

APPEAL NO. 081222
FILED OCTOBER 14, 2008

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A consolidated contested case hearing was held on July 10, 2008. With regard to Docket No. 1 regarding an (DOI for Docket No.1), injury, the hearing officer determined that the compensable injury of (DOI for Docket No.1), does not extend to include respondent 1/cross-appellant's (claimant) lumbar radiculopathy and spondylolisthesis on or after (DOI for Docket No. 2).

With regard to Docket No. 2 regarding an (DOI for Docket No. 2), injury, the hearing officer determined that the appellant/cross-respondent, Sentry Select Insurance Company (Carrier S), did not waive the right to contest compensability of lumbar radiculopathy and spondylolisthesis by not timely contesting the injury in accordance with Section 409.021, and that the compensable injury of (DOI for Docket No. 2), extends to include lumbar radiculopathy and spondylolisthesis.

Carrier S appeals the hearing officer's determinations that the compensable injury of (DOI for Docket No. 2), extends to include lumbar radiculopathy and spondylolisthesis and that the compensable injury of (DOI for Docket No.1), does not extend to include the claimant's lumbar radiculopathy and spondylolisthesis on or after (DOI for Docket No. 2). The claimant responded, urging affirmance. Respondent 2, Universal Underwriters of Texas Insurance Company (Carrier U), the carrier for the (DOI for Docket No.1), injury, also responded