

APPEAL NO. 052574
FILED JANUARY 2, 2006

This appeal arises pursuant to the Texas Worker's Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on October 27, 2005. With regard to the disputed issues the hearing officer determined that the compensable injury of _____, does not include an injury to the lumbar spine consisting of disc protrusions at L3-4 and degenerative spondylolisthesis (spelled spondylolisthesis in the medical reports) of L4 on L5 and that the carrier (self-insured) did not waive the right to contest compensability of the claimed injury by not timely contesting the injury in accordance with Section 409.021.

The claimant appeals, contending that the hearing officer erred in admitting certain exhibits from the self-insured which the claimant contends were not timely exchanged, that the hearing officer erred in finding that the compensable injury did not include the claimed conditions and that the hearing officer erred in finding that the self-insured had not waived the right to contest compensability of the claimed conditions. The self-insured responds, generally urging affirmance.

DECISION

Reversed and a new decision rendered.

It is undisputed that the claimant, "a shipmate" sustained a compensable injury on _____. The claimant testified how he was standing in a small boat which was jerked and how he injured his back. It is also undisputed that the claimant had prior back problems. The claimant sought medical care at a hospital emergency room (ER) on _____, the day of the accident, and a CT scan was performed. The CT scan had an impression of "Degenerative spondylolisthesis of L4 and L5, 2 disk protrusions at L3-4 and L4-5," (the claimed condition). The claimant testified that the medical personnel at the hospital told him to see his own doctor for further treatment and that he subsequently saw (Dr. M). Some progress notes apparently beginning on July 2, 2004, refer to a prior "IDET 9 months ago," a strain to the low back, degenerative disc disease and "Spondylolisthesis of L4 & L5." The claimant testified that Dr. M referred him for physical therapy. A physical therapy Plan of Treatment with a "Date of Initial Evaluation: 07 21 2004" lists the diagnosis as "1) degenerative spondylolisthesis of L4 on L5; 2) disc protrusion at L3-4 & L4-5; 3) tendonitis left shoulder." A Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) dated July 9, 2004, indicates that the claimant elected to use accrued leave through July 6, 2004, and that the nature of injury was a "strain." Another TWCC-21 dated July 14, 2004, indicates that temporary income benefits (TIBs) were being paid and the nature of injury was a "strain." It is undisputed, and the hearing officer found, that the self-insured "received a [the] CT scan of the Claimant's low back revealing the Claimant's disc degeneration on July 19, 2004." In evidence is another TWCC-21 dated July 22, 2004, showing TIBs had been paid, the nature of the injury as a strain and that the "employee returned to

work 7/21/04.” A Work Status Report (TWCC-73) dated July 2, 2004, has the claimant off work “through 7/9/04” with a diagnosis of “strain/contusion low back” and a left shoulder strain. The hearing officer made a finding that the “treating doctor and the billing codes sent to the Self-insured reflected that the Claimant’s condition was that of a lumbar strain through September 2, 2004.” The self-insured filed a (TWCC PLN-011) form on September 8, 2004, disputing medical benefits “for pre-existent degenerative disc disease, disc protrusions, and spondylolisthesis in the lumbar spine.” The hearing officer made a finding that the “billing codes on September 3, 2004, changed to include the diagnosis in dispute and the Self-insured filed a PLN 11 on September 8, 2004.”

ALLEGED PROCEDURAL ERROR ON THE ADMISSION OF EVIDENCE

The self-insured offered certain medical records dealing with the claimant’s prior back condition. The claimant objected to the admission on the basis of no timely exchange. There was both discussion, and testimony from the self-insured’s witness-(adjuster) as to the efforts made to obtain the records. As the claimant’s appeal acknowledges, to obtain reversal of a decision based upon error in the admission or exclusion of evidence, it must be shown that the evidentiary ruling was in fact error, and that the error was reasonably calculated to cause, and probably did cause the rendition of an improper decision. Appeals Panel Decision (APD) 051705, decided September 1, 2005. We conclude that the claimant has not shown that the hearing officer abused his discretion in admitting the evidence over the claimant’s objection that it was not timely exchanged nor has the claimant shown that the error, if any, amounted to reversible error. The claimant acknowledges that he had prior back problems and testified about the IDET procedure.

CARRIER (SELF-INSURED) WAIVER

The claimant sustained a compensable injury on _____. He went to a hospital ER the same day and a CT scan was performed which showed the disputed conditions. The claimant then sought out his own doctor, Dr. M, who referred the claimant for physical therapy for the compensable injury. The physical therapist’s initial evaluation of July 21, 2004, has a diagnosis of the disputed conditions plus “tendonitis left shoulder.” Although no evidence was presented on the subject, the self-insured presumably could have reasonably discovered the prescribed physical therapy notes as well as the CT scan within the 60 day waiver period which the parties seemed to agree ran from July 1 through August 30, 2004.

Section 409.021 provides that for claims based on a compensable injury that occurred on or after September 1, 2003, that no later than the 15th day after the date on which an insurance carrier (or self-insured pursuant to Section 409.021(f)) 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 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. In 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 self-insured received the CT scan of the claimant's low back, which showed the disputed conditions on July 19, 2004. We would also note that the physical therapist's initial evaluation containing the disputed conditions was dated July 21, 2004. The disputed conditions of lumbar disc protrusions at L3-4 and L4-5 and degenerative "spondylolisthesis" of L4 on L5 could have been reasonably discovered by the self-insured's investigation prior to the expiration of the waiver period. We reverse the hearing officer's determination that the self-insured did not waive the right to contest compensability of the lumbar disc protrusions at L3-L4 and L4-L5 and degenerative "spondylolisthesis" and render a new decision that the carrier has waived the right to contest compensability of the lumbar disc protrusions at L3-L4 and L4-L5 and degenerative "spondylolisthesis" by not timely contesting the diagnosis in accordance with Sections 409.021.

Because the self-insured waived the right to contest compensability of the lumbar disc protrusions at L3-4 and degenerative "spondylolisthesis" of L4 on L5 those conditions have become compensable as a matter of law. We reverse the hearing officer's determination that the compensable injury of _____, does not extend to disc protrusion at L3-4 and degenerative spondylolisthesis of L4 on L5 and render a new decision that the compensable injury of _____, does extend to disc protrusion at L3-4 and degenerative spondylolisthesis of L4 on L5.

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