

APPEAL NO. 061631
FILED SEPTEMBER 12, 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 June 27, 2006. The disputed issues were:

1. (As amended by the parties.) Did the [respondent (Claimant)] have disability as a result his compensable injury of _____, beginning March 8, 2006, and if so, for what periods(s)?
2. Does the Claimant's compensable injury of _____, extend to include bulging at L3-4, annular tear at L4-5, herniation at C-3-4, and bulging at C4-5, C5-6, and C6-7?
3. Has the [appellant (Carrier)] waived the right to contest compensability of the claimed injury by not timely contesting the injury in accordance with Texas Labor Code, Section 409.021 and 409.022?

The hearing officer determined that the claimant's injury of _____, does not extend to include bulging at L3-4, annular tear at L4-5, herniation at C3-4 and bulging at C4-5, C5-6, and C6-7 (collectively referred to as the claimed injuries), that the carrier waived the right to contest compensability of the claimed injuries by not timely contesting the injury in accordance with Sections 409.021 and 409.022, thereby making the claimed injuries compensable as a matter of law so that the compensable injury of _____, extends to the claimed injuries and that the claimant had disability as a result of his compensable injury of _____, beginning March 8, 2006, through the date of the CCH (June 27, 2006).

The carrier appealed, contending that the hearing officer erred in finding that the compensable injury of _____, extends to the claimed injuries, that the carrier had waived its right to contest compensability by not timely contesting the injury and that the claimant had disability as a result of the compensable injury of _____. The claimant responded, urging affirmance.

DECISION

Affirmed in part and reversed and rendered in part.

It is undisputed that the claimant sustained a prior compensable injury involving the cervical and lumbar spine on (the 2004 injury). An MRI performed on October 29, 2004, showed disc disease at the L4 through S1 levels, and other lumbar disc protrusions and bulges. A cervical MRI performed on January 12, 2005, showed a cervical disc herniation at C3-4 and disc bulges at C4-5 and C6-7. Medical records and Work Status Reports (DWC-73) in October 2004 note lumbar disc herniations. (Carrier Exhibit L). A designated doctor for the 2004 injury, in a Report of Medical Evaluation

(DWC-69) and narrative dated April 23, 2005, referenced the MRI's, certified maximum medical improvement on April 15, 2005, with a 5% impairment rating (0% for Cervicothoracic Diagnosis-Related Estimate (DRE) Category I and 5% for Lumbosacral DRE Category II: Minor Impairment). The claimant testified that he was essentially pain free at that time although a report dated July 28, 2005, from a treating doctor noted cervical and lumbar disc herniations and recommended work hardening. Another report dated August 3, 2005, from the doctor noted that the claimant "does not really want to do work hardening. He is having neck pain and lower back pain." A DWC-73 dated August 3, 2005, released the claimant to return to work without restrictions on August 3, 2005.

The claimant testified that he returned to work in August 2005, worked a few days and injured his low back on _____, lifting a sack or sacks of chemicals. Cervical and lumbar MRI's were performed on August 30, 2005. The cervical MRI showed a protrusion at C3-4, bulging at C4-5 and a protrusion at C6-7. The lumbar MRI showed a disc bulge at L3-4, a bulge at L4-5 with "the posterior anterior aspect of the disc compatible with an annular tear" and a protrusion at L5-S1.

The hearing officer, in this case, found, in an unappealed finding, that the carrier received first written notice of an _____, "Back" injury through the employer's first report of injury on October 3, 2005 (Finding of Fact No. 7). The hearing officer further found that the carrier filed a notice of Denial of Compensability/Liability and Refusal to Pay Benefits (PLN 1) on October 10, 2005. The carrier's reason for the denial states:

Carrier denies this claim in its entirety. The carrier is relieved of liability of the alleged injury since the claimant failed to timely notify the employer of a new injury within 30 days of the injury. Based on the current information, there is no medical documentation which establishes a casual connection between a new injury and the workplace. It is the claimant's burden of proof to provide evidence that an "injury" has occurred arising out of course and scope of employment. It is the carrier's position that the claimant did not sustain a new injury but is suffering from a flare-up from the previous work related injury.

That denial resulted in a CCH on March 7, 2006, where another hearing officer found that the claimant "sustained a compensable injury on _____," that the claimant "had disability from August 29, 2005, through the date of this hearing [March 7, 2006]" and that the claimant had given timely notice of the claimed injury to the employer. Extent of injury was not an issue in that case and the hearing officer commented that "[w]hile not resolving the extent of injury, it appears from the credible evidence that Claimant sustained at a minimum, a lumbar sprain . . . on _____." That decision was appealed to the Appeals Panel and the hearing officer's decision and order became final on May 30, 2006. On April 20, 2006, presumably as a result of the hearing officer's March 2006 decision, the carrier filed a DWC Form PLN-11 disputing entitlement to indemnity and medical benefits stating:

CARRIER DENIES AN INJURY, IF ANY, DOES NOT EXTEND TO OR INCLUDE CERVICAL AND LUMBAR DISC HERNIATION AND PROTRUSIONS. IT IS THE CARRIER'S POSITION THAT THE CERVICAL AND LUMBAR DISC HERNIATIONS AND PROTRUSIONS ARE RELATED TO THE (2004 INJURY). CARRIER DENIES THERE IS ANY DISABILITY FOR A CERVICAL AND LUMBAR STRAIN/STRAIN ALONG CERVICAL/LUMBAR DISC HERNIATIONS AND PROTRUSIONS.

