

APPEAL NO. 071546  
FILED OCTOBER 9, 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 July 18, 2007. The hearing officer resolved the disputed issues by deciding that the appellant (carrier) has waived the right to contest compensability of the cervical disc herniations and cervical radiculopathy and that the compensable injury does extend to include cervical disc herniations and cervical radiculopathy only because the carrier waived their dispute. The carrier appealed, disputing the determinations that it waived the right to contest compensability of the cervical disc herniations and cervical radiculopathy as well as the determinations that the \_\_\_\_\_, compensable injury extends to those conditions due to waiver. Respondent 1 (claimant) responded, urging affirmance. Respondent 2 (subclaimant) also responded, urging affirmance and contending that the claimant met her burden of proof on the issues in dispute.

DECISION

Affirmed in part and reversed and rendered in part.

The parties stipulated that the claimant sustained a compensable injury on \_\_\_\_\_. At issue was whether the carrier waived its right to contest compensability of the cervical disc herniations at C3-7 and cervical radiculopathy by not timely contesting these diagnoses in accordance with Section 409.021 and whether the compensable injury of \_\_\_\_\_, extended to those conditions.

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 no later than the seventh 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. 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 found that the carrier received written notice of an injury on (date carrier received written notice). That finding is not disputed on appeal. The carrier argues that since "it received notice on (date carrier received written notice), the

seven day period would extend to (date 7 days after carrier received written notice), at which time [the] carrier did not dispute the claimed injury.” However, the hearing officer additionally found that the carrier initiated benefits within 7 days. That finding was not appealed. Therefore, the waiver period was not 7 days but rather 60 days from receipt of the written notice of the injury.

Both the carrier and the claimant point out in their respective pleadings that the hearing officer mistakenly found that 60 days after the date of receipt of written notice by the carrier was January 2, 2001. We agree, 60 days after the date of receipt of written notice by the carrier is (date 60 days after carrier received written notice). There is no evidence that the carrier disputed the claimed injury of \_\_\_\_\_, within 60 days of (date carrier received written notice). In evidence was a medical record from the claimant’s treating doctor dated November 6, 2000, which noted that compression causes pain down into the right upper extremity and decreased sensation to pinwheel in the right C6 dermatome and gave as a diagnosis cervical radiculopathy. The same record stated that cervical disc herniation should be ruled out. A MRI of the claimant’s cervical spine dated November 14, 2000, was also in evidence which gave as an impression posteriorly protruded discs at C4-5 and C5-6. The MRI also noted a torn annulus impinging on the thecal sac at those same levels. Additionally, a subsequent medical report from the claimant’s treating doctor dated November 20, 2000, stated that the claimant’s MRI confirms a torn annulus at C4-5 and a disc protrusion at C5-6, and gave diagnoses of cervical disc herniation and cervical radiculopathy. A medical note dated November 30, 2000, from a referral medical doctor is also in evidence in which the referral doctor opined that the claimant’s “signs and symptoms, as well as diagnostic testing are consistent with cervical radiculopathy with nerve root irritation of the C5 and C6 nerve roots.” The evidence reflects that the claimant later had cervical spinal surgery.

The evidence supports the hearing officer’s finding that the carrier through a reasonable investigation, could have determined within 60 days following (date carrier received written notice), that cervical radiculopathy and cervical disc herniations at C4-5 and C5-6 were part of the claimed injury. The claimant was diagnosed with cervical disc herniations at C4-5 and C5-6 within the waiver period. We affirm the hearing officer’s determination that the carrier has waived the right to contest compensability of cervical radiculopathy and cervical disc herniations at C4-5 and C5-6. We affirm the hearing officer’s determination that the compensable injury of \_\_\_\_\_, extends to include cervical radiculopathy and cervical disc herniations at C4-5 and C5-6.

There is no evidence which supports the hearing officer’s finding that the carrier through a reasonable investigation, could have determined within 60 days following (date carrier received written notice), that the claimant had cervical disc herniations at C3-4 or C6-7. We reverse the hearing officer’s determination that the carrier waived the right to contest compensability of cervical disc herniations at C3-4 and C6-7 and render a new determination that the carrier did not waive the right to contest compensability of the cervical disc herniations at C3-4 and C6-7. The hearing officer’s finding that the

claimant's cervical disc herniations and cervical radiculopathy were not produced by nor naturally flowed from the compensable injury was not appealed. The hearing officer determined that the compensable injury extends to include cervical disc herniations only because the carrier waived the right to dispute the cervical disc herniations. We reversed the waiver determination regarding cervical disc herniations at levels C3-4 and C6-7, we therefore render a new determination that the compensable injury of \_\_\_\_\_, does not extend to include cervical disc herniations at levels C3-4 and C6-7.

### **SUMMARY**

We affirm the hearing officer's determinations that the carrier waived the right to contest compensability of cervical radiculopathy and cervical disc herniations at C4-5 and C5-6 and that the compensable injury of \_\_\_\_\_, extends to include cervical radiculopathy and cervical disc herniations at C4-5 and C5-6. We reverse the hearing officer's determinations that the carrier waived the right to contest compensability of the cervical disc herniations at C3-4 and C6-7 and that the compensable injury of \_\_\_\_\_, extends to include disc herniations at C3-4 and C6-7, and we render a decision that the carrier did not waive the right to contest compensability of cervical disc herniations at C3-4 and C6-7 and that the compensable injury of \_\_\_\_\_, does not extend to include cervical disc herniations at C3-4 and C6-7.

The true corporate name of the insurance carrier is **LUMBERMENS MUTUAL CASUALTY COMPANY** and the name and address of its registered agent for service of process is

**CORPORATION SERVICE COMPANY  
701 BRAZOS, SUITE 1050  
AUSTIN, TEXAS 78701.**

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Margaret L. Turner  
Appeals Judge

CONCUR:

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Thomas A. Knapp  
Appeals Judge

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Veronica L. Ruberto  
Appeals Judge