

APPEAL NO. 062019
FILED DECEMBER 19, 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 September 6, 2006. The hearing officer resolved the disputed issues by deciding that: (1) the compensable injury of _____, does not include a hip contusion, a herniated nucleus pulposus (HNP) at C5-6¹, HNP at L4-5, HNP at L5-S1, or thoracic sprain/strain; and (2) that the respondent/cross-appellant (carrier) did not waive the right to contest the claimed hip contusion, HNP at C5-6, HNP at L4-5, HNP at L5-S1, or thoracic sprain/strain injuries in that no such injuries have been sustained by the claimant. The appellant/cross-respondent (claimant) appealed, disputing both the extent of injury and waiver determinations. The carrier responded, urging affirmance of the extent and waiver determinations. The carrier also filed a supplemental response, however, it was not received timely and will not be considered. The carrier also filed a timely appeal, disputing the hearing officer's finding that the diagnoses of hip contusion, thoracic strain, and HNP at C5-6, L4-5, and L5-S1 were reasonably discoverable by the carrier within 60 days of March 7, 2006. The appeal file does not contain a response from the claimant to the carrier's cross-appeal.

DECISION

Reversed and rendered.

The parties stipulated that the claimant sustained a compensable injury on _____. The extent of the claimant's compensable injury and whether or not the carrier waived the right to contest compensability of the claimed injury by not timely contesting the injury in accordance with Sections 409.021 and 409.022 were in dispute. Although it was undisputed that a work-related incident occurred, there was conflicting testimony regarding the precise mechanism of injury and the seriousness of its impact upon the claimant.

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))

¹ We note the hearing officer misidentified the cervical spine level herniations as L5/6 (rather than C5-6) in Conclusion of Law Nos. 3 and 4 as well as in his decision.

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 an injury, 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's findings that "the carrier received notice of the _____, injury on March 7, 2006," and that "the carrier did not file any dispute within 60 days of March 7, 2006," were not appealed. It is undisputed that the notice received by the carrier on March 7, 2006, was written notice. In evidence is a copy of the Employer's First Report of Injury or Illness (DWC-1) which bears a received date stamp of March 7, 2006, by "claims." The hearing officer based his waiver determination on his finding that the claimant did not sustain a hip contusion, thoracic strain, or herniated discs at C5-6, L4-5, and L5-S1. The carrier contends the hearing officer properly applied Continental Casualty Company v. Williamson, 971 S.W.2d 108 (Tex. App.-Tyler 1998, no pet.) in making his waiver determination. In Williamson, the Tyler Court of Appeals held that if a hearing officer determines that there is no injury, and that finding is not against the great weight and preponderance of the evidence, the carrier's failure to contest compensability cannot create an injury as a matter of law. We do not disagree with that proposition; however, we find it is not applicable in this case. We have held that Williamson applies only where there is no underlying injury. APD 992907, decided February 10, 2000. The parties stipulated that the claimant sustained a compensable injury and the hearing officer determined that the carrier did not timely file a dispute. Thus, the injury that becomes compensable by virtue of waiver is determined by the information that could have been reasonably discovered by the carrier's investigation prior to the expiration of the waiver period.

The carrier disputes the hearing officer's finding that the diagnoses of hip contusion, thoracic strain, and HNPs at C5-6, L4-5, and L5-S1 were reasonably discoverable by the carrier within 60 days of March 7, 2006. However, the evidence supports this finding. There are medical records in evidence dated within the waiver period (as early as March 8 and 9, 2006) that contain diagnoses of a hip contusion and thoracic strain. Both a cervical and a lumbar MRI are in evidence, dated April 12, 2006, which give as an impression herniated discs at the C5-6, L4-5, and L5-S1 levels.

Conflicting medical evidence was presented regarding whether or not the claimant's compensable injury extended to include a right hip contusion, thoracic strain/sprain, and HNPs at C5-6, L4-5, and L5-S1. This is not an instance where a body part was misidentified in the medical records but rather the medical evidence conflicts regarding whether the claimant has actual herniations or suffers from disc bulges at the specified levels, which are the result of a degenerative condition rather than a specific event. Dr. D, a carrier required medical examination doctor, testified at the CCH. He acknowledged that he did not examine the claimant until June 14, 2006, and testified at the CCH that there was no notation in all the records available that any medical provider actually observed a right hip contusion. However, in a medical record dated 5 days after the injury, a medical provider who examined the claimant gives a specific

diagnosis of right hip contusion. Further, the same record also gives a diagnosis of thoracic sprain/strain. The hearing officer's finding that the claimant has not sustained any HNPs, hip contusion, or thoracic strain as of the date of the CCH is against the great weight and preponderance of the evidence.

The hearing officer's determination that the carrier did not waive the right to contest the claimed hip contusion, HNPs at C5-6, L4-5, and L5-S1, or thoracic sprain/strain injuries in that no such injuries have been sustained by the claimant is reversed and a new decision rendered that the carrier did waive the right to contest the claimed hip contusion, thoracic sprain/strain, and HNPs at C5-6, L4-5, and L5-S1.

EXTENT OF INJURY

Since a new decision has been rendered that the carrier did waive the right to contest the claimed hip contusion, thoracic sprain/strain, and HNPs at C5-6, L4-5, and L5-S1, those conditions have become compensable as a matter of law. Therefore, the hearing officer's determination that the compensable injury of _____, does not include a hip contusion, HNPs at C5-6, L4-5, and L5-S1, or a thoracic sprain/strain is reversed and a new decision rendered that the compensable injury of _____, does include a hip contusion, HNPs at C5-6, L4-5, and L5-S1, and a thoracic sprain/strain.

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

**JOSEPH KELLEY-GRAY, PRESIDENT
6907 CAPITOL OF TEXAS HIGHWAY NORTH
AUSTIN, TEXAS 78755.**

Margaret L. Turner
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Veronica L. Ruberto
Appeals Judge