That denial led to the present case.

DISABILITY

The hearing officer's determination on disability is supported by sufficient evidence and is affirmed.

EXTENT OF INJURY

We hold that the hearing officer's determination that the claimant's injury of _____, does not extend to the claimed injuries is supported by sufficient evidence and is affirmed.

CARRIER WAIVER

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 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 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 evidence reflects that the carrier received the first written notice of a back injury on October 3, 2005. In a PLN-1 dated October 7, 2005, and filed on October 10, 2005, the carrier denied the claim "in its entirety" and stated its position "that the claimant did not sustain a new injury but is suffering from a flare-up from the previous work related injury." The hearing officer acknowledged this timely dispute of compensability, referenced the second dispute of the claim "in response to a decision and order of a hearing officer, signed on March 8, 2006" but nonetheless appears to

hold that a general denial of liability was insufficient and that the carrier was required to deny the specific pathologies contained in the August 30, 2005, MRIs. The hearing officer acknowledged that the August 30, 2005, MRIs “were received” before the carrier received written notice of the 2005 injury but the hearing officer nonetheless commented that:

Once [the Carrier] received notice of the second injury, it had an obligation to again review the file from the earlier injury and take note of any medical record in that file after the date of the claimed second injury. This it did not do and I am compelled to find waiver of the extent of injury issue.

We disagree.

Prior to the March 13, 2000, change to Rule 124.3 a carrier had 60 days to dispute the compensability of an injury or it waived the right to do so. Based upon Appeals Panel decisions prior to March 2000, every time the carrier was notified of a new diagnosis, condition, or claimed body part, the carrier had an additional 60 days from the date it received the notice to dispute the diagnosis, condition, or body part or it again waived. See APD 980822, decided June 3, 1998; APD 962415, decided January 10, 1997. In other words, prior to the adoption of Rule 124.3, the carrier would waive the extent of an injury if it failed to dispute the additionally claimed diagnosis, condition, or body part within 60 days of receiving notice.

When Rule 124.3 was changed effective March 13, 2000, it provided that the waiver provision of Section 409.021 does not apply to issues of extent of injury. The preamble for the change to Rule 124.3 states:

Previously the rules were virtually silent on the issue of how to dispute extent of injury. This has led to numerous problems within the system. In the absence of guidance on this issue, the [A]ppeals [P]anel has attempted to provide some structure to this issue. One [A]ppeals [P]anel approach has suggested that when a doctor attempts to treat additional body parts/systems, . . . [Section] 409.021 (regarding Initiation of Benefits; Insurance Carrier’s Refusal; Administrative Violation) is invoked and the carrier has 60 days to file a dispute for extent of injury or waive the right to dispute this issue and become liable for this body part/system. This rule does not adopt that interpretation. [Section] 409.021, is intended to apply to the compensability of the injury itself or the carrier’s liability for the claim as a whole, not individual aspects of the claim.

In the instant case, the carrier received first written notice of a back injury on October 3, 2005, and on October 10, 2005, the carrier filed a PLN-1 dispute denying the claim in its entirety, denying that there is a casual connection between a new injury and the work place and asserting that the claimed new injury was merely a flare up of a previous work-related injury. Because the carrier timely disputed the new injury in its entirety alleging that any complaints are due to a flare up from the previous work injury, there

could be no waiver under Sections 409.021 and 409.022 regarding the nature of the injury that was later determined through dispute resolution to be compensable.

Accordingly, we reverse the hearing officer's decision that the carrier had waived the right to contest compensability of the claimed injuries (Conclusion of Law No. 4) and render a new decision that the carrier had not waived the right to contest compensability of the claimed injuries. In that the hearing officer's determination that the claimant's compensable injury of _____, extends to include the claimed injuries is premised on carrier waiver, we also reverse the hearing officer's determination that the claimant's compensable injury of _____, extends to include the claimed injuries (Conclusion of Law No. 5). We have previously affirmed the hearing officer's determination regarding disability and on the merits that the claimant's injury of _____, does not extend to include the claimed injuries, (Conclusion of Law No. 3).

The true corporate name of the insurance carrier is **ACE AMERICAN INSURANCE COMPANY** and the name and address of its registered agent for service of process is

**ROBIN M. MOUNTAIN
6600 CAMPUS CIRCLE DRIVE EAST #300
IRVING, TEXAS 75063.**

Thomas A. Knapp
Appeals Judge

CONCUR:

Veronica L. Ruberto
Appeals Judge

Margaret L. Turner
Appeals Judge