APPEAL NO. 071697
FILED NOVEMBER 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 (CCH) was held on August 1, 2007. The hearing officer decided that: (1) the compensable injury of _____, does not extend to an infection of the right foot, including an auto-amputation of the right great toe; (2) the appellant (claimant) did not have disability; and (3) the "carrier" (self-insured) did not waive the right to contest the compensability of the infection of the right foot and auto-amputation of the right great toe by not contesting compensability in accordance with Section 409.021.

The claimant appealed, contending among other matters, that the self-insured's accident report of the _____, date of injury, specifically included a right foot injury, that Dr. Y, the treating doctor, diagnosed cellulitis of the right foot and that the claimant was diagnosed with a right great toe infection at (Hospital H) within the 60-day waiver period. The claimant also appealed the extent-of-injury issue, citing the designated doctor's report, and the disability issue, citing reports of a subsequent treating doctor. The self-insured responded to the appeal, urging affirmance.

DECISION

Reversed and rendered in part and reversed and remanded in part.

The parties stipulated that the claimant sustained a compensable injury on _____. It is undisputed that the claimant was employed as a bus driver and that on _____, was involved in a motor vehicle accident (MVA) involving another bus.

CARRIER WAIVER

The key issue of this case is whether the self-insured waived the right to contest compensability of an infection of the right foot, including an auto-amputation of the right great toe. 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 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 the right to contest compensability. The hearing officer does not make a finding when the self-insured received the first written notice of injury but the evidence

established that date to be _____.[1] The 60th day after _____, is December 10, 2006. 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.

In evidence is an accident report completed by the claimant and a self-insured's Supervisor Report of Accident, both dated _____, and both of which indicate "right foot" as well as low back injury complaints. On _____, the claimant was taken by ambulance to (Hospital S) emergency room (ER). The ER report lists complaints of "Foot & Back" pain and indicates right foot complaints. The claimant was primarily treated for a lumbar strain and released to return to work with discharge instructions to include "Heat Therapy." The claimant subsequently sought treatment with her family physician, Dr. Y. The self-insured took a recorded statement of the claimant on October 17, 2006, in which the claimant complained that she had hit her right foot in the MVA. The claimant saw Dr. Y on a subsequent visit on October 31, 2006, with right foot complaints. Dr. Y recites a history of discomfort of the great toe, "pain initially began 7 days ago" and the "precipitating event was pour hot [scalding] water on toes hoping to treat nail fungus? And repeat blunt trauma to great toe due to foot and chair leg." Dr. Y's assessment included, "Toe pain not gangrene more burn injuries but need to [rule out] fracture [because] of blunt trauma." Right foot x-rays performed on November 9, 2006, were negative for fractures. The claimant saw Dr. Y again for a flu shot on November 7, 2006, at which time Dr. Y noted, "[Right] 1st and 2nd toe 1st degree burn here for [follow-up] area still bluish with purple tinge but seen [sic] to be improving." Dr. Y had an assessment of toe pain. The claimant returned to Dr. Y on November 14, 2006, with worsening right big toe pain. Dr. Y commented that he suspected secondary infection as complication of the prior burn wound which had resolved. Dr. Y's assessment was cellulitis of the right foot. The claimant was admitted to Hospital H on November 16 or 17, 2006 (conflicting medical records) with a right great toe infection "with a history of three weeks prior to her admission, that she kicked her right great toe and presented with edema, erythema, pain and pus. The patient was using Silvadene with not [sic] improvement." Necessity of the toe amputation was discussed; however, the claimant refused the procedure, although it was explained to the claimant that "the chances of necrosis and gangrene are very high." Hospital H's operative report of November 22, 2006, indicated the claimant "presented with a diabetic infection of her right great toe," had initial debridement two or three days ago, and now further necrotic tissue needs debridement. The necrosis of the right great toe, identified in the November 22, 2006, operative report, was later explained in the designated doctor's report as being "essentially auto-amputation of the right great toe."

