

APPEAL NO. 080414
FILED MAY 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 begun on June 26, 2007, and concluded on February 19, 2008. With regard to the issues before him the hearing officer determined that the compensable injury of _____, includes injury to the head but does not include any dysfunction of either eye and that the appellant (carrier) waived the right to contest compensability of an injury to the head by not timely contesting the injury in accordance with Section 409.021 but that the carrier has not waived the right to contest compensability of injury to the eyes by not timely contesting an eye injury in accordance with Section 409.021. The hearing officer's determinations on extent of injury regarding the eyes and carrier waiver regarding the eyes have not been appealed.

The carrier appealed the determinations that the compensable injury includes an injury to the head and that the carrier waived the right to contest compensability of the head injury. The file does not contain a response from the respondent (claimant).

DECISION

Affirmed in part and reversed and rendered in part.

It is undisputed that the claimant sustained a compensable injury on _____, when the dump truck the claimant was driving overturned and the claimant was ejected from the vehicle. The parties stipulated that the claimant sustained a compensable injury on _____, and that the carrier has not contested compensability of the claim. The hearing officer made unappealed findings of fact that the carrier received its first written notice of the claimed injury by February 15, 2006, and that the Section 409.021(c) 60-day waiver period following February 15, 2006, expired on April 17, 2006.¹

EXTENT OF INJURY

The hearing officer's determination that the compensable injury of _____, includes an injury to the head is supported by sufficient evidence, and is affirmed.

WAIVER

The claimant was taken from the scene of the accident to a hospital emergency room. Various CT scans were performed at the hospital on the day of injury, including a head CT scan. The report of the CT scan of the head gave as an impression: "[n]o

¹ Because the 60th day after February 15, 2006, was Sunday, April 16, 2006, the expiration of the 60-day waiver period in Section 409.021(c) was extended to the next working day, Monday, April 17, 2006. See 28 TEX. ADMIN. CODE §§ 102.3(a)(3) and 102.3(b) (Rules 102.3(a)(3) and 102.3(b)).

acute intracranial abnormality” and noted that the CT scan was done because the claimant had been in a motor vehicle accident.

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. Appeals Panel Decision 041738-s, decided September 8, 2004, 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.

As previously noted, the hearing officer found that the 60-day waiver period following February 15, 2006, expired on April 17, 2006. The hearing officer, in the Background Information, commented “[a]lthough no one diagnosed injury to the head prior to the expiration of the waiver period . . . , the [hospital] records include a report for CT scan of the head. Carrier waived the right to contest compensability of injury to the head” We disagree. Injury is defined in Section 401.011(26) as damage or harm to the physical structure of the body and a disease or infection naturally resulting from the damage or harm. There was no mention of damage or harm to the claimant’s head or a diagnosis of a head injury in any of the medical records prior to the expiration of the waiver period on April 17, 2006. Because the CT scan of the claimant’s head done on the day of injury was negative for abnormality, it would not put the carrier on notice of a head injury. The CCH record contains no information that the carrier could have reasonably discovered prior to the expiration of the waiver period that the claimant has a head injury. The hearing officer’s determination that the carrier waived the right to contest compensability of an injury to the head is so against the great weight and preponderance of the evidence as to be clearly wrong and unjust.

Accordingly, we reverse the hearing officer’s determination that the carrier waived the right to contest compensability of an injury to the head by not timely contesting the head injury in accordance with Section 409.021 and we render a new decision that the carrier has not waived the right to contest compensability of an injury to the head.

SUMMARY

We affirm the hearing officer’s determination that the compensable injury of _____, includes an injury to the head. We reverse the hearing officer’s determination that the carrier waived the right to contest compensability of an injury to

the head and render a new decision that the carrier did not waive the right to contest compensability of an injury to the head.

The true corporate name of the insurance carrier is **VIRGINIA SURETY COMPANY, INC.** and the name and address of its registered agent for service of process is

**CT CORPORATION SYSTEM
800 BRAZOS STREET
AUSTIN, TEXAS 78701.**

Thomas A. Knapp
Appeals Judge

CONCUR:

Veronica L. Ruberto
Appeals Judge

Margaret L. Turner
Appeals Judge