

APPEAL NO. 071919  
FILED DECEMBER 18, 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 September 19, 2007. The hearing officer resolved the disputed issues by deciding that: (1) the compensable injury of \_\_\_\_\_, does not extend to include cervical disc herniations at C4-5 and C6-7 with spinal cord compression, aggravation of preexisting condition (C5-6 fusion with osteophyte formation and canal stenosis), spondylitic changes in the cervical spine with central canal stenosis at C5-6, thoracic disc protrusion/herniation at T2-3, thoracic radiculopathy, thoracic fibromyositis, right shoulder AC joint arthritis, and persistent parasthesia bilaterally in hands secondary to cervical laminectomy; (2) the respondent (self-insured) did not waive the right to contest compensability of thoracic disc protrusion/herniation at T2-3 and thoracic fibromyositis by not timely contesting the injury in accordance with Sections 409.021 and 409.022; and (3) the self-insured did waive the right to contest compensability of persistent parasthesia bilaterally in hands secondary to cervical laminectomy by not timely contesting the injury in accordance with Sections 409.021 and 409.022. The appellant (claimant) appealed, disputing the hearing officer's extent-of-injury determination as well as the determination that the carrier did not waive the right to contest compensability of the thoracic disc protrusion/herniation at T2-3 and thoracic fibromyositis by not timely contesting the injury in accordance with Section 409.021. The self-insured responded, urging affirmance. The determination that the self-insured did waive the right to contest compensability of persistent parasthesia bilaterally in hands secondary to cervical laminectomy was not appealed and has become final pursuant to Section 410.169.

**DECISION**

Affirmed in part and reversed and rendered in part.

The parties stipulated that the claimant sustained a compensable injury on \_\_\_\_\_<sup>1</sup>; the compensable injury includes a lumbar sprain/strain, cervical sprain/strain, right shoulder sprain/strain, and thoracic sprain/strain; the self-insured received first written notice of injury on June 8, 2005; and the 60-day waiver period for contesting the injury expired on August 7, 2005. The claimant testified she was injured when a ladder fell striking her. It was undisputed that the claimant had a prior cervical surgery in 2001.

**WAIVER**

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

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<sup>1</sup> Stipulation B contained in the Decision and Order contains a typographical error, listing (incorrect date of injury), rather than \_\_\_\_\_, regarding the stipulation that the claimant was an employee of employer on the date of injury.

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 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 its right to contest compensability. 28 TEX. ADMIN. CODE § 124.3(e) (Rule 124.3(e)) provides that Section 409.021 does not apply to disputes of extent of injury. 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. It is undisputed that the self-insured did not contest compensability of the injury within 60 days after receiving written notice of an injury.

The hearing officer's decision that the self-insured did not waive the right to contest compensability of thoracic disc protrusion/herniation at T2-3 by not timely contesting the injury in accordance with Section 409.021 is supported by sufficient evidence and is affirmed.

There is a medical record from the claimant's treating doctor in evidence dated June 21, 2005, in which the doctor diagnosed the claimant with thoracic fibromyositis and further notes the claimant was there to follow-up on mid back pain for "w/c." Further there are Work Status Reports (DWC-73) dated June 21, 2005, and July 5, 2005, which give thoracic fibromyositis as a work injury diagnosis. The self-insured could have reasonably discovered in its investigation prior to the expiration of the 60-day waiver period, the work injury diagnosis of thoracic fibromyositis. Therefore, we reverse the hearing officer's determination that the self-insured did not waive the right to contest the compensability of thoracic fibromyositis by not timely contesting the injury in accordance with Section 409.021 and render a new determination that the self-insured did waive the right to contest the compensability of thoracic fibromyositis.

## **EXTENT OF INJURY**

We affirm that portion of the hearing officer's determination that the compensable injury of \_\_\_\_\_, does not extend to include cervical disc herniations at C4-5 and C6-7 with spinal cord compression, aggravation of preexisting condition (C5-6 fusion with osteophyte formation and canal stenosis), spondylitic changes in the cervical spine with central canal stenosis at C5-6, thoracic disc protrusion/herniation at T2-3, thoracic radiculopathy, and right shoulder AC joint arthritis, as being supported by the evidence.

The hearing officer's determination that the self-insured did waive the right to contest compensability of persistent parasthesia bilaterally in hands secondary to cervical laminectomy by not timely contesting the injury in accordance with Section 409.021 was not appealed and became final pursuant to Section 410.169. The self-

insured waived the right to contest the compensability of the claimant's persistent parasthesia bilaterally in hands secondary to cervical laminectomy and therefore it became part of the compensable injury as a matter of law. APD 041738, *supra*. We reverse that portion of the hearing officer's extent-of-injury determination that the compensable injury of \_\_\_\_\_, does not extend to include persistent parasthesia bilaterally in hands secondary to cervical laminectomy and render a new determination that the compensable injury of \_\_\_\_\_, does extend to include persistent parasthesia bilaterally in hands secondary to cervical laminectomy.

Because we have reversed the hearing officer's determination that the self-insured did not waive the right to contest compensability of thoracic fibromyositis and rendered a new decision that the self-insured did waive the right to contest compensability of thoracic fibromyositis by not timely contesting the injury in accordance with Section 409.021 that condition has also become compensable as a matter of law. Accordingly, we reverse that portion of the hearing officer's extent-of-injury determination that the compensable injury of \_\_\_\_\_ does not extend to include thoracic fibromyositis and render a new decision that the compensable injury of \_\_\_\_\_, does extend to include thoracic fibromyositis.

### **SUMMARY**

We affirm the hearing officer's determinations that: (1) the compensable injury of \_\_\_\_\_ does not extend to include cervical disc herniations at C4-5 and C6-7 with spinal cord compression, aggravation of preexisting condition (C5-6 fusion with osteophyte formation and canal stenosis), spondylitic changes in the cervical spine with central canal stenosis at C5-6, thoracic disc protrusion/herniation at T2-3, thoracic radiculopathy, and right shoulder AC joint arthritis; and (2) the self-insured did not waive the right to contest compensability of thoracic disc protrusion/herniation at T2-3 by not timely contesting the injury in accordance with Section 409.021.

We reverse the hearing officer's determinations that: (1) the compensable injury of \_\_\_\_\_, does not extend to include persistent parasthesia bilaterally in hands secondary to cervical laminectomy and thoracic fibromyositis; and (2) the self-insured did not waive the right to contest compensability of thoracic fibromyositis in accordance with Section 409.021. We render a new decision that: (1) the compensable injury of \_\_\_\_\_, does extend to include persistent parasthesia bilaterally in hands secondary to cervical laminectomy and thoracic fibromyositis; and (2) the self-insured did waive the right to contest compensability of thoracic fibromyositis in accordance with Section 409.021.

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

**RC  
(ADDRESS)  
(CITY), TEXAS (ZIP CODE)**

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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