

APPEAL NO. 070903-s  
FILED JULY 27, 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 April 17, 2007. The issues before the hearing officer were:

1. Does the respondent/cross-appellant's (claimant) compensable injury of \_\_\_\_\_, extend to include right carpal tunnel syndrome (CTS)?
2. Has the appellant/cross-respondent's (carrier) waived the right to contest compensability of the claimed right CTS?

With regard to the disputed issues the hearing officer determined that the claimant does not have right CTS and in his Conclusion of Law No. 4 concluded that "[t]he Claimant's compensable injury of \_\_\_\_\_ extends to include non-existent right [CTS] because the Carrier waived the right to dispute the compensability of the claimed right [CTS]."

The carrier appealed Conclusion of Law No. 4 contending that the claimant did not have CTS and that "it cannot waive its right to dispute a medical condition that does not exist when the finding that the medical condition does not exist is supported by the evidence" citing Appeals Panel Decision (APD) 981640, decided September 2, 1998. The claimant appeals the hearing officer's determination that she "does not have [CTS] and that the alleged [CTS] is non-existent." The claimant responded to the carrier's appeal urging affirmance of the carrier waiver issue. The file does not contain a response to the claimant's appeal.

DECISION

Reversed and remanded.

The claimant was employed as a cashier in a large retail store. The hearing officer notes that the carrier accepted a right wrist repetitive trauma injury "without further identifying the nature of the injury." It is undisputed that the date of injury (DOI) was \_\_\_\_\_. In an unappealed determination the hearing officer found that the carrier first received written notice of the claimed right hand injury on September 8, 2006. In evidence is a medical report dated October 6, 2006, from Dr. M, a referral doctor from a clinic where claimant was first seen. The report had a diagnosis of CTS. Two Texas Workers' Compensation Work Status Reports (DWC-73), one dated October 6, 2006, the other dated November 6, 2006, both have a work injury diagnosis code for CTS. In a progress note dated November 6, 2006 (transcribed November 8, 2006) Dr. M notes that the claimant is not better and comments:

At this point I don't think we have an obvious diagnosis. She does not seem to have first dorsal compartment symptoms, it is more just having diffuse pain. I don't have a better answer for it other than tendonitis. I see no obvious objective masses or point tenderness. We are going to get an MRI to rule out some type of neuritis or tenosynovitis. I will see her back after the MRI is complete.

In a Notice of Disputed Issue(s) and Refusal to Pay Benefits (PLN-11) dated and filed November 8, 2006,<sup>1</sup> the carrier admits the claimant suffered an injury to the right wrist on \_\_\_\_\_, but denies that the injury extends to or includes right CTS or to any other body part other than the right wrist.

An EMG/NCV was performed and the results were due the date of the CCH and the claimant requested that the record be kept open for the results. The carrier objected and the hearing officer denied the request stating that the results would not matter because even if the test finds the claimant does not have CTS the carrier has waived into it.

A peer review report dated January 19, 2007, stated no diagnosis of right CTS had been validated. Dr. A was appointed as a designated doctor to determine maximum medical improvement/impairment rating MMI/IR (not an issue in this case) and the extent of the employee's compensable injury including whether the claimant had CTS. In a report dated March 2, 2007, Dr. A states that based on the claimant's history of how her injury occurred, his assessment is that the claimant did not have CTS. Dr. A concluded that there is no evidence based medicine that validates CTS in the claimant.

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 (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 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 found that Dr. M's report of October 6, 2006, could have reasonably been discovered by the carrier by the 60th day after September 8, 2006,

---

<sup>1</sup> (Based on the unappealed finding of first written notice of the right hand injury on September 8, 2006, the last day of the 60-day waiver period was November 7, 2006.)

and that the carrier first contested compensability of the claimed right CTS injury on November 8, 2006 (the 61st day after September 8, 2006). The hearing officer also found that the claimant does not have right CTS. Neither that finding nor the Background Information indicates whether the hearing officer believed that the claimant never had CTS on or after the DOI, or whether the claimant had CTS on or after the DOI but did not have CTS on the date of the CCH.

In Continental Casualty Company v. Williamson, 971 S.W.2d 108 (Tex. App.-Tyler 1998, no pet.) the court stated 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.” While we recognize the facts in Williamson are readily distinguishable from the facts in this case, we note that by analogy the rationale is applicable in this case. While the claimant in this case clearly had a compensable right wrist repetitive trauma injury the question becomes whether the claimant ever had right CTS on or after the DOI. As indicated above, the hearing officer does not indicate if the claimant ever had CTS on or after the DOI. If the hearing officer finds that the claimant never had right CTS on or after the DOI, and that determination is not against the great weight and preponderance of the evidence, using the Williamson rationale, the carrier’s failure to timely contest compensability cannot create an injury as a matter of law. In other words, applying the rationale in Williamson, carrier waiver cannot create an injury that does not exist. If, however, the hearing officer finds that the compensable injury does not extend to right CTS because the claimant failed to prove the employment caused the right CTS, then carrier waiver would apply, provided that the condition exists or had existed on or after the DOI and the CTS diagnosis was reasonably discoverable prior to the expiration of the waiver period.

The carrier cites APD 981640, *supra*, as a good example of a case analogous to the instant case contending that the Appeals Panel had determined, in that case, that the carrier cannot waive its right to dispute a condition that did not exist. The hearing officer in APD 981640, found that the claimant did not have reflex sympathetic dystrophy (RSD) as of the date of the hearing, and that the self-insured did not contest compensability of the RSD on or before the 60th day after receiving written notice of the RSD thereby waiving the right to contest compensability of the claimed RSD. Citing Williamson, *supra*, the Appeals Panel in APD 981640 reversed the determination that the self-insured waived its right to contest compensability of the RSD and rendered a new decision that the claimant’s injury does not extend to RSD as of the date of the hearing. We decline to follow APD 981640, on the carrier waiver issue, to the extent that it fails to consider whether the RSD ever existed after the DOI.

We further note that in APDs prior to March 2000, whenever a 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 9, 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. APD 061713-s, decided October 20, 2006. We further distinguish APD 981640 from the instant case in that in APD 981640 a carrier could be faced with multiple waiver periods. When Rule 124.3 was adopted 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 Rule 124.3 comments that 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. APD 061713-s, *supra*. As noted, the Appeals Panel has held that the nature of the injury that becomes compensable by virtue of carrier waiver will be defined by that information that could have been reasonably discovered in the carrier's investigation prior to the expiration of the waiver period. APD 041738-s, *supra*.

We reverse the hearing officer's determinations of both the factual determination that the claimant does not have right CTS (appealed by the claimant) and the conclusion that the compensable injury of \_\_\_\_\_, extends to include non-existent right CTS because the carrier waived the right to dispute the compensability of the claimed right CTS (appealed by the carrier). We remand the case for the hearing officer to make a determination of whether the CTS has ever existed on or after the DOI and dependent on the resolution of that issue determine whether there was carrier waiver, as noted above.

Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Division, pursuant to Section 410.202 which was amended June 17, 2001, to exclude Saturdays and Sundays and holidays listed in Section 662.003 of the Texas Government Code in the computation of the 15-day appeal and response periods. See APD 92642, decided January 20, 1993.

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 STREET, SUITE 1050  
AUSTIN, TEXAS 78701.**

---

Thomas A. Knapp  
Appeals Judge

CONCUR:

---

Veronica L. Ruberto  
Appeals Judge

---

Margaret L. Turner  
Appeals Judge