

APPEAL NO. 070900
FILED JULY 2, 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 March 27, 2007. The hearing officer resolved the disputed issues by deciding that the compensable injury does not include a disc bulge at L5-S1 and that the respondent (carrier) did not waive the right to contest the compensability of a disc bulge at L5-S1 by not timely contesting the diagnosis in accordance with the 1989 Act. The appellant (claimant) appealed, disputing both the waiver and extent determinations. The claimant argues that the evidence presented established the date of the carrier's first written notice of the claimed injury and that the carrier failed to timely dispute the compensable injury and contends the signed and approved Benefit Dispute Agreement (DWC-24), which documents the parties' agreement regarding the certification of maximum medical improvement (MMI) and impairment rating (IR) which rated the claimant's L5-S1 disc problem, establishes the carrier's acceptance of the disputed extent of injury condition. The carrier responded, urging affirmance. The carrier contends that the claimant failed to establish the date that the carrier received first written notice of the injury and failed to establish the date or dates during the "waiver period" during which claimant was diagnosed with a disc bulge at L5-S1.

DECISION

Reversed and rendered.

The parties stipulated that the claimant sustained a compensable injury on _____. No testimony was presented at the CCH and both parties relied on the documentary exhibits admitted into evidence. The evidence reflected that the claimant was employed as a diesel mechanic and sustained an injury to his back when he slipped and fell.

Section 409.021, effective for a claim for workers' compensation benefits based on a compensable injury that occurred before September 1, 2003, provides in part that not later than the 7th 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 by this subtitle or notify the Texas Department of Insurance, Division of Workers' Compensation and the employee in writing of its refusal to pay. Continental Casualty Company v. Downs, 81 S.W.3d 803 (Tex. 2002), held that taking some action within 7 days is what entitles the carrier to a 60-day period to investigate or deny compensability. 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. The initiation of payments by an insurance carrier does not affect the right of the insurance carrier to continue to investigate or deny the compensability of an injury during the 60-day 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.

The hearing officer noted in the background information that the claimant failed to establish the date on which the carrier had received its first written notice of the claimed injury. A Payment of Compensation or Notice of Refused/Disputed Claim (DWC-21) was in evidence which reflects that the insurance carrier's first written notice of injury was received on December 3, 1991, and that the carrier initiated temporary income benefits on December 9, 1991, which was within 7 days of its receipt of first written notice of injury. Therefore, the carrier had 60 days from its receipt of the first written notice of injury to investigate or deny the compensability of the injury. Downs, supra. In evidence was a medical record entitled "Initial Medical Report" dated December 9, 1991, which notes radiographs of the lumbar spine revealed a decrease in the disc space at L5-S1 and listed a MRI scan of the lumbar spine as part of the treatment plan. A MRI of the lumbar spine was performed December 18, 1991, and gave as an impression degenerated L5-S1 disc with mild central protrusion. There was no evidence that the carrier ever disputed the compensability of the claimed injury of

The issue is whether the claimant has a compensable L5-S1 disc bulge. The evidence that could have been reasonably discovered within the 60-day period from December 3, 1991, was that the claimant had a L5-S1 disc protrusion based on the December 18, 1991, MRI. In the context of the evidence in this case, it is clear that the terms bulge and protrusion have been used interchangeably to describe the identical condition. Some examples include: the MMI/IR certification report from the designated doctor in which he concluded that the claimant had "a bulging disc on his MRI scan, L5-S1; in the same report the designated doctor listed the diagnosis as lumbosacral strain and protruding disc at L5-S1, assessing a 5% IR "based on disease process assuming that he has a protruding disc at L5-S1." Additionally, a peer review dated December 3, 2003, concludes the compensable injury resulted in "a strain/sprain, a disc bulge."

The carrier could have reasonably discovered in its investigation prior to the expiration of the 60-day waiver period, the MRI results, which showed the L5-S1 disc protrusion. Therefore, we reverse the hearing officer's determination that the carrier did not waive the right to contest the compensability of a disc bulge at L5-S1 by not timely contesting the diagnosis in accordance with the 1989 Act and render a new determination that the carrier did waive the right to contest the compensability of a disc bulge at L5-S1. Because the evidence established the date when the carrier received first written notice of the injury and the evidence reflects that the carrier could have reasonably discovered in its investigation prior to the expiration of the 60-day waiver period, the MRI results, which showed the L5-S1 disc bulge, we reverse the hearing officer's determination that the carrier did not waive the right to contest the compensability of a disc bulge at L5-S1 by not timely contesting the diagnosis in accordance with the Act and render a new determination that the carrier did waive the

right to contest the compensability of a disc bulge at L5-S1. Because the carrier has waived the right to contest the compensability of a disc bulge at L5-S1, we reverse the hearing officer's determination that the compensable injury does not extend to include a disc bulge at L5-S1 and render a new determination that the compensable injury does include a disc bulge at L5-S1. Because we are rendering a decision for the claimant based on the waiver issue, we need not address the claimant's other argument on appeal.

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

**CT CORPORATION SYSTEM
350 NORTH ST. PAUL STREET
DALLAS, TEXAS 75201.**

Margaret L. Turner
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Veronica L. Ruberto
Appeals Judge