

APPEAL NO. 060273
FILED MARCH 31, 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 17, 2006. The hearing officer resolved the disputed issues by deciding that the appellant's (claimant) compensable injury does not include central bulging at L2-3, L3-4, and L4-5, and mild neural foraminal narrowing at L5-S1; that the respondent (carrier) has not waived the right to contest compensability of the central bulging at L2-3 and L3-4, and the neural foraminal narrowing at L5-S1 by not timely contesting those diagnoses in accordance with Sections 409.021 and 409.022; and that the claimant has not had disability for the claimed period beginning on July 18, 2005, and continuing through the date of the CCH. The claimant appealed, disputing the waiver, extent-of-injury, and disability determinations. The carrier responded, urging affirmance.

DECISION

Affirmed in part and reversed and rendered in part.

It was undisputed that the claimant was injured in the course and scope of employment on _____. The claimant testified that he worked for the employer as a truck driver and injured his back while securing a machine he was hauling. The hearing officer's findings that the carrier had first written notice of the _____, injury on August 18, 2004, and that the carrier filed a Notice of Disputed Issues and Refusal to Pay Benefits (PLN 11) on July 12, 2005, were not appealed.

WAIVER

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 (or self-insured pursuant to Section 409.021(f)) 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 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.

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 medical records dated August 4, 2004, reflect that the claimant sought medical treatment for back pain he sustained in a work-related incident on _____. The evidence reflected that the claimant had a lumbar MRI on August 16, 2004. The MRI listed the following as impressions: a central annular tear at the L3-4 level, mild central annular bulge at the L2-3 level, and degenerative disc changes at L5-S1 with mild neural foraminal narrowing bilaterally. The medical records further reflect that on September 21, 2004, the claimant had a lumbar regional steroid injection. The lumbar MRI was dated after the date of injury and prior to the carrier's first written notice of the injury. The MRI was information that the carrier could have reasonably discovered by its investigation prior to the expiration of the waiver period. The claimant received at least one injection to his lumbar spine during the waiver period. The carrier had the full benefit of the 60-day waiver period to ascertain the results of the diagnostic test. However, we note that the waiver issue was specifically limited at the CCH to whether the carrier waived the right to contest compensability of the central bulging at L2-3 and L3-4 and the mild neural foraminal narrowing at L5-S1. The lumbar MRI does not show central bulging at L3-4 but rather an annular tear. The hearing officer's determination that the carrier has not waived the right to contest compensability of the central bulging at L2-3 and mild neural foraminal narrowing at L5-S1 is against the great weight and preponderance of the evidence. We reverse the hearing officer's determination that the carrier has not waived the right to contest compensability of the central bulging at L2-3 and mild neural foraminal narrowing at L5-S1 and render a new determination that the carrier has waived its right to contest compensability of the central bulging at L2-3 and mild neural foraminal narrowing at L5-S1 by not timely contesting those diagnosed conditions in accordance with Sections 409.021 and 409.022. We affirm the hearing officer's determination that the carrier did not waive its right to contest the compensability of central bulging at L3-4 because there was no evidence that the carrier through a reasonable investigation would have discovered prior to the expiration of the waiver period information of central bulging at L3-4.

EXTENT OF INJURY

Because the carrier waived its right to contest compensability of the central bulging at L2-3 and mild neural foraminal narrowing at L5-S1 those conditions become compensable as a matter of law. The hearing officer's determination that the compensable injury of _____, does not include central bulging at L2-3 and mild neural foraminal narrowing at L5-S1 is reversed and a new determination rendered that the compensable injury of _____, includes central bulging at L2-3 and mild neural foraminal narrowing at L5-S1. We affirm the hearing officer's determination that the compensable injury does not include central bulging at L3-4 or L4-5 levels.

DISABILITY

Disability means the inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage. Section 401.011(16). The claimant worked for approximately nine months following an initial two-week off

work period following the injury. The hearing officer noted that a surveillance video of September 16, 2005, reflected the claimant carrying a cane while he unloaded various items without problems from over the side of the bed of a pickup truck. The hearing officer determined that the claimant did not have disability from July 18, 2005, through the date of the CCH. The hearing officer's determination on the disability issue is supported by sufficient evidence and is not so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. We affirm the disability determination.

We reverse the determination that the carrier did not waive the right to contest compensability of the central bulging at L2-3 and neural foraminal narrowing at L5-S1 by not timely contesting these diagnoses in accordance with Sections 409.021 and 409.022 and render a new determination that the carrier did waive its rights to contest the compensability of the central bulging at L2-3 and neural foraminal narrowing at L5-S1. We affirm the hearing officer's determination that the carrier did not waive its right to contest compensability of the central bulging at L3-4. We reverse the hearing officer's determination that the claimant's compensable ____, injury does not include central bulging at L2-3 and mild neural foraminal narrowing at L5-S1 and render a new determination that the claimant's compensable injury of ____, does include central bulging at L2-3 and mild neural foraminal narrowing at L5-S1. We affirm the hearing officer's determination that the compensable injury does not include central bulging at L3-4 or L4-5 levels. We affirm the hearing officer's determination that the claimant has not had disability for the claimed period beginning on July 18, 2005, and continuing through the date of the CCH.

The true corporate name of the insurance carrier is **ST. PAUL FIRE & MARINE INSURANCE COMPANY** and the name and address of its registered agent for service of process is

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

Margaret L. Turner
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Robert W. Potts
Appeals Judge