrist. The injuries under consideration were not included in the claimant's diagnosis. This, then, is a true extent dispute, and waiver is not applicable.

The claimant appeals the hearing officer's Finding of Fact No. 6 that "The claimed injuries to the left extremities and the right shoulder were not diagnosed as part to [sic] the compensable injury within 60 days of _____, the date Carrier received notice of the claimed injury." The claimant also appeals the hearing officer's conclusion of law that "The Carrier has not waived the right to contest compensability of the claimed injuries by failing to timely contest the injuries in accordance with TEX. LABOR CODE ANN §409.021."

With regard to the disputed body parts, by February 10, 2004, the medical records from the medical clinic where the claimant was being treated by Dr. F for her

compensable injury recorded left shoulder pain with deltoid bruises, left knee pain, a left wrist strain, a left knee strain, a right elbow strain, and a right shoulder strain. Thus, contrary to the hearing officer's decision, there were diagnoses related to the disputed body parts within the 60-day waiver period, some of which were made by Dr. F in response to a carrier request for information regarding the compensable injury, and some of which appear on a medical form noted as a workers' compensation follow-up. We hold that the hearing officer erred in making Finding of Fact No. 6.

We do not render a decision because of the TWCC-21 dated January 19, 2004, which is in evidence. At the CCH, the parties noted that the carrier's TWCC-21 dated January 19, 2004, which was within the 60-day period, did not contain a date stamp indicating Commission receipt of that form and the claimant's attorney asked the hearing officer to take official notice of the Commission Dispute Resolution Information System (DRIS) logs to determine when that form was filed with the Commission. It was the claimant's position that the DRIS logs would show that no dispute was filed until August 4, 2004. The carrier also requested that the hearing officer look at the Commission's records to determine the date the Commission received the TWCC-21, but also requested that the CCH record be held open so that the carrier could look for the file stamped copy of that form. It was the carrier's position that the TWCC-21 was timely filed and that the carrier could not waive an extent issue. The hearing officer said that he would take notice of the Commission file, except that the file was a (City 1) file and he is the (City 2) hearing officer so rather than do that, he would hold the CCH record open to see if the carrier could find the information because he would not be in a position to do so. The hearing officer said he would leave the CCH record open until Tuesday (March 8). There is no indication in the hearing officer's decision that the CCH record was left open or that any information was provided by the carrier if it was left open. There is no indication that the hearing officer took official notice of Commission records to ascertain the date the TWCC-21 was filed with the Commission. The hearing officer made no finding of fact with regard to the filing of the TWCC-21.

In Texas Workers' Compensation Commission Appeal No. 030295, decided March 27, 2003, the Appeals Panel stated that it had required that a hearing officer take official notice of essential Commission forms where timely filing requirements are in issue, and in that decision approved a hearing officer's action in taking official notice of a Notice of Injury (CS-11) form. In Texas Workers' Compensation Commission Appeal No. 002287, decided November 13, 2000, the Appeals Panel determined that a hearing officer acted within his authority in reviewing the Commission file and admitting into evidence a document that reflected when the dispute was filed, noting that the hearing officer was permitted to develop the record to include information essential to the resolution of the issue before him. In Texas Workers' Compensation Commission Appeal No. 010696, decided April 26, 2001, the Appeals Panel held that the hearing officer did not err in making the date-stamped copy of the carrier's TWCC-21, which the hearing officer obtained from the claim file, a hearing officer exhibit. In Appeal No. 010696, as in the instant case, the TWCC-21 in evidence did not contain a date stamp indicating when the Commission received the form. In Texas Workers' Compensation Commission Appeal No. 012101, decided October 22, 2001, the Appeals Panel

remanded for the hearing officer to take official notice of the date that the TWCC-21 was filed with the Commission.

We reverse the hearing officer's determination that the carrier did not waive its right to contest compensability of the claimed injuries, and we remand the case to the hearing officer for the hearing officer to take official notice of Commission records with regard to the filing of the carrier's TWCC-21 dated January 19, 2004; to make the documents and information that are officially noticed hearing officer exhibits; to allow the parties an opportunity to review documents and information officially noticed and to respond to them; and to make further findings of fact, conclusions of law, and a decision on the disputed waiver issue.

Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Commission's Division of Hearings pursuant to Section 410.202, as amended effective June 17, 2001, to exclude Saturdays and Sundays and holidays listed in Section 662.003 of the Texas Government Code in the computation of time in which a request for appeal or a response must be filed.

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

**CORPORATION SERVICE COMPANY
DBA CSC-LAWYERS INCORPORATING SERVICE COMPANY
701 BRAZOS STREET, NO. 1050
AUSTIN, TEXAS 78701.**

Robert W. Potts
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Margaret L. Turner
Appeals Judge