

APPEAL NO. 052524
FILED JANUARY 9, 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 was held on October 11, 2005. The issues were: (1) does the compensable injury of _____, include the hypertrophy at L4/5 and L5/S1; and (2) has the respondent (carrier) waived the right to contest compensability of the hypertrophy at L4/5 and L5/S1 by not timely contesting the diagnosis in accordance with Sections 409.021 and 409.022. The hearing officer determined that the compensable injury does not extend to facet hypertrophy at L4/5 and L5/S1 and that the carrier did not waive the right to contest the compensability of the facet hypertrophy at L4/5 and L5/S1 by failing to timely dispute the diagnosis in accordance with Sections 409.021 and 409.022.

The appellant (claimant) appeals, contending that her fall at work caused the claimed injury and that the carrier had failed to timely dispute the claimed condition therefore making it compensable. The carrier responded, generally urging affirmance although not agreeing "with all of the reason underlying" the decision.

DECISION

Reversed and a new decision rendered.

The parties stipulated that the claimant sustained a compensable injury on _____. The claimant testified how she fell from a pallet jack at work. The claimant was seen at a hospital on December 4, 2004, and was diagnosed with "sprained back" and "sacrum and coccyx injuries." X-rays of the lumbosacral spine were read as normal. The claimant subsequently began seeing (Dr. O), who in a progress note dated December 6, 2004, assessed lower back pain and muscle spasm. Dr. O performed manipulative treatment and therapy and referred the claimant for an MRI. The MRI was performed December 27, 2004, and recited a history of "low back pain associated with pain at the left hip, recent fall." The MRI had an impression of mild left facet hypertrophy at L4-5 and L5-S1.

There was testimony regarding how the carrier tried to get the MRI report from Dr. O. The claimant contends that a reasonable investigation of the hospital records would have disclosed the MRI. The hearing officer made an unappealed determination that the "Carrier received notice of the initial claimed injury on December 14, 2004" and that the "existence of the facet hypertrophy at L4/5 and L5/S1 was reasonably discoverable by the carrier as of January 1, 2005." Although the carrier's response indicates that it does not agree with this finding, the response, while timely as a response, is not timely as an appeal and we do not consider the carrier's contention an appeal. The hearing officer comments that while the MRI "was reasonably discoverable with [*sic* within] 60 days of December 14, 2004" the MRI does not address the causation of the facet hypertrophy, "which is a degenerative condition." The carrier's response

cites the definition of hypertrophy from Dorland's Illustrated Medical Dictionary, 26th Ed. as being "the enlargement or overgrowth of an organ or part due to an increase in size of its constituent cells." The carrier represented that it eventually received the MRI report on May 18, 2005. In a Notice of Disputed Issues and Refusal to Pay Benefits (PLN 11) dated June 7, 2005, the carrier disputed entitlement of "mild left facet hypertrophy at L4-5 and L5-S1 because: this is a degenerative problem that is not causally related to the unemployment and is a result of ordinary disease of life." A designated doctor, in a report dated August 3, 2005, certified the claimant at maximum medical improvement on that date with a 0% impairment rating based on Diagnosis-Related Estimate Lumbosacral Category I: Complaints or Symptoms. The designated doctor noted that the claimant had an MRI and commented that the "MRI scan did not reveal significant findings. . . ."

CARRIER WAIVER

The claimant had sustained a compensable lumbar injury. Dr. O, in treating the lumbar injury, referred the claimant for an MRI which noted a "recent fall." The hearing officer's and carrier's argument seems to be that since the MRI findings were subsequently determined to have not been caused by the compensable injury and the MRI "does not address causation of the facet hypertrophy" the carrier had not waived the facet hypertrophy.

Section 409.021 provides that for claims based on a compensable injury that occurred on or after September 1, 2003, 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: (1) begin the payment of benefits as required by the 1989 Act; or (2) notify the Texas Department of Insurance, Division of Workers' Compensation (Division) and the employee in writing of its refusal to pay. Section 409.021(c) 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. 28 TEX. ADMIN. CODE § 124.3(e) (Rule 124.3(e)) provides that Section 409.021 does not apply to disputes of extent of injury. In this case there is no indication that the carrier disputed compensability of the injury within the 60-day waiver period. The question then becomes what is the injury that the carrier has waived. In Appeals Panel Decision (APD) 041738-s, decided September 8, 2004, the Appeals Panel 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. The hearing officer found that the existence of the MRI "was reasonably discoverable" prior to the expiration of the waiver period. Because the carrier failed to deny compensability within the waiver period the carrier has waived compensability of the claimed condition. We reverse the hearing officer's determination that the carrier did not waive the right to contest the compensability of the facet hypertrophy at L4/5 and L5/S1 and render a new decision that the carrier has waived the right to contest compensability of the hypertrophy at L4/5 and L5/S1 by not timely contesting the diagnosis in accordance with Sections 409.021 and 409.022.

Because the carrier waived the right to contest compensability of the facet hypertrophy at L4/5 and L5/S1 that condition has become compensable as a matter of law. We reverse the hearing officer's determination that the compensable injury of (alleged date of injury), does not extend to facet hypertrophy at L4/5 and L5/S1 and render a new decision that the compensable injury of _____, does extend to facet hypertrophy at L4/5 and L5/S1.

The true corporate name of the insurance carrier is **TRAVELERS PROPERTY & CASUALTY COMPANY OF AMERICA** and the name and address of its registered agent for service of process is

**CORPORATION SERVICE COMPANY
701 BRAZOS STREET, SUITE 1050
AUSTIN, TEXAS 78701.**

Thomas A. Knapp
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Margaret L. Turner
Appeals Judge