

APPEAL NO. 051017
FILED JUNE 22, 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 commenced on February 8, 2005, and concluded on April 11, 2005. With regard to the issues before him the hearing officer determined that the appellant/cross-respondent (claimant) is not entitled to lifetime income benefits (LIBs) based on the total and permanent loss of use of the upper extremities, lower extremities, or one upper extremity and one lower extremity, that respondent 2 (Subsequent Injury Fund (SIF)) is not liable for LIBs pursuant to Section 408.162, that the claimant's _____, compensable injury does extend to and include complex Regional Pain Disorder (CRPS or RSD) of the bilateral upper extremities and right lower extremity and that respondent/cross-appellant 1 (self-insured) waived the right to contest compensability of the CRPS of the bilateral upper extremities and right lower extremity.

The claimant appealed the LIBs determination summarizing the evidence in some detail and contending that the hearing officer erred in not correctly applying Section 408.161, the case of Travelers Insurance Company v Seabolt, 361 S.W.2d 204 (Tex. 1962), and the Appeals Panel decisions. The self-insured appealed the extent-of-injury issue, the carrier waiver issue and conditionally appealed the SIF issue if the Appeals Panel reversed the LIBs entitlement issue. The self-insured also responded to the claimant's appeal urging affirmance on the LIBs issue. The self-insured responded to the claimant and self-insured's appeals, urging affirmance. The file does not contain a response from the claimant.

DECISION

Affirmed in part and reversed and rendered in part.

The claimant was employed as a deputy sheriff for the self-insured. The claimant has an extensive history of various injuries as set out by the hearing officer. The claimant testified how he was kicked in the left knee and sustained a dislocated knee cap on _____. In 1998 another hearing officer determined that the claimant sustained a compensable left knee injury on _____. That determination was affirmed in Texas Workers' Compensation Commission Appeal No. 981814, decided September 17, 1998. A designated doctor found the claimant to be at maximum medical improvement (MMI) on September 22, 1999, with a 19% impairment rating (IR) which included a diagnosis of RSD and CRPS of the left lower extremity. The claimant testified that his right leg began bothering him in the "first part of 99." The first medical documentation of "RSD type symptoms" spreading to both legs is in a February 2001 note from the claimant's doctor, referencing "vein harvesting" in both legs in conjunction with a heart attack sometime in 2000.

ENTITLEMENT TO LIBS

Section 408.161 sets out the requirements for LIBs and provides LIBs for the loss of both feet at or above the ankle, loss of both hands at or above the wrist or the loss of one foot at or above the ankle and the loss of one hand at or above the wrist. The claimant's appeal, after summarizing the evidence from his perspective, asserts that the hearing officer did not apply the legal standard for LIBs set out in Seabolt, *supra*. We disagree. The hearing officer not only saw and heard the evidence presented at the CCH, but also had the benefit of observing the claimant and his demeanor at the CCH. The hearing officer made five factual determinations to support his conclusion that the claimant did not meet the requirements for entitlement to LIBs. The hearing officer's determination on this issue is supported by the evidence and is affirmed.

SIF NOT LIABLE FOR LIBS

In so far as this issue was contingently appealed and as we are affirming the hearing officer's determination regarding the LIBs issue we also affirm the hearing officer's determination that the SIF is not liable for LIBs.

EXTENT OF INJURY

There was conflicting medical evidence presented regarding this issue. Both the claimant's treating doctor and a carrier peer review doctor testified at the CCH. The hearing officer, as the sole judge of the weight and credibility of the evidence could, and apparently did, accept the treating doctor's reports and testimony on this issue. With conflicting evidence the hearing officer's decision on this issue is supported by sufficient evidence and is affirmed.

CARRIER WAIVER

The hearing officer determined that the carrier waived the right to contest compensability of CRPS of the bilateral upper extremities and right lower extremity stating in his Background Information section:

Carrier filed a letter dated November 1, 2004, to dispute the extent of Claimant's injury. Claimant's Ex. 8 at 1. The evidence presented does not appear to indicate that Carrier disputed the claim or paid benefits within 7 days of the date of first written notice or within 60 days of the date of first written notice.

There was no evidence when the carrier received the first written notice of the present claimed injuries. Fairly clearly the carrier received notice of the left knee injury sometime in 1997 and the compensability of the left knee injury was resolved in Appeal No. 981814, *supra*. As indicated there was no specific evidence of a date when the carrier was given written notice of the claimed upper extremities and right lower extremity injuries. Such a date might have possibly been in February 2001.

The provisions of Section 409.021 in effect for compensable injuries that occurred before September 1, 2003, 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 and the employee in writing of its refusal to pay benefits. 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. 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 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 9, 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 provisions of Section 409.021 do not apply to issues of extent of injury.

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 the 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 define what the original injury was."

In this case the original injury was clearly the compensable left knee injury and the original waiver period would have been in 1997. There was no diagnosis or evidence of CRPS/RSD of the upper extremities or lower right leg during the waiver period. The additional CRPS/RSD injuries only arose at some later date, not documented prior to February 2001, or at the very earliest a spread to the right leg in June 2000, based on the treating doctor's testimony. In any event, the additional

CRPS/RSD injuries are clearly an extent-of-injury issue not subject to waiver under Rule 124.3(e). The hearing officer erred in finding that the carrier waived the right to contest compensability of CRPS of the bilateral upper extremities and right lower extremity.

We reverse that determination and render a new decision that the carrier did not waive the right to contest compensability on the extent of injury to the CRPS of the bilateral upper extremities and right lower extremity.

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

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

Thomas A. Knapp
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Margaret L. Turner
Appeals Judge