

APPEAL NO. 072259  
FILED FEBRUARY 19, 2008

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 November 6, 2007. The issues before the hearing officer were:

- (1) Does the compensable injury of \_\_\_\_\_, include an L5-S1 disc protrusion/herniated nucleus pulposus (HNP)?<sup>1</sup>
- (2) Has the [respondent (carrier)] waived the right to contest an L5-S1 disc protrusion/HNP by not timely contesting the injury in accordance with Section 409.021? and
- (3) Did the [appellant (claimant)] have disability resulting from an injury sustained on \_\_\_\_\_, for the period beginning July 13, 2007, and continuing through the present?

The hearing officer determined that: (1) the claimant's compensable injury of \_\_\_\_\_, does not include a protrusion/HNP at L5-S1; (2) the carrier did not waive the right to contest compensability of a protrusion/HNP at L5-S1 by not contesting the diagnosis in accordance with Section 409.021; and (3) as the protrusion/HNP at L5-S1 is not compensable, there can be no resulting disability. The claimant appealed the hearing officer's carrier waiver, extent-of-injury, and disability determinations. The carrier responded, urging affirmance.

#### DECISION

Reversed and rendered.

#### CARRIER 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 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.

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<sup>1</sup> Based on the medical evidence, the parties understood that either a protrusion or HNP at L5-S1 equated to the same condition as worded in the issues on carrier waiver and extent of injury.

The parties stipulated that the claimant sustained a compensable injury on \_\_\_\_\_. On that date the claimant fell off a ladder while working and hit his back on a beam. The hearing officer found that “[t]he evidence is insufficient to show when [the] Carrier first received written notice of the claimed protrusion/HNP at L5-S1; but, the evidence shows that the first written notice was not received by the Carrier within the sixty-day waiver period.” The hearing officer states in the Discussion section of her decision that the carrier disputed the compensability of the “multi-level degenerative disc disease and spondylosis of L5-S1,”<sup>2</sup> subsequent to a CT scan that revealed “some L5-S1 nerve root involvement,” and that “[Dr. D] physician assistant (PA)] characterized the pathology as a herniated disc on March 3, 2007.”<sup>3</sup> The hearing officer concluded that the carrier did not waive the right to contest compensability of a protrusion/HNP at L5-S1 by not contesting the diagnosis in accordance with Section 409.021.

In evidence is a document entitled “Temporary Income Benefits Payment History” prepared by “AIG” Claim Services, the adjuster for the carrier, that states: “Date of Original Injury Notice to AIG/AIGCS” was September 18, 2006, and “[Employers First Report of Injury or Illness (DWC-1)] Received” was September 18, 2006. In closing argument, both the claimant and the carrier acknowledged that the carrier received first written notice of the claimed injury on September 18, 2006. Additionally, the carrier acknowledged in closing argument that the 60-day waiver period ends November 17, 2006. The only date that is supported by the evidence and acknowledged by the parties to show when the carrier first received written notice of the claimed injury is September 18, 2006. Accordingly, we hold that the carrier received first written notice of the injury on September 18, 2006. Given that September 18, 2006, is the date the carrier received first written notice of the injury, the 60-day waiver period ends on November 17, 2006. There is no evidence that the carrier disputed compensability of the injury on or before the 60th day after it received first written notice of the 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. The claimant underwent diagnostic testing for his back injury. In evidence is a CT scan of the lumbar spine dated \_\_\_\_\_, which finds that “[t]here is a broad-based disk bulge versus herniation at L5-S1.” An MRI of the lumbar spine dated November 8, 2006, reveals “[t]he images at L5-S1 show posterior protrusion of disk material slightly more prominent on the right” and gives an impression as “[c]hronic disk degenerative changes of L5-S1 with posterolateral disk

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<sup>2</sup> A Notice of Disputed Issue(s) and Refusal to Pay Benefits (PLN-11) dated March 7, 2007, states in part that: “[the claimant’s] compensable injury of closed [fracture] of lumbar vertebra without spinal cord injury and abrasion to the right arm does not [extend] to multilevel degenerative disc disease and spondylosis of L5-S1.”

