

APPEAL NO. 071264
FILED AUGUST 14, 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 24, 2007. The hearing officer resolved the disputed issue in (Docket No. 1) which concerned the (Date of injury for Docket No. 1), compensable injury, by deciding that the compensable injury of (Date of injury for Docket No. 1), does not include disc desiccation at L1-2 and L2-3, posterior bulge at L3-4, posterior and central disc herniation at L4-5, posterior disc bulge at L5-S1, lumbar facet dysfunction, and bilateral sacroiliac dysfunction. The extent-of-injury determination regarding the (Date of injury for Docket No. 1), injury was not appealed and has become final pursuant to Section 410.169.

The hearing officer resolved the disputed issues in (Docket No. 2) which concerned the (Date of injury for Docket No. 2), compensable injury, by deciding that: (1) the respondent (self-insured) did not waive its right to contest the compensability of the claimed disc desiccation at L1-2 and L2-3, posterior bulge at L3-4, posterior and central disc herniation at L4-L5, posterior disc bulge at L5-S1, and lumbar facet dysfunction; and (2) the compensable injury of (Date of injury for Docket No. 2), includes or extends to include posterior and central disc herniation at L4-5, but it does not include disc desiccation at L1-2 and L2-3, posterior bulge at L3-4, posterior disc bulge at L5-S1, lumbar facet dysfunction, and bilateral sacroiliac dysfunction. The determination that the compensable injury of (Date of injury for Docket No. 2), includes or extends to include posterior and central disc herniation at L4-5 was not appealed and has become final pursuant to Section 410.169. The appellant (claimant) appealed, disputing the unfavorable extent-of-injury determination regarding the (Date of injury for Docket No. 2), compensable injury. The claimant also contends that the hearing officer's waiver determination is so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. The self-insured responded, urging affirmance.

DECISION

Affirmed in part and reversed and rendered in part.

The claimant worked as a food service clerk in a school district cafeteria when she was injured in both 2004 and 2005. The parties stipulated that the claimant sustained a compensable injury on (Date of injury for Docket No. 2), in the form of a lumbar sprain/strain and that the carrier received [first written] notice of claimant's claim [the (Date of injury for Docket No. 2), injury] on September 21, 2005.

CARRIER 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 Texas Department of Insurance, Division of Workers' Compensation (Division) and the employee in writing of its refusal to pay. 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. 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 parties stipulated that the self-insured first received written notice of an injury on September 21, 2005. The 60-day waiver period ended November 20, 2005. The only evidence in the record that the self-insured disputed the (Date of injury for Docket No. 2), injury was a Notice of Disputed Issue(s) and Refusal to Pay Benefits (PLN-11), dated December 26, 2006, and file-stamped by the Division on December 27, 2006. The medical records in evidence reflect that: (1) on September 29, 2005 (the 8th day of the waiver period), the claimant's treating doctor initially diagnosed the claimant with lumbar intervertebral disc displacement, lumbar facet dysfunction, lumbar discogenic pain, and myofascial pain syndrome and listed a magnetic resonance imaging (MRI) lumbar spine to "evaluate the current anatomy and exclude any other pathology" under his reported plan; (2) on November 2, 2005 (the 42nd day of the waiver period), a MRI was performed on the claimant and it revealed partial desiccation of the disc spaces between L1-2 and L2-3, near complete desiccation of the remainder of the disc spaces, posterior bulge with minimal impingement on the thecal sac at L3-4, a posterior and central disc herniation with impingement at L4-5 and posterior bulge at L5-S1; and (3) a medical note dated November 10, 2005 (50th day of the waiver period), reflects the claimant and her treating doctor discussed the MRI results, and the doctor's diagnoses were identical to those on September 29, 2005. As previously stated, the only evidence of a dispute from the self-insured of the (Date of injury for Docket No. 2), injury was dated December 26, 2006, after the waiver period.

The self-insured argues that it did not waive the right to dispute the conditions at issue because it did not receive the MRI until December 1, 2005, well outside the waiver period. The Appeals Panel has stated that the receipt date of a report does not control when it could have been reasonably discovered. In APD 060233, decided April 4, 2006, we held that "[t]he fact that the carrier actually received the diagnostic testing . . . outside the waiver period does not mean that the carrier could not have discovered the

results of the diagnostic testing through a reasonable investigation prior to the expiration of the waiver period.”

Under the facts of this case, the self-insured could have reasonably discovered in its investigation prior to the expiration of the 60-day waiver period, the treating doctor’s initial diagnoses and the MRI results. The hearing officer’s determination that the self-insured has not waived its right to contest the compensability of the claimed disc desiccation at L1-2 and L2-3, posterior bulge at L3-4, posterior and central disc herniation at L4-5, posterior disc bulge at L5-S1 and lumbar facet dysfunction is against the great weight and preponderance of the evidence. Therefore, we reverse the hearing officer’s determination that the self-insured did not waive the right to contest the compensability of the claimed disc desiccation at L1-2 and L2-3, posterior bulge at L3-4, posterior and central disc herniation at L4-5, posterior disc bulge at L5-S1, and lumbar facet dysfunction and render a new decision that the self-insured did waive the right to contest the compensability of the claimed disc desiccation at L1-2 and L2-3, posterior bulge at L3-4, posterior and central disc herniation at L4-5, posterior disc bulge at L5-S1, and lumbar facet dysfunction.

Because we are rendering a new determination that the self-insured did waive the right to contest the compensability of the claimed disc desiccation at L1-2 and L2-3, posterior bulge at L3-4, posterior and central disc herniation at L4-5, posterior disc bulge at L5-S1, and lumbar facet dysfunction, those conditions have become compensable as a matter of law. Therefore, we reverse the hearing officer’s determination that the compensable injury of (Date of injury for Docket No. 2), does not extend to include disc desiccation at L1-2 and L2-3, posterior bulge at L3-4, posterior disc bulge at L5-S1, and lumbar facet dysfunction and render a new determination that the compensable injury of (Date of injury for Docket No. 2), does extend to include desiccation at L1-2 and L2-3, posterior bulge at L3-4, posterior disc bulge at L5-S1, and lumbar facet dysfunction. There is sufficient evidence to support the hearing officer’s determination that the compensable injury of (Date of injury for Docket No. 2), does not extend to include bilateral sacroiliac dysfunction. Therefore, we affirm the determination that the (Date of injury for Docket No. 2), compensable injury, does not extend to include bilateral sacroiliac dysfunction.

The true corporate name of the insurance carrier is **(a self-insured governmental entity)** and the name and address of its registered agent for service of process is

**EB
(ADDRESS)
(CITY), TEXAS (ZIP CODE).**

Margaret L. Turner
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Veronica L. Ruberto
Appeals Judge