

APPEAL NO. 071513
FILED OCTOBER 12, 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 was held on June 11, 2007, with the record closing on July 3, 2007. The disputed issues were:

1. Does the compensable injury of _____ extend to include retrolisthesis of L5 on S1, posterior annular disc bulge at L4-L5, and a disc protrusion/herniation at L5-S1?

For good cause, the following issue was added at respondent's (claimant) request:

2. Has the appellant (carrier) waived the right to contest the compensability of the retrolisthesis of L5 on S1, posterior annular disc bulge at L4-L5, and a disc protrusion/herniation at L5-S1 by not timely contesting these injuries in accordance with Texas Labor Code Ann. § 409.021 and § 409.022?

The hearing officer determined that the claimant has retrolisthesis of L5 on S1, posterior annular disc bulge at L4-L5, and a disc protrusion/herniation at L5-S1, but that those conditions did not arise in the course and scope of employment and were not aggravated by the incident on _____, nor were they otherwise causally related to the compensable injury. Those determinations have not been appealed and have become final.

The hearing officer further determined that the carrier waived the right to contest compensability of the retrolisthesis of L5 on S1, posterior annular disc bulge at L4-L5, and a disc protrusion/herniation at L5-S1 by not timely contesting those diagnoses in accordance with Section 409.021 and that the compensable injury of _____, includes retrolisthesis of L5 on S1, posterior annular disc bulge at L4-L5, and a disc protrusion/herniation at L5-S1.

The carrier appealed, contending that the hearing officer erred in determining the date the carrier received written notice of the injury by relying on evidence outside of the record, that the carrier could not have reasonably discovered the asserted conditions during the "investigation" period and that the hearing officer erred in finding good cause to add the issue of the carrier waiver. The claimant responded, urging affirmance.

DECISION

Reversed and a new decision rendered.

It is undisputed that the claimant sustained a low back injury on _____.

GOOD CAUSE TO ADD THE CARRIER WAIVER ISSUE

The carrier contends that there was no good cause to add the issue of waiver. We have reviewed the record and we perceive no abuse of discretion on the part of the hearing officer granting the request to add the issue of carrier waiver. Downer v. Aquamarine Operations, Inc., 701 S.W.2d 238 (Tex. 1985); Morrow v. H.E.B., Inc., 714 S.W.2d 297 (Tex. 1986).

CARRIER WAIVER

The claimant first sought medical treatment for his _____, low back injury from Dr. B on October 17, 2003. Dr. B's diagnosis in a report dated October 18, 2003, was lumbar disc syndrome and lumbar radiculitis. The claimant filed an Employee's Notice of Injury or Occupational Disease and Claim for Compensation (DWC-41) dated October 17, 2003, with the Texas Department of Insurance, Division of Workers' Compensation (Division) on October 22, 2003. There is no Employer's First Report of Injury or Illness (DWC-1) in evidence.

Section 409.021(a) 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 the right to contest compensability.

When the 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. Appeals Panel Decision 051656, decided September 14, 2005. Written notice of injury is defined in 28 TEX. ADMIN. CODE § 124.1 (Rule 124.1) which provides that written notice of injury consists of the carrier's earliest receipt of:

1. the DWC-1
2. the notification provided by the Division under subsection (e) of Rule 124.1; or
3. if no DWC-1 has been filed, any other communication regardless of source, which fairly informs the carrier of the name of the injured employee, the identity of the employer, the approximate date of the injury and information which asserts the injury is work related.

The claimant alleged that the carrier received first written notice of injury prior to November 4, 2003, because the carrier had filed a DWC-1 with the Division on

November 4, 2003 (received by the Division on November 5, 2003) therefore the carrier must have had knowledge of the claimant's injury. The claimant sought to prove first written notice of injury to the carrier by the admission as an exhibit of the Division's "Texas Compass Injury Information-IAIABC 148/TWCC-1" notes. Page 1 of that exhibit lists the following pertinent information: claim number; claimant's name; date of injury as "_____"; nature of injury as "strain"; body part "Lower Back Area (Lumbar Area and Lumbo-sacral)"; and date administrator notified as "10/23/03." We note that neither the identity of the employer nor the administrator is listed. However, page 2 of the exhibit lists the employer's name as "(employer)" located in (City 1), TX. Dispute Resolution Information System (DRIS) notes, in evidence as a hearing officer exhibit, lists the employer as (name of employer listed in DRIS notes) and the Benefit Review Conference (BRC) report lists the employer as "(name of employer listed in DRIS notes), Inc" located in (City 2), Texas. The parties also stipulated that (name of employer listed in DRIS notes) was the claimant's employer on _____. There was no evidence in the record of the relationship, if any, of (employer) and (name of employer listed in DRIS notes). Page 5 of the Compass Injury Information exhibit also identified as "Texas Compass Claim Forms Lists" indicates two DWC-1s were filed with the Division on "11/05/2003" and on "06/17/2005." Other information in the Compass Injury Information notes lists the claim number and the claimant's name but does not indicate whether or which of the DWC-1s was for the _____, injury nor does any information in the Compass Injury Information notes give the identity and address of the employer listed in the BRC report and the DRIS notes.

The hearing officer in the Background Information comments:

There was no evidence as to when and how the Carrier received the first written notice of injury; however, the evidence established that Carrier electronically filed the Employer's First Report of Injury on November 5, 2003. Carrier knew or should have known about the notice of injury by November 5, 2003.

In this case, we hold that the evidence was insufficient to show when the carrier received first written notice of the injury as described in Rule 124.1. Accordingly, we reverse the hearing officer's determination that the carrier waived the right to contest compensability of the retrolisthesis of L5 on S1, posterior annular disc bulge at L4-L5, and a disc protrusion/herniation at L5-S1 by not timely contesting those diagnoses and render a new decision that the carrier did not waive the right to contest compensability of the retrolisthesis of L5 on S1, posterior annular disc bulge at L4-L5, and a disc protrusion/herniation at L5-S1. Because the hearing officer's determination that the compensable injury of _____, includes retrolisthesis of L5 on S1, posterior annular disc bulge at L4-L5, and a disc protrusion/herniation at L5-S1 was based on a carrier waiver (the hearing officer had made an unappealed determination that those conditions did not arise in the course and scope of the claimant's employment and were not aggravated by the compensable injury) we also reverse the hearing officer's determination that the compensable injury of _____, includes retrolisthesis of L5 on S1, posterior annular disc bulge at L4-L5, and a disc protrusion/herniation at L5-S1 and render a new decision that the compensable injury of _____, does not

include retrolisthesis of L5 on S1, posterior annular disc bulge at L4-L5, and a disc protrusion/herniation at L5-S1.

The true corporate name of the insurance carrier is **AMERICAN CASUALTY COMPANY OF READING, PENNSYLVANIA** 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.**

Thomas A. Knapp
Appeals Judge

CONCUR:

Veronica L. Ruberto
Appeals Judge

Margaret L. Turner
Appeals Judge