<sup>3</sup> There is no evidence of a medical report dated March 3, 2007, from Dr. D’s PA in the record. However, we note that in evidence is a medical report dated March 3, 2007, from Dr. D in which he references that a “Myelo-CT of the lumbar spine reveals herniation of the L5-S1 disk” and gives an impression of “Herniated lumbar disk with L5 radiculopathy.” (Claimant’s Exhibit No. 5, pages 9-10).

protrusion more prominent on the right causing right S1 nerve root impingement.” Based on the medical evidence, the carrier could have reasonably discovered in its investigation that either a protrusion or HNP at L5-S1 equated to the same condition and was part of the claimed injury within the 60-day waiver period.

Accordingly, we reverse the hearing officer determination that the carrier did not waive the right to contest compensability of a protrusion/HNP at L5-S1 by not contesting the diagnosis in accordance with Section 409.021 and we render a new decision that the carrier waived the right to contest compensability of a disc protrusion and HNP at L5-S1 by not contesting the injury in accordance with Section 409.021.

### **EXTENT OF INJURY**

Given that we have reversed the hearing officer’s determination on the waiver issue and we rendered a new decision that the carrier waived the right to contest compensability of a disc protrusion and HNP at L5-S1 by not contesting the injury in accordance with Section 409.021, we reverse the hearing officer’s extent-of-injury determination because the disc protrusion and HNP at L5-S1 became compensable by virtue of carrier waiver. See APD 041738-s, *supra*. Accordingly, we reverse the hearing officer’s determination that the compensable injury of \_\_\_\_\_, does not include a protrusion/HNP at L5-S1 and we render a new decision that the compensable injury of \_\_\_\_\_, includes a disc protrusion and HNP at L5-S1 by virtue of carrier waiver.

### **DISABILITY**

Section 401.011(16) defines “disability” as “the inability because of a compensable injury to obtain and retain employment at wages equivalent to the pre-injury wage.” The hearing officer found that the “[c]laimant’s inability to obtain or retain employment at wages equivalent to his pre-injury wage beginning July 13, 2007 through the present is solely due to the pending surgery for the claimed disc protrusion/HNP at L5-S1.” The claimant testified that he was taken off work several months ago, and he is not currently working because his doctor is awaiting approval for spinal surgery from the carrier. The medical evidence supports the claimant’s testimony. The evidence establishes a period of disability from July 13, 2007, through the date of the CCH. Accordingly, we reverse the hearing officer’s determination that as the protrusion/HNP at L5-S1 is not compensable, there can be no resulting disability and we render a new decision that the claimant had disability resulting from an injury sustained on \_\_\_\_\_, for the period beginning July 13, 2007, and continuing through the date of the CCH.

### **SUMMARY**

We reverse the hearing officer’s determination that the carrier did not waive the right to contest compensability of a disc protrusion/HNP at L5-S1 by not contesting the diagnosis in accordance with Section 409.021 and we render a new decision that the

carrier waived the right to contest compensability of a disc protrusion and HNP at L5-S1 by not contesting the injury in accordance with Section 409.021. We reverse the hearing officer's determination that the compensable injury of \_\_\_\_\_, does not include a protrusion/HNP at L5-S1 and we render a new decision that the compensable injury of \_\_\_\_\_, includes a disc protrusion and HNP at L5-S1 by virtue of carrier waiver. We reverse the hearing officer's determination that as the protrusion/HNP at L5-S1 is not compensable, there can be no resulting disability and we render a new decision that the claimant had disability resulting from an injury sustained on \_\_\_\_\_, for the period beginning July 13, 2007, and continuing through the date of the CCH.

The true corporate name of the insurance carrier is **AMERICAN HOME ASSURANCE COMPANY** and the name and address of its registered agent for service of process is

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

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Veronica L. Ruberto  
Appeals Judge

CONCUR:

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Cynthia A. Brown  
Appeals Judge

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Thomas A. Knapp  
Appeals Judge