

APPEAL NO. 052499
FILED JANUARY 18, 2006

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 October 11, 2005. The hearing officer resolved the disputed issue by deciding that the appellant/cross-respondent (claimant) did not sustain a compensable injury on ____; that because the claimant did not sustain a compensable injury, he did not have disability; that the claimant did not sustain a compensable injury to his low back on ____; and that the respondent/cross-appellant (carrier) waived the right to contest compensability of the claimed injury by not contesting compensability in accordance with Section 409.021. Both parties have appealed. The claimant appealed, disputing the injury, extent and disability determinations. The carrier appealed, disputing the waiver determination. The appeal file does not contain a response from either party to the other's appeal.

DECISION

Affirmed in part, reversed and rendered in part, and reversed and remanded in part.

The claimant testified that on ____, as he was carrying a box in the course of his job duties, he hit the corner of a desk with his right thigh. He testified that he had pain from his mid-back to his toes.

CARRIER WAIVER

In his discussion of the evidence, the hearing officer noted that the carrier had "notice of the claimant's injury by September 28, 2004." The carrier does not dispute on appeal that it received first notice by September 28, 2004. The hearing officer's finding that the carrier first contested compensability on August 1, 2005, was not appealed by either party. The provision of Section 409.021(a) effective for a claim for benefits based on a compensable injury that occurred on or after September 1, 2003, provides that not later than the 15th day after the date on which an insurance carrier receives written notice of an injury, the insurance carrier shall begin the payment of benefits as required or notify the Texas Department of Insurance, Division of Workers' Compensation (Division) and the claimant in writing of its refusal to pay benefits. Section 409.021(a-1) further provides that if an insurance carrier fails to comply with the 15th day requirement, the carrier does not waive its right to contest compensability but rather commits an administrative violation. It is Section 409.021(c) that then defines the waiver period. It 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. The carrier did not contend either at the CCH or on appeal that it contested the compensability of the injury within the 60-day period. Rather the carrier

argues that it found evidence that could not have reasonably been discovered earlier which would allow it to reopen the issue of compensability pursuant to Section 409.021(d).

The hearing officer specifically found that on or about September 18, 2004, the carrier reasonably could have discovered that the claimant's alleged injury occurred at home. In evidence was a medical record, which identified that the injury occurred two weeks prior to September 18, 2004, at the claimant's home. The carrier alleged that it did not receive the claimant's initial medical records from a different facility until July 20, 2005. The initial medical records note that the claimant's pain increased after he was installing shingles at his home and the carrier contends that these records caused the carrier to file its dispute. However, the carrier acknowledged that during the first 60 days after receiving notice of the injury that it was aware that there were rumors that the claimant was injured at home. The carrier interviewed two employees. There was evidence that the employer employed only 12 people. The carrier contends that it did not find the identity of the co-worker that stated the claimant said he injured himself at home until later April 2005. Whether due diligence is shown in contesting compensability upon the discovery of new evidence or whether the evidence could have reasonably been discovered earlier are questions of fact for the hearing officer to determine. See Appeals Panel Decision (APD) 010386, decided March 27, 2001.

There is sufficient evidence to support the hearing officer's determination that the carrier has not obtained newly discovered evidence that could not have reasonably been discovered earlier. The hearing officer's determination that the carrier waived the right to contest the compensability of the claimed injury by not contesting compensability in accordance with Section 409.021 is affirmed.

COMPENSABLE INJURY AND EXTENT OF INJURY

The determination of carrier waiver is affirmed. Therefore, we must review the evidence to determine what, if anything, the carrier waived by its failure to contest the compensability within the time frames required by the 1989 Act. The nature of the injury that becomes compensable by virtue of waiver is defined by the information that could have been reasonably discovered by the carrier's investigation prior to the expiration of the waiver period. APD 041738-s, decided September 8, 2004. The hearing officer's determination that the claimant did not sustain a compensable injury on ____, is error as a matter of law because the carrier waived the right to contest the compensability of the claimed injury. The hearing officer was not persuaded that the claimed injury extended to the low back. However, several records exist dated within the waiver period which indicate that the claimant was alleging a low back injury in connection with the incident he claimed occurred during the course and scope of his employment. The medical records dated September 25, 2004, note that the claimant's chief complaint was back pain and that the back pain was acute. Additionally, treatment notes from the claimant's doctor dated November 2, 2004, indicate the claimant injured his back during the work-related incident alleged. Although there was some conflicting evidence regarding the back injury, there was evidence within the waiver period that could have been

reasonably discovered within the waiver period that the claimant was alleging an injury to his back in connection with the claimed work-related incident. The hearing officer correctly noted in his discussion of the evidence that there were inconsistencies in the claimant's testimony. However, since the carrier waived its right to contest the compensability of the claimed injury, the claimed injury becomes compensable as a matter of law. The nature of the injury that becomes compensable by waiver 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 included injury to the claimant's right thigh and low back. We reverse the hearing officer's determination that the claimant did not sustain a compensable injury on ____, and that the claimant did not sustain a compensable injury to his low back on ____, and render a new decision that because the carrier waived its right to contest the compensability of the claimed injury, the claimant sustained a compensable injury on ____, including an injury to the claimant's right thigh and low back.

DISABILITY

The hearing officer's determination on disability was predicated on the determination that the claimant did not sustain a compensable injury. Since the hearing officer's determinations regarding compensable injury and extent of injury have been reversed, we remand the issue of disability back to the hearing officer to make a finding regarding disability.

We affirm the determination that the carrier waived the right to contest compensability of the claimed injury by not contesting compensability in accordance with Section 409.021. We reverse the hearing officer's determination that the claimant did not sustain a compensable injury on ____, and render a new decision that because the carrier waived its right to contest compensability, the claimant sustained a compensable injury on ____. We reverse the hearing officer's determination that the claimant did not sustain a compensable injury to his low back on ____, and render a new decision that because the carrier waived its right to contest compensability of the claimed injury, the claimant sustained a compensable injury to his low back on ____. We reverse the hearing officer's determination that because the claimant did not sustain a compensable injury on ____, he did not have disability, and remand back to the hearing officer to make a finding with regard to the disability 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 Division 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 **TEXAS MUTUAL INSURANCE COMPANY** and the name and address of its registered agent for service of process is

**MR. RUSSELL RAY OLIVER, PRESIDENT
6210 HIGHWAY 290 EAST
AUSTIN, TEXAS 78723.**

Margaret L. Turner
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Veronica L. Ruberto
Appeals Judge