

APPEAL NO. 060254
FILED MARCH 29, 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 January 3, 2006. The hearing officer resolved the disputed issues by deciding that the compensable injury of ____, does extend to include a diagnosis of disc herniation at C4-5; that the compensable injury does not extend to include a disc herniation of L5-S1 or a right shoulder sprain/strain; and that the respondent (self-insured) has not waived the right to contest compensability of the disc herniation at C4-5 by not contesting compensability of the disc herniation at C4-5 in accordance with Sections 409.021 and 409.022. The appellant (claimant) appealed, disputing the waiver determination and the determination that the compensable injury does not extend to include the disc herniation of L5-S1 or a right shoulder sprain/strain. The self-insured responded, urging affirmance.

DECISION

Affirmed in part and reversed and rendered in part.

The parties stipulated that the claimant sustained a compensable injury on ____, and that the self-insured accepted as compensable injuries lumbar/cervical strains/sprains, a left shoulder sprain/strain, and a contusion to the left forearm. At issue was whether the compensable injury extends to include diagnosis of right shoulder sprain/strain and disc herniations at C4-5 and L5-S1 and whether the self-insured waived the right to contest compensability of the disc herniation at C4-5 by not timely contesting the injury in accordance with Sections 409.021 and 409.022.

The hearing officer found that the self-insured received written notice of the claim on October 28, 2004; that the self-insured timely initiated benefits; that 60 days after the date of receipt of written notice by the self-insured was December 26, 2004; and that the self-insured filed a Notice of Disputed Issues and Refusal to Pay Benefits (PLN 11) with the Texas Department of Insurance, Division of Workers' Compensation, disputing the cervical injury, beyond a sprain/strain, on April 6, 2005. These findings were not appealed. Section 409.021(c), effective for a claim based on a compensable injury that occurred on or after September 1, 2003, 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. In Appeals Panel Decision 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 evidence reflects that the claimant had a cervical MRI on December 9, 2004, which listed as an impression a 3 mm disc herniation at the C4-5 level. The self-insured argued at the CCH that it did not receive a copy of the MRI

within the 60-day waiver period and the hearing officer noted that there was no evidence showing when the third party administrator of the self-insured received a copy of the cervical MRI report. The fact the self-insured may have actually received a copy of the cervical MRI after the expiration of the waiver period does not mandate a finding that the self-insured did not waive its right to dispute the C4-5 herniation. As previously stated, 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 self-insured's investigation prior to the expiration of the waiver period. It is whether the information could have been discovered through a reasonable investigation within the waiver period, not actual receipt that defines the nature of the injury. The hearing officer correctly notes that a doctor's report mistakenly refers to the diagnostic test that found a disc herniation at C4-5 under the heading Lumbar MRI. However, we cannot agree that this would have impeded any knowledge by the self-insured of a cervical herniated nucleus pulposus. The hearing officer's determination that the self-insured has not waived the right to contest compensability of the disc herniation at C4-5 by not contesting compensability of the disc herniation at C4-5 in accordance with Sections 409.021 and 409.022 is reversed and a new decision rendered that the self-insured has waived its right to contest the compensability of the disc herniation at C4-5 by not contesting compensability of the disc herniation at C4-5 in accordance with Sections 409.021 and 409.022.

The extent of the claimant's compensable injury was also in dispute at the CCH. The hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). As the fact finder, the hearing officer was charged with the responsibility of resolving the conflicts and inconsistencies in the evidence and deciding what facts the evidence had established. This is equally true of medical evidence. Texas Employers Ins. Ass'n v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). There is sufficient evidence in the record to support the hearing officer's determination that the compensable injury extends to include a diagnosis of disc herniation at C4-5 and that the compensable injury does not extend to include a diagnosis of disc herniation at L5-S1.

The claimant argues on appeal that the hearing officer's determination that the compensable injury does not extend to include a right shoulder sprain/strain is error because the evidence reflects that the self-insured accepted bilateral shoulder sprains/strains from the beginning of the claim, citing the language in the PLN 11 dated April 6, 2005. The PLN 11 listed the body parts injured as "left arm, low back, neck, bilateral shoulder[s]" and stated as follows:

"Carrier denies the diagnosis of degenerative disc disease to the cervical and lumbar spine in the course & scope of employment as a result of the DOI [date of injury]. Carrier contends that the current condition of the employee is not a direct result of the above DOI but a result of pre-existing ordinary disease of life. It is the Carrier's opinion that the employee's injury is limited to a contusion of the left arm, and a soft tissue sprain/strain only to the employee's lumbar, cervical and shoulder areas.

Carrier accepts liability for these diagnoses only. It is the Carrier's opinion that there was no physical damage or harm to the employee's spine as a result of the above DOI. [Dr. F], (IME) [independent medical examination] stated that the employee had pre-existing chronic changes to his bilateral shoulders, neck, and lumbar unrelated to the above DOI. He also indicated that his injuries a[s] a result of the DOI of ___ have resolved. Carrier denies any other diagnosis or extent of injury as not related to the accepted compensable injury, not suffered in the course & scope of employment, and not in any other way compensable."

The PLN 11 could be interpreted to include acceptance of both the right and left shoulder sprain/strain but it could also be interpreted to include acceptance of only one of the claimant's shoulders. The parties stipulated that the self-insured accepted as compensable injuries lumbar/cervical strains/sprains, a left shoulder sprain/strain, and a contusion to the left forearm. Additionally, the parties agreed that one of the issues in dispute was, does the compensable injury of ___, extend to include diagnosis of right shoulder sprain/strain and disc herniations at C4-5 and L5-S1. Further, at the CCH the parties agreed to expressly limit the waiver issue as follows: "Has the self-insured waived the right to contest compensability of the disc herniation at C4-5 by not timely contesting the injury in accordance with Section 409.021 and 409.022?" Under these circumstances we cannot agree that the compensable injury extends to include the right shoulder strain/sprain based solely on the language of the PLN 11. The hearing officer's determination that the compensable injury does not include a right shoulder sprain/strain is supported by the evidence and is affirmed.

We affirm the hearing officer's determination that the compensable injury of ___, does extend to include a diagnosis of disc herniation at C4-5 but does not include a diagnosis of disc herniation at L5-S1. We affirm the hearing officer's determination that the compensable injury of ___, does not extend to include a right shoulder sprain/strain. We reverse the determination that the self-insured has not waived the right to contest compensability of the disc herniation at C4-5 by not contesting compensability of the disc herniation at C4-5 and render a new determination that the self-insured did waive the right to contest compensability of the disc herniation at C4-5 in accordance with Sections 409.021 and 409.022.

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).

Margaret L. Turner
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Robert W. Potts
Appeals Judge