The claimant and the self-insured's adjuster had a telephone conversation on November 27, 2006, wherein the claimant expressed concern about the medical bills for

[1] A notice of Denial of Compensability and Refusal to Pay Benefits (PLN-1) dated November 27, 2006, in evidence, indicates that the self-insured is its own third party administrator. See Section 409.021(f)(2). The PLN-1 stated that the self-insured received notice that the claimant had reported an on the job injury on October 11, 2006.

treatment of her right foot and right big toe. As a result of that conversation the self-insured prepared a PLN-1 dated November 27, 2006. The PLN-1 stated that the self-insured received notice that the claimant had reported an on the job injury on _____, that the self-insured does not dispute that an incident occurred, that the claimant was "administratively separated for violating safety policies on 10/27/2006" and that the claimant's "attempt to claim injuries to [her] right great toe are in retaliation of being administratively separated." The self-insured denied the claimant's claim for workers' compensation benefits. The self-insured's adjuster testified that the PLN-1 was not filed with the claimant nor the Division because the claimant had not had any disability and, in the opinion of the adjuster, the self-insured was not required to file a PLN-1 when there was no disability.

The hearing officer, in her Background Information, comments that the claimant was taken to the hospital (Hospital S) via ambulance following the accident and was diagnosed with only a lumbar strain. However, clearly as indicated in Hospital S's ER notes, in the self-insured's Supervisor's Accident Report, and in the claimant's accident report, the claimant was also asserting a right foot injury. The hearing officer comments that the "subsequent medical records, including those of the claimant's family doctor, indicate that the right great toe infection was caused by a burn due to putting scalding water on her foot, and not the accident on _____." The hearing officer further commented that the medical records during the 60-day waiver period following the notice of the injury do not indicate that the right great toe infection was related to the compensable injury of _____.[2] However, clearly the self-insured acknowledges in its unfiled PLN-1 dated November 27, 2006, that the claimant was attempting to claim injuries to her right great toe as a retaliation claim. While there was conflicting evidence regarding the causation of the right foot infection and auto-amputation of the right great toe, the claimant from the initial reports through the conversation with the self-insured's adjuster on November 27, 2006, which resulted in the unfiled PLN-1, has asserted that the right foot infection and the auto-amputation of the right great toe were due to the right foot injury sustained in the _____, accident and that the self-insured had not contested compensability for that injury. The hearing officer bases her decision that the self-insured has not waived the right to contest compensability of the right foot infection and auto-amputation of the right great toe on the basis that the claimant has not medically proven causation (was related to the compensable injury). However, the self-insured by November 27, 2006, was aware that the claimant was claiming the right great toe infection as part of the compensable injury, and it failed to file its PLN-1 because the self-insured did not believe there was disability and the claim was a retaliation claim. The self-insured did not timely contest compensability of the right foot infection and the auto-amputation of the right great toe.

We reverse the hearing officer's determination that the self-insured did not waive the right to contest the compensability of the infection to the right foot and auto-amputation of the right great toe by not contesting compensability in accordance with Section 409.021. We render a new decision that the self-insured did waive the right to

[2] The claimant denies that she poured scalding water on her foot and testified that she only soaked her right foot in hot water in compliance with Hospital S's ER notes for "Heat Therapy."

contest the compensability of the infection of the right foot and auto-amputation of the right great toe by not timely contesting compensability under Section 409.021.

EXTENT OF INJURY

The hearing officer found that the compensable injury of _____, does not extend to an infection of the right foot, including an auto-amputation of the right great toe. In that we have reversed the hearing officer's determination on the waiver issue, thereby making the infection of the right foot, including an auto-amputation of the right great toe compensable by operation of waiver, we likewise reverse the hearing officer's determination that the compensable injury of _____, does not extend to an infection of the right foot, including an auto-amputation of the right great toe. We render a new decision that the compensable injury of _____, does extend to an infection of the right foot, including an auto-amputation of the right great toe by operation of waiver.

DISABILITY

The hearing officer determined that the claimant did not have disability from _____, through the date of the CCH. That determination is based on the premise that the infection of the right foot, including an auto-amputation of the right great toe, was not compensable. As we have reversed the hearing officer's determinations on the compensability of the infection of the right foot, including an auto-amputation of the right great toe, we also reverse the hearing officer's determination that the claimant did not have disability. We remand the case to the hearing officer for a determination of disability due to a compensable injury which includes the infection of the right foot, including auto-amputation of the right great toe.

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

PA
(ADDRESS)
(CITY), TEXAS (ZIP CODE).

_____
Thomas A. Knapp
Appeals Judge

CONCUR:

_____
Veronica L. Ruberto
Appeals Judge

_____
Margaret L. Turner
Appeals Judge