

APPEAL NO. 070311
FILED APRIL 3, 2007

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on January 11, 2007. The hearing officer determined that: 1) the respondent (carrier) did not waive the right to contest compensability of the claimed diagnosis of sciatica by not timely contesting the injury pursuant to Section 409.021; 2) the appellant's (claimant) injury of _____, does not extend to and include sciatica, reflex sympathetic dystrophy (RSD) of the left lower extremity and an injury to the lumbar spine; 3) the first certification of maximum medical improvement (MMI) and assigned impairment rating from Dr. S on September 30, 2005, did not become final under Section 408.123; and 4) the claimant is not entitled to change treating doctors (TD) to Dr. B pursuant to Section 408.022.

The claimant appealed the carrier waiver, extent of injury and change of TD issues, principally on a sufficiency of the evidence basis. The carrier responded, generally urging affirmance. There was no appeal of the hearing officer's decision regarding lack of finality under Section 408.123 and that determination has become final pursuant to Section 410.169.

DECISION

Affirmed in part and reversed and rendered in part.

The claimant testified how a steel gate on a track ran over his left foot causing him to fall forward on _____. The parties stipulated that the claimant sustained a compensable injury to his left ankle in the form of a sprain/strain, torn ligaments of his left ankle, and a contusion to the left lower extremity on _____. The injury occurred at about 11:30 p.m. and the claimant testified that the employer took him to C Clinic for medical attention the morning of September 20, 2005.

CARRIER WAIVER

The hearing officer, in an unappealed finding, determined that the carrier received written notice of the claimed injury on or about September 20, 2005. A C Clinic note of a visit on September 20, 2005, discusses the claimant's injury and has a diagnosis of ankle sprain and sciatica. A Work Status Report (DWC-73) dated September 20, 2005, also has a work injury diagnosis of ankle sprain and sciatica and releases the claimant back to work with restrictions. Other DWC-73's dated September 23, September 30, October 3, and October 15, 2005, from C Clinic all include a work injury diagnosis of sciatica as does an activity status report dated September 30, 2005. The claimant changed treating doctors to Dr. H on October 17, 2005. Dr. H diagnosed and treated a ligamentous tear of the left ankle. The first indication that the carrier was

disputing the sciatica was in a Notice of Disputed Issues and Refusal to Pay Benefits (PLN-11) dated September 6, 2006.

Section 409.021(a), effective for a compensable injury that occurred on or after September 1, 2003, provides 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 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. Section 409.021(c) defines the waiver period. It provides that if an insurance carrier does not contest 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. It is undisputed that the carrier did not contest compensability of the injury within the 60-day waiver period.

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 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. In this case the hearing officer clearly believes that there must be an injury to the lumbar spine for there to be a diagnosis of sciatica. The hearing officer comments in the Background Information:

The evidence was insufficient to put the carrier on notice that the diagnosis of sciatica was part of the compensable injury. There was no way of knowing that 'sciatica' was part of the compensable injury given the fact that no injury to the lower back was mentioned, treated, or examined. It should also be noted that the claimant's incident report, filled out by the claimant, failed to note an injury to the lumbar spine.

The hearing officer, in Finding of Fact No. 5, then found that the evidence was insufficient and failed to establish the carrier could reasonably discover the diagnosis of sciatica was related to the compensable injury when no history of an injury to the lumbar spine was documented and no treatment to the lumbar spine was given to the claimant within 60 days from receiving notice of the claimed injury.

Both parties submitted the following definition of sciatica.

Sciatica: Pain resulting from irritation of the sciatic nerve, typically felt from the low back to behind the thigh and radiating down below the knee. While sciatica can result from a herniated disc directly pressing on the nerve, any cause of irritation or inflammation of this nerve can produce the painful symptoms of sciatica.

As the definition states, sciatica can result from a herniated disc but it can also be the result of any cause of irritation or inflammation of the sciatic nerve. Clearly medical notes and DWC-73's beginning on September 20, 2005, diagnose sciatica and the carrier could have reasonably discovered that diagnosis prior to the end of the waiver period. The hearing officer's determination that the carrier has not waived the right to contest compensability of the claimed sciatica is reversed as being against the great weight and preponderance of the evidence. We render a new decision that the carrier has waived the right to contest compensability of the claimed diagnosis of sciatica by not timely contesting the injury in accordance with Section 409.021.

Because we are reversing the hearing officer's determination that the carrier has not waived the right to contest compensability of the diagnosis of sciatica, the sciatica has become compensable as a matter of law. Therefore we also reverse the hearing officer's determination that the claimant's injury of _____, does not extend to and include sciatica. We render a new decision that the compensable injury does extend to and include sciatica.

EXTENT OF INJURY

The hearing officer also found that the claimant's injury sustained on _____, does not extend to and include RSD of the left lower extremity and an injury to the lumbar spine. That determination is supported by the evidence and is affirmed.

CHANGE OF TREATING DOCTOR

The hearing officer, in her Background Information, commented that the evidence established that the claimant's requested change of treating physicians was in order to secure a new date of MMI and not because of any inappropriate treatment by Dr. H or that the doctor/patient relationship was compromised. The hearing officer's determination that the claimant is not entitled to change treating doctors to Dr. B pursuant to Section 408.022 is supported by the evidence and is affirmed.

SUMMARY

The hearing officer's determinations that: 1) the compensable injury does not extend to and include RSD to the left lower extremity and an injury to the lumbar spine; and 2) the claimant is not entitled to change treating doctors to Dr. B are affirmed. The hearing officer's determination that the carrier has not waived the right to contest compensability of the sciatica is reversed and we render a new decision that the carrier waived the right to contest compensability of the sciatica by not timely contesting the injury in accordance with Section 409.021. Because we have reversed the hearing officer's determination on the carrier waiver of the diagnosis of sciatica, the sciatica has become compensable as a matter of law. Therefore we also reverse the hearing officer's decision that the compensable injury of _____, does not extend to and

include sciatica and render a new decision that the compensable injury does extend to and include sciatica.

The true corporate name of the insurance carrier is **AMERICAN HOME ASSURANCE 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.**

Thomas A. Knapp
Appeals Judge

CONCUR:

Veronica L. Ruberto
Appeals Judge

Margaret L. Turner
Appeals Judge