

APPEAL NO. 071171
FILED AUGUST 1, 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 May 22, 2007. The hearing officer resolved the disputed issues by deciding that: (1) the appellant (carrier) did not contest compensability of the respondent's (claimant) right knee degenerative joint disease (DJD), osteoarthritis, and severe tri-compartmental arthritis of the right knee in accordance with Sections 409.021 and 409.022 and the carrier's contest is not based on newly discovered evidence that could not have been reasonably discovered at an earlier date; and (2) the compensable injury does extend to and include right knee DJD, osteoarthritis, and severe tri-compartmental arthritis of the right knee.

The carrier appealed, disputing the hearing officer's determinations on extent of injury and carrier waiver. The 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 _____. The hearing officer's extent-of-injury determinations are supported by the evidence and are not so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. Accordingly, we affirm the hearing officer's determination that the compensable injury of _____, extends to and includes right knee DJD, osteoarthritis, and severe tri-compartmental arthritis of the right knee.

Section 409.021 provides that an insurance carrier shall initiate compensation under this subtitle promptly. For claims with a date of injury prior to September 1, 2003, the carrier had 7 days after receiving written notice of the claimed injury to begin paying benefits or to notify the Texas Department of Insurance, Division of Workers' Compensation and the employee in writing of its refusal to pay. Section 409.021(a). If an insurance carrier does not contest the compensability of an injury on or before the 60th day after the date on which the carrier is notified of the injury, the insurance company waives the 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. Section 409.021(c). A carrier that failed to begin payment of benefits or file a Payment of Compensation or Notice of Refused/Disputed Claim (DWC-21) accepting or denying the compensability of the claimed injury within the 7-day period waived the right to later contest the compensability of the claimed injury. Continental Casualty Company v. Downs, 81 S.W.3d 803 (Tex. 2002); Appeals Panel Decision (APD) 030380-s, decided April 10, 2003. 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, decided September 8, 2004.

When a claimant asserts that the carrier has waived the right to contest compensability, the claimant has the burden to prove when the carrier received the first written notice of injury and, once that is done, the burden shifts to the carrier to prove that it timely filed a dispute. APD 051656, decided September 14, 2005. The hearing officer in the Background Information noted that, although the claimant did not establish the date the carrier first received written notice of the work-related injury, it is undisputed that the carrier accepted the injury as compensable. The hearing officer failed to make a finding regarding a date certain of when the carrier received first written notice of injury. No evidence was presented as to the date that the carrier first received written notice of the _____, injury. The carrier acknowledged that the injury was "accepted" but there is no evidence when temporary income benefits began. Without a determination as to what the waiver period was, based on the carrier's first receipt of written notice of injury, it cannot be determined what information the carrier could have reasonably discovered regarding the conditions in dispute prior to the expiration of the waiver period. We hold that the claimant has failed to meet her burden of proof to establish the date that the carrier received the first written notice of an injury. Accordingly, we reverse the hearing officer's determination that the carrier did not contest compensability of the claimant's right knee DJD, osteoarthritis, and severe tri-compartmental arthritis of the right knee in accordance with Sections 409.021 and 409.022. We render a new decision that the carrier has not waived the right to contest compensability of the claimant's right knee DJD, osteoarthritis, and severe tri-compartmental arthritis of the right knee in accordance with Section 409.021. Because we have decided that the carrier did not waive the right to contest the specified conditions, we need not reach the issue of whether the carrier's contest was based on newly discovered evidence.

We affirm the hearing officer's determination that the claimant's _____, compensable injury extends to include right knee DJD, osteoarthritis, and severe tri-compartmental arthritis of the right knee. We reverse the hearing officer's determination that the carrier did not contest compensability of the claimant's right knee DJD, osteoarthritis, and severe tri-compartmental arthritis of the right knee in accordance with Sections 409.021 and 409.022. We render a new decision that the carrier has not waived the right to contest compensability of the claimant's right knee DJD, osteoarthritis, and severe tri-compartmental arthritis of the right knee in accordance with Section 409.021.

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

**CORPORATION SERVICE COMPANY
800 BRAZOS, COMMODORE 1
AUSTIN, TEXAS 78701.**

Margaret L. Turner
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Veronica L. Ruberto
Appeals Judge