

APPEAL NO. 080004
FILED FEBRUARY 22, 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 December 4, 2007. The hearing officer resolved the disputed issues by deciding that: (1) the appellant (carrier) waived the right to contest the compensability of the claimed right shoulder injury by not timely contesting the injury in accordance with Sections 409.021 and 409.022; (2) the compensable injury of _____, includes the right shoulder impingement and degenerative rotator cuff tear; and (3) the respondent (claimant) reached maximum medical improvement (MMI) on March 23, 2007, with a 15% impairment rating (IR). The carrier appealed, disputing the waiver, extent-of-injury, and IR determinations. The claimant responded, urging affirmance.

DECISION

Affirmed in part and reversed and rendered in part.

The parties stipulated that the claimant sustained a compensable injury on _____, and reached MMI on March 23, 2007.

WAIVER

The carrier waiver issue certified in the Benefit Review Conference (BRC) Report was “[h]as carrier waived the right to contest compensability of the claimed a [sic] right shoulder impingement and degenerative rotator cuff tear injury by not timely contesting the injury in accordance with Texas Labor Code, § 409.021 and § 409.022?” The parties agreed at the CCH that this was one of the disputed issues. However, in the Decision and Order, the hearing officer listed the waiver issue as “[h]as the carrier waived the right to contest the compensability of the claimed right shoulder injury by not timely contesting the injury in accordance with Tex. Labor Code Ann. §§ 409.021 and 409.022?” It is clear from the BRC report and the parties’ agreement at the CCH that the waiver issue was limited to the specific conditions of right shoulder impingement and right shoulder degenerative rotator cuff tear. The hearing officer found that the carrier received its first written notice of the _____, injury on May 2, 2006. The evidence reflects that the carrier contested the compensability of the claimant’s right shoulder injury on May 31, 2007.

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. 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.

The hearing officer correctly noted in his discussion that the right shoulder pain was indicated in pain drawings contained in several of the medical records dated within the 60-day waiver period from the carrier's first written notice of the injury on May 2, 2006. The hearing officer concluded that had the carrier reviewed the claimant's medical records in May or June, it could have easily discovered that the claimant was complaining of right shoulder pain and disputed that the right shoulder was injured in the fall from the ladder. However, the waiver issue was specifically limited to the right shoulder conditions of shoulder impingement and degenerative rotator cuff tear. These specific conditions are not mentioned in the medical records prior to the expiration of the waiver period.

No right shoulder diagnoses were made prior to the expiration of the waiver period nor did the records reflect that the right shoulder received any type of medical treatment prior to the expiration of the waiver period. The initial report of injury only listed a low back injury. See APD 070537, decided May 24, 2007.

Under the facts of this case, the hearing officer's determination that the carrier waived the right to contest the compensability of the claimed right shoulder injury is so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust. We reverse the hearing officer's determination that the carrier waived the right to contest the compensability of the claimed right shoulder injury by not timely contesting the injury in accordance with Section 409.021 and render a new decision that the carrier did not waive the right to contest the compensability of a right shoulder impingement and degenerative rotator cuff tear by not timely contesting the injury in accordance with Section 409.021.

EXTENT OF INJURY

The hearing officer's decision that the compensable injury includes the right shoulder impingement and degenerative rotator cuff tear is supported by sufficient evidence and is affirmed.

IR

The hearing officer's decision that the claimant's IR is 15% is supported by sufficient evidence and is affirmed.

SUMMARY

The hearing officer's decision that the compensable injury extends to include the right shoulder impingement and degenerative rotator cuff tear is affirmed. The hearing officer's decision that the claimant's IR is 15% is affirmed. The hearing officer's decision that the carrier waived the right to contest the compensability of the claimed right shoulder injury by not timely contesting the injury in accordance with Section 409.021 is reversed and a new decision is rendered that the carrier did not waive the right to contest the compensability of a right shoulder impingement and degenerative rotator cuff tear by not timely contesting the injury in accordance with Section 409.021.

The true corporate name of the insurance carrier is **INDEMNITY INSURANCE COMPANY OF NORTH AMERICA** and the name and address of its registered agent for service of process is

**ROBIN M. MOUNTAIN
6600 CAMPUS CIRCLE DRIVE EAST, SUITE 300
IRVING, TEXAS 75063.**

Margaret L. Turner
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Veronica L. Ruberto
Appeals Judge