

APPEAL NO. 080730
FILED JULY 17, 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 was held on April 24, 2008. The issues before the hearing officer were:

1. Whether the appellant's (claimant) compensable injury of _____, extends to and includes her cervical spine, specifically including cervical radiculopathy, and the findings noted in the March 14, 2006, MRI study and Dr. Lipscomb's (Dr. L) April 6, 2006, notes; and
2. Whether the respondent (carrier) has waived its right to dispute the compensability of the extent of injury alleged herein.¹

The hearing officer decided that the claimant's compensable injury of _____, does not extend to or include her cervical spine and that the carrier has not waived its right to dispute the alleged compensability of the claimant's cervical injury. The claimant has appealed the hearing officer's adverse determinations regarding extent of injury and carrier waiver. The claimant also appealed the hearing officer's determination that the claimant is "estopped" to assert that the carrier waived its right to dispute the alleged compensability of her cervical spine injury, stating that the hearing officer impermissibly limited the scope of Sections 409.021 and 409.022. The carrier responded, urging affirmance.

DECISION

Reversed and rendered.

Unappealed are the hearing officer's Findings of Fact that:

- (1) on _____, the claimant sustained damage or harm to the physical structure of her body while she was engaged in the exercise of her job duties with employer;
- (2) the carrier received its first written notice of claimant's _____, compensable injury on February 21, 2006;

¹ We note that issues were reported out of the benefit review conference as follows: (1) does the compensable injury of (incorrect date of injury) [sic should be _____] extend to include the claimant's cervical spine, including, the findings and impressions stated on the MRI of the cervical spine dated 03/14/06, and the diagnosis of cervical radiculopathy in the SOAP [Subjective Objective Assessment Plan] notes dated 04/06/06 from Dr. L; and (2) has the carrier waived the right to dispute the findings and impressions on the MRI of the cervical spine dated 03/14/06, and the diagnosis of cervical radiculopathy as stated in Dr. L's report dated 04/06/06, by not timely contesting the compensability in accordance with Sections 409.021 and 409.022? The hearing officer paraphrased the disputed issues and corrected the date of injury, and the parties agreed with the wording on the record.

- (3) the claimant's cervical pathology was diagnosed within 60 days of February 21, 2006; and
- (4) within 60 days of February 21, 2006, or on or before April 22, 2006, the carrier did not dispute the currently alleged (cervical spine) extent of the claimant's compensable injury of _____.

It is undisputed that the carrier accepted a right shoulder injury that occurred at work on _____, when the claimant, a dental assistant, injured herself while adjusting the height of a dental chair. The claimant initially sought medical treatment from her treating doctor, Dr. L, on February 23, 2006. In a letter dated July 25, 2006, Dr. L wrote that at the time of her initial evaluation, the claimant had "pain and tenderness associated with the lateral aspect of her right shoulder, but also had complaints involving the right trapezial area, with tenderness localized in this particular region. This particular finding is more consistent with a cervical or neck condition." The evidence established that on March 14, 2006, the claimant underwent a cervical MRI, which revealed multiple findings regarding the cervical spine, and gave impressions of "[r]ight-sided C5-6 disc herniation" and "[d]egenerative disc bulge present at C6-7." In evidence is a March 15, 2006, Electromyography Report that concluded "[n]o evidence of a right cervical radiculopathy by EMG." Additionally in evidence were several SOAP notes (dated prior to the expiration of the waiver period) from Dr. L:

- (1) on March 7, 2006, indicating the claimant's symptoms of severe numbness and pain in fingers and elbow and "schedule cervical spine m.r.i.: C-6-C-7 [herniated nucleus pulposus];"
- (2) on March 23, 2006, indicating the claimant was there for a review of the cervical MRI, which was positive for "C-6, C-7 disc herniation;" and
- (3) on April 6 and April 20, 2006, including the diagnosis of cervical radiculopathy.

It is undisputed that on June 20, 2006, after the expiration of the 60-day waiver period, the carrier filed with the Texas Department of Insurance, Division of Workers' Compensation (Division) a Notice of Disputed Issue(s) and Refusal to Pay Benefits (PLN-11), "disputing entitlement of Cervical Spine because [t]he carrier disputes that the compensable [injury] extends to include any injury to the claimant's cervical region of the spine. The employee did not have cervical complaints until several months after the injury. The medical fails to indicate that there is any injury to the cervical spine that is related to the compensable right shoulder injury." The cervical radiculopathy identified in the extent of injury and waiver issues is what Dr. L diagnosed in his SOAP notes of April 6, 2006.

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 Division and the employee in writing of its refusal to pay. Section 409.021(c) defines the waiver period. It 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. It is undisputed that the carrier did not contest compensability of the injury prior to the expiration of the waiver period on April 22, 2006.

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 this case, it is undisputed that the diagnosis of cervical radiculopathy (in Dr. L's April 6, 2006, notes), and the March 14, 2006, cervical MRI with multiple findings regarding the cervical spine and with impressions of "[r]ight-sided C5-6 disc herniation" and "[d]egenerative disc bulge present at C6-7" were in the claimant's medical records dated after her work injury and prior to the expiration of the waiver period. In evidence is the transcript of a recorded statement of the claimant by the claim's adjuster on March 13, 2006. A portion of the recorded statement reads:

Q. Your doctor contacted me about doing an MRI of your neck. Have you had any problems with your neck?

A. None.

Q. Okay. But you're aware that sometimes a neck injury can be masqueraded as a shoulder injury. That happens sometimes.

A. Yes. Yes.

Q. But your primary concern is your shoulder. You think there's something wrong with your shoulder. Is that right?

A. There's a specific area that when I push on it I know exactly where it hurts.

[additional dialogue]

Q. Okay. When you got hurt, did you - - was there a sudden movement? Did you twist anything? Did - - Was your neck involved in any way that you know of when you had your accident?

A. No.

In the hearing officer's Discussion section of her decision, she noted that the claimant's diagnoses of cervical pathology and bulging and herniated cervical discs were prior to the expiration of the waiver period. She wrote that: "the medical records reflecting cervical pathology do not purport to link the cervical diagnoses to the compensable shoulder injury . . . [i]t therefore appears reasonable to conclude that Carrier was under no obligation to infer or dispute causation of what then appeared to be an incidental finding, particularly in light of Claimant's unequivocal denial that the claim injury extended to or included her cervical spine in any manner. Moreover, having denied the currently alleged extent of injury and having induced Carrier to rely upon such denial, Claimant should be considered estopped to assert that carrier waived its right to dispute the extent of injury at issue in this decision." The claimant appeals the hearing officer's Conclusion of Law No. 5 that the claimant is "estopped" to assert that the carrier waived its right to dispute the alleged compensability of her cervical spine injury.

We read the hearing officer's use of the concept of "estoppel" to refer to "equitable estoppel" rather than "collateral estoppel."² "Equitable estoppel" is based on the principle that "one who by his conduct has induced another to act in a particular manner should not be permitted to adopt an inconsistent position and thereby cause loss or injury to the other." See City of Fredericksburg v. Bopp, 126 S.W.3d 218 (Tex. App.-San Antonio 2003, no pet.). "Equitable estoppel" is an affirmative defense that is established when: (1) a false representation or concealment of material facts; (2) is made with knowledge, actual or constructive, of those facts; (3) with the intention that it should be acted on; (4) to a party without knowledge or means of obtaining knowledge of the facts; and (5) who detrimentally relies on the representations. See Sefzik v. City of McKinney, 198 S.W.3d 884 (Tex. App.-Dallas 2006, no pet.). None of the carrier's evidence identifies a false representation or concealment of material facts made by the claimant to the carrier with knowledge, actual or constructive, of those facts with the intention that it should be acted upon by the carrier without knowledge or means of obtaining knowledge of the facts. The carrier relies on the claimant's transcribed recorded statement of March 13, 2006, as set out above, to establish the required elements. Although the claimant said in her March 13, 2006, recorded statement that her neck was not involved in any way that she knew of when she was injured at work, it is evident from the adjuster's question that the carrier was aware that a neck injury could masquerade as a shoulder injury. As previously stated, the claimant underwent a cervical MRI one day after her recorded statement that gave impressions of "[r]ight-sided C5-6 disc herniation" and "[d]egenerative disc bulge present at C6-7." Less than

² In APD 061381-s, decided August 16, 2006, there is a discussion by the Appeals Panel as to "collateral estoppel," frequently referred to as issue preclusion, which bars relitigation of any ultimate issue of fact actually litigated and essential to the judgment in a prior suit, regardless of whether the second suit is based on the same cause of action.

a month later, on April 6, 2006, Dr. L diagnosed the claimant with cervical radiculopathy. Considering the timeline of events and the nature of the work injury, the carrier should have reasonably followed through with its duty to investigate and to obtain the claimant's medical records (including the findings and impressions of the cervical MRI and medical diagnoses) prior to the expiration of the waiver period, especially in light of its statements to claimant on March 13, 2006, recognizing that a neck injury can be disguised as a shoulder injury. Therefore, the hearing officer erred in applying the doctrine of "equitable estoppel" to the disputed issue of carrier waiver without the necessary elements of "equitable estoppel" being established.

More importantly, what needs to be looked to is what information the carrier could have reasonably discovered in its investigation prior to the expiration of the waiver period. See APD 041738-s, *supra*. Under the facts of this case, prior to the date of injury, _____, the claimant had not been previously diagnosed with cervical spine pathology, although we note that in evidence are medical records and a letter from Dr. P. Dr. P wrote that he treated the claimant for pain in the cervical area in the year 2003, and subsequently saw her for low back pain from 2005 through 2007. He stated that "[p]rior to 2007 [the claimant] never presented with a symptom picture that would lead me to believe there was a disc problem. In those times she would respond well to conservative care. Even though discs do not respond to such care, her response was much faster than would be expected from a disc problem." After the date of injury, _____, the impressions and findings of the March 14, 2006, cervical MRI and the diagnosis of cervical radiculopathy (in Dr. L's medical notes, dated April 6, 2006, and continuing) could have been reasonably discovered by the carrier's investigation prior to the expiration of the waiver period on April 22, 2006. The claimant was not required under these facts to allege a causal connection between the compensable injury and a condition that she had not previously been diagnosed with.

In APD 052808, decided February 1, 2006, the Appeals Panel reversed a hearing officer's determination on waiver and rendered a decision that the carrier waived its right to dispute the compensability of bilateral carpal tunnel syndrome (CTS) by failing to timely contest compensability of the injury in accordance with Sections 409.021 and 409.022. The Appeals Panel held that the claimant had not been previously diagnosed with bilateral CTS and had consistently complained of left wrist pain and pain radiating down her right arm from her initial reporting of her work injury. In that case, there were medical records dated after the date of injury and prior to the expiration of the waiver period containing multiple references of tingling and numbness in her fingers and hands as well as a diagnosis of bilateral CTS. Under those facts, the claimant was not required to allege a causal connection between the compensable injury and a condition that she had not previously been diagnosed with.

The hearing officer cites APD 051040, decided June 21, 2005, for the proposition that an allegation of a causal connection between the compensable injury and the disputed condition must have been reasonably discoverable within the waiver period. In APD 051040, medical records prior to the date of injury indicated the claimant had been diagnosed with pulmonary fibrosis. There were no medical records in evidence dated

within the waiver period referencing pulmonary fibrosis. Under those circumstances the only way the carrier could be aware that there was a claim that the compensable injury extended to pulmonary fibrosis was a specific allegation that the previously diagnosed condition of pulmonary fibrosis was aggravated or connected in some way to the compensable injury which occurred in that case. We disagree with the hearing officer that the facts in the present case are similar to those in APD 051040 rather than in APD 052808, *supra*.

Accordingly, the hearing officer's determinations that the carrier did not waive the right to contest compensability of the claimed extent of injury alleged and that the claimant was "estopped" to assert that the carrier waived its right to dispute the alleged compensability of her cervical spine injury is reversed as being against the great weight and preponderance of the evidence. We render a new decision that the carrier has waived its right to dispute the compensability of the cervical spine, specifically cervical radiculopathy (as diagnosed in Dr. L's April 6, 2006, notes), and the findings and impressions revealed in the March 14, 2006, cervical MRI, by not timely contesting the injury in accordance with Section 409.021.

EXTENT OF INJURY

The hearing officer also found that the claimant did not sustain damage or harm to the physical structure of her cervical spine as a result of her on-the-job injury of _____. That finding is supported by the evidence. However, because we are reversing the hearing officer's determination on carrier waiver and rendering a new decision, as stated above, we reverse the hearing officer's extent-of-injury determination and render a new decision that the claimant's compensable injury of _____, extends to and includes her cervical spine, specifically cervical radiculopathy as diagnosed in Dr. L's April 6, 2006, notes and the findings and impressions revealed in the March 14, 2006, cervical MRI, as a matter of law.

SUMMARY

The hearing officer's determinations that the claimant is "estopped" to assert that the carrier waived its right to dispute the alleged compensability of her cervical spine injury and that the carrier has not waived its right to dispute the compensability of the extent of injury alleged herein are reversed and we render a new decision that the carrier has waived its right to dispute the compensability of the cervical spine, specifically cervical radiculopathy as diagnosed in Dr. L's April 6, 2006, notes and the findings and impressions revealed in the March 14, 2006, cervical MRI, by not timely contesting the injury in accordance with Section 409.021. Because we have reversed the hearing officer's determination on carrier waiver, we also reverse the hearing officer's decision that the claimant's compensable injury of _____, does not extend to or include her cervical spine and render a new decision that the claimant's compensable injury of _____, does extend to and include her cervical spine, specifically cervical radiculopathy as diagnosed in Dr. L's April 6, 2006, notes and the

findings and impressions revealed in the March 14, 2006, cervical MRI as a matter of law.

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

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

Cynthia A. Brown
Appeals Judge

CONCUR:

Veronica L. Ruberto
Appeals Judge

Margaret L. Turner
Appeals Judge