

APPEAL NO. 070424
FILED APRIL 18, 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 (CCH) was held on January 30, 2007. The hearing officer resolved the disputed issues by deciding that the appellant (carrier) waived the right to contest the compensability of the right carpal tunnel syndrome (CTS) and tendonitis by not contesting compensability in accordance with Sections 409.021 and 409.022; and that the compensable injury of _____, extends to include right CTS and tendonitis. The carrier appealed, disputing both the waiver and extent-of-injury determinations. The respondent (claimant) responded, urging affirmance.

DECISION

Affirmed in part and reversed and rendered in part.

The parties stipulated that the claimant sustained a compensable injury on _____; that the carrier received first written notice of the claimed injury on (6 days after date of injury); and that the carrier disputed the right CTS and tendonitis by filing a Notice of Disputed Issue and Refusal to Pay Benefits (PLN-11) with the Texas Department of Insurance, Division of Workers' Compensation (Division) on October 13, 2006. Whether the claimant's compensable injury extended to include right CTS and tendonitis and whether the carrier waived its right to contest the right CTS and tendonitis by not timely contesting the injury were in dispute.

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 Division 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 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 carrier contends that it disputed the claimant's injury in its entirety and thus waiver does not apply in this case. The carrier cites APD 061631, decided September

12, 2006, as authority to support its position. However, in APD 061631, the dispute filed by the carrier was in evidence, and both the date and the language denying the claim in its entirety were entered into evidence. In the instant case, the carrier relies on a prior decision and order in evidence to prove it contested compensability within the 60-day waiver period. The prior decision and order is based on a CCH held on September 19, 2006, to decide whether the claimant sustained a compensable repetitive trauma injury, with a date of injury of (DOI) _____. The hearing officer in that decision held that the claimant did sustain a compensable injury in the form of an occupational disease with a DOI of _____, and that decision was not appealed. There was no issue at the prior CCH regarding whether the carrier waived its right to contest compensability of the injury. The hearing officer in the prior decision did state in the discussion of the evidence that the claimant testified that her claim was denied by the carrier but a specific date of such denial is not stated. The only dispute filed by the carrier in evidence in the instant case was the PLN-11 filed on October 13, 2006, disputing any diagnosis other than a right scaphoid fracture. There is no evidence in the record to identify the date the carrier disputed the compensability of the claimed injury in its entirety or evidence regarding the exact nature or language of the dispute. The Appeals Panel has generally held that once a claimant has satisfied the burden of proving the date the carrier received written notice of the claimed injury, the carrier then has the burden of proving the date it disputed the claimed injury. APD 032862, decided December 19, 2003. In the instant case, the parties stipulated as to the date the carrier received first written notice of the claimed injury. The carrier failed to provide any evidence regarding the date it disputed the claimed injury. Since the carrier failed to provide evidence of a timely dispute, 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 waiver issue in dispute was limited to two specific conditions, right CTS and tendonitis. Therefore, we look to the record to determine whether right CTS and tendonitis could have been reasonably discovered by the carrier's investigation prior to the expiration of the waiver period.

The hearing officer found that the carrier, through a reasonable investigation, could have determined within 60 days following (6 days after date of injury), that the right CTS and tenosynovitis were part of the claimed injury. The initial medical record of the claimant dated March 27, 2006, contains tentative diagnoses of right CTS and tenosynovitis and noted the claimant's wrist injuries were sustained in the course of her regular job activities. Several Work Status Reports (DWC-73) dated within the waiver period were in evidence and contained a work injury diagnosis of right CTS. Additionally there are several progress report notes in evidence dated within the waiver period which diagnose the claimant with right CTS and right wrist tenosynovitis. There is sufficient evidence to support the hearing officer's determination that the carrier waived the right to contest the compensability of the right CTS by not timely contesting compensability in accordance with Section 409.021.

There is sufficient evidence to support the hearing officer's finding that tenosynovitis could have been reasonably discovered by the carrier's investigation prior to the expiration of the waiver period. However, as previously noted the waiver issue

was limited to right CTS and tendonitis. The hearing officer's conclusion of law and decision determine that the carrier waived the right to contest the compensability of tendonitis by not contesting compensability in accordance with Sections 409.021 and 409.022. The carrier argues on appeal that there is not a single mention in any medical record that the claimant has, is suspected of having, or is diagnosed with tendonitis. The evidence does not reflect any mention of tendonitis. The Benefit Review Conference Report identified the claimant's position to be that the compensable injury includes right CTS and tenosynovitis. The medical records in evidence contain references to tenosynovitis not tendonitis. The parties at the CCH seemed to use the terms interchangeably. Although the disputed issue omitted the term tenosynovitis, the parties actually litigated this injury and the evidence supports the hearing officer's finding that the carrier, through a reasonable investigation, could have determined within 60 days following (6 days after date of injury), that the tenosynovitis was a part of the claimed injury. We reverse the hearing officer's determination that the carrier waived the right to contest the compensability of tendonitis by not contesting compensability in accordance with Sections 409.021 and 409.022 and render a new determination that the carrier waived the right to contest the compensability of tenosynovitis.

EXTENT OF INJURY

The hearing officer found that right CTS and tenosynovitis arose out of or naturally flowed from the compensable injury. There is sufficient evidence to support the hearing officer's finding. The hearing officer's determination that the compensable injury of _____, extends to right CTS is affirmed. However, as noted above, there was no evidence of tendonitis. Although the disputed issue omitted the term tenosynovitis, the parties actually litigated this injury and the evidence supports the hearing officer's finding that tenosynovitis arose out of or naturally flowed from the compensable injury. The hearing officer's determination that the compensable injury of _____, extends to tendonitis is reversed and a new decision rendered that the compensable injury of _____, extends to tenosynovitis.

SUMMARY

We affirm the hearing officer's determination that the carrier waived its right to contest the compensability of the right CTS by not contesting compensability in accordance with Section 409.021. We affirm the hearing officer's determination that the compensable injury of _____, extends to right CTS.

We reverse the hearing officer's determination that the carrier waived its right to contest the compensability of tendonitis by not contesting compensability in accordance with Sections 409.021 and 409.022 and render a new determination that the carrier waived its right to contest the compensability of tenosynovitis by not contesting compensability in accordance with Section 409.021. We reverse the hearing officer's determination that the compensable injury of _____, extends to tendonitis and

render a new determination that the compensable injury of _____, extends to tenosynovitis.

The true corporate name of the insurance carrier is **NEW HAMPSHIRE 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 78701-3232.**

Margaret L. Turner
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Veronica L. Ruberto
Appeals Judge