

APPEAL NO. 080648
FILED JULY 2, 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 April 1, 2008. The issues before the hearing officer were:

- (1) Does the compensable injury extend to include: (1) brachial plexitis; (2) cervical herniated nucleus pulposus (HNP) at C3-4 and C6-7; (3) neuralgia, neuritis and radiculitis of the cervical spine; (4) cervical sprain/strain; (5) cervical intervertebral disc disorder without myelopathy; (6) cervical strain with underlying degenerative disc disease; (7) cervical radiculopathy; (8) situational depression; (9) cervical cord compression; (10) disc pathology involving from C3-4 to C6-7 (disc bulges/protrusions) with foraminal stenosis at all levels; (11) C6 radiculopathy; (12) chronic/severe long thoracic neuropathy; and (13) right arm/shoulder strain?
- (2) Has the appellant (carrier) waived the right to contest the compensability of: (1) brachial plexitis; (2) cervical HNP at C3-4 and C6-7; (3) neuralgia, neuritis and radiculitis of the cervical spine; (4) cervical sprain/strain; (5) cervical intervertebral disc disorder without myelopathy; (6) cervical strain with underlying degenerative disc disease; (7) cervical radiculopathy; (8) situational depression; (9) cervical cord compression; (10) disc pathology involving from C3-4 to C6-7 (disc bulges/protrusions) with foraminal stenosis at all levels; (11) C6 radiculopathy; (12) chronic/severe long thoracic neuropathy; and (13) right arm/shoulder strain by not timely contesting the injury in accordance with Sections 409.021 and 409.022?
- (3) Did the respondent (claimant) have disability as a result of the compensable injury, from July 13, 2007, through the present?

The hearing officer determined that the compensable injury extends to include all of the diagnoses/conditions listed in the extent-of-injury issue.

The hearing officer determined that the carrier did not waive the right to contest compensability of the cervical HNP at C3-4 and C6-7 by not timely contesting the injury in accordance with Sections 409.021 and 409.022, but that the carrier waived the right to contest compensability of all of the other diagnoses/conditions listed in the carrier waiver issue by not timely contesting the injury in accordance with Sections 409.021 and 409.022.

The hearing officer determined that the claimant had disability as a result of the compensable injury, from July 13, 2007, through the date of the CCH.

The carrier appealed the hearing officer's determinations on the issues of waiver, disability and extent of injury that were adverse to the carrier. The hearing officer's determination that the carrier did not waive the right to contest compensability of the cervical HNP at C3-4 and C6-7 by not timely contesting the injury in accordance with Sections 409.021 and 409.022 was not appealed and has become final pursuant to Section 410.169. The claimant responded, urging affirmance of the hearing officer's decision on the issues of waiver, extent of injury and disability.

DECISION

Affirmed in part and reversed and rendered in part.

The claimant testified that he sustained a right arm/shoulder injury on _____, while stocking furniture at work. The parties stipulated that the carrier accepted a cervical sprain/strain and right arm and shoulder sprain/strain as part of the compensable injury; and that the carrier received written notice of the injury on March 8, 2007. It is undisputed that the 60th day after March 8, 2007, is May 7, 2007.

EXTENT OF INJURY

The hearing officer's decision on the extent-of-injury issue is supported by sufficient evidence and is affirmed.

DISABILITY

The hearing officer's decision on the disability issue is supported by sufficient evidence and is affirmed.

CARRIER WAIVER

Section 409.021(a) provides that for claims based on a compensable injury that occurred on or after September 1, 2003, that not 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 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.

In a Notice of Disputed Issue(s) and Refusal to Pay Benefits (PLN-11) dated April 19, 2007, and filed with the Division on April 20, 2007, the carrier stated “[a]t this time, the carrier has accepted as compensable only the following injury: Right Arm/Shoulder Strain.” The carrier argues that the PLN-11 contains limitation language sufficient to dispute all the diagnoses/conditions listed in the carrier waiver issue.

In Finding of Fact No. 3 the hearing officer found that “[t]he PLN-11 dated May 15, 2007 [sic should be April 19, 2007], reflected that the insurance Carrier accepted right arm/shoulder strain but failed to limit its acceptance of a compensable injury to those conditions and did not specifically state that they disputed any and all other diagnoses or body parts.” The hearing officer states in the Background Information section of her decision that based on APD 060701-s, decided May 23, 2006, and APD 052689, decided January 27, 2006, the PLN-11 dated April 19, 2007, “did not specifically dispute any and all conditions other than the right arm/shoulder strain and have therefore waived the right to contest compensability of any other condition.”

In APD 060701-s, *supra*, the carrier filed a PLN-11 which basically stated that the carrier denied all medical treatment, indemnity benefits, etc. for the claimant’s cervical and thoracic areas, and that the carrier was accepting a strain/sprain of the lumbar area. The Appeals Panel reversed the hearing officer’s determination on carrier waiver and rendered a decision that the carrier waived the right to contest the additional lumbar injuries. In that case, the Appeals Panel stated “[t]he evidence reflects that the carrier through a reasonable investigation could have discovered the MRI findings and lumbar spondylosis were claimed to be part of the compensable injury within the waiver period and it failed to deny these conditions either specifically or by limiting the lumbar condition it accepted.” We distinguish APD 060701-s, from the instant case in that the carrier in this case expressly limited its acceptance of the compensable injury to only the right arm/shoulder strain. In APD 060701-s, the Appeals Panel stated that “[p]rior Appeals Panel decisions have recognized that disputes containing limitation language are sufficient to dispute any injury other than the one specifically accepted.”

We also distinguish APD 052689, *supra*, which was cited by the hearing officer in her decision. In APD 052689, the carrier did not include cervical spine in the conditions it specifically disputed as being part of the compensable injury within the 60-day waiver period nor did the carrier dispute any or all conditions except for “chest pain” which it identified as the compensable injury. The Appeals Panel reversed the hearing officer’s determination that the carrier did not waive the right to dispute compensability of a cervical spine injury and rendered a decision that the carrier waived its right to dispute the cervical spine injury. We note that in APD 052689, the carrier did not state in its dispute that it accepted as compensable “only” the chest pain.

In APD 000119, decided March 6, 2000, the carrier’s dispute contained the following language: “[c]arrier disputes that the compensable (date of injury for Appeal No. 000119) injury extends to both shoulders or any other body part. The compensable injury is limited to the lumbar area only.” In APD 000119, *supra*, the Appeals Panel reversed the hearing officer’s determination that the carrier waived its right to contest

compensability of the cervical spine injury and rendered a decision that the carrier did not waive its right to contest the compensability of the cervical injury. Further, the Appeals Panel stated “[w]e believe that the carrier’s contest in this case, which likewise stated that the compensable injury was ‘limited to the lumbar area only’ was sufficiently specific to dispute any injury other than a lumbar injury.”

In the instant case, the PLN-11 dated April 19, 2007, filed by the carrier prior to the expiration of the 60-day waiver period, although not stating that the carrier disputes any and all conditions other than a right arm/shoulder strain, does specifically limit the compensable injury it accepted to only a right arm/shoulder strain. We conclude that the language in the PLN-11 dated April 19, 2007, is sufficient to dispute any injury other than the right arm/shoulder strain, which was specifically accepted by the carrier. Accordingly, we reverse the hearing officer’s determination that the carrier waived the right to contest compensability of: (1) brachial plexitis; (2) neuralgia, neuritis and radiculitis of the cervical spine; (3) cervical sprain/strain; (4) cervical intervertebral disc disorder without myelopathy; (5) cervical strain with underlying degenerative disc disease; (6) cervical radiculopathy; (7) situational depression; (8) cervical cord compression; (9) disc pathology involving from C3-4 to C6-7 (disc bulges/protrusions) with foraminal stenosis at all levels; (10) C6 radiculopathy; and (11) chronic/severe long thoracic neuropathy by not timely contesting the injury in accordance with Sections 409.021 and 409.022. We render a new decision that the carrier did not waive the right to contest compensability of: (1) brachial plexitis; (2) neuralgia, neuritis and radiculitis of the cervical spine; (3) cervical sprain/strain; (4) cervical intervertebral disc disorder without myelopathy; (5) cervical strain with underlying degenerative disc disease; (6) cervical radiculopathy; (7) situational depression; (8) cervical cord compression; (9) disc pathology involving from C3-4 to C6-7 (disc bulges/protrusions) with foraminal stenosis at all levels; (10) C6 radiculopathy; and (11) chronic/severe long thoracic neuropathy by not timely contesting the injury in accordance with Sections 409.021 and 409.022. We affirm the hearing officer’s determination that the carrier waived the right to contest compensability of the right arm/shoulder strain.

SUMMARY

We affirm the hearing officer’s decision on the extent-of-injury issue and the disability issue. We also affirm the hearing officer’s decision that the carrier waived the right to contest compensability of the right arm/shoulder strain.

We reverse the hearing officer’s decision on that portion of the carrier waiver issue appealed by the carrier other than the determination on the right arm/shoulder strain and we render a new decision that the carrier did not waive the right to contest compensability of: (1) brachial plexitis; (2) neuralgia, neuritis and radiculitis of the cervical spine; (3) cervical sprain/strain; (4) cervical intervertebral disc disorder without myelopathy; (5) cervical strain with underlying degenerative disc disease; (6) cervical radiculopathy; (7) situational depression; (8) cervical cord compression; (9) disc pathology involving from C3-4 to C6-7 (disc bulges/protrusions) with foraminal stenosis

at all levels; (10) C6 radiculopathy; and (11) chronic/severe long thoracic neuropathy by not timely contesting the injury in accordance with Sections 409.021 and 409.022.

The true corporate name of the insurance carrier is **TRAVELERS PROPERTY & CASUALTY COMPANY** and the name and address of its registered agent for service of process is

**CORPORATION SERVICE COMPANY d/b/a
CSC-LAWYERS INCORPORATING SERVICE COMPANY
701 BRAZOS STREET #1050
AUSTIN, TEXAS 78701.**

Veronica L. Ruberto
Appeals Judge

CONCUR:

Cynthia A. Brown
Appeals Judge

Margaret L. Turner
Appeals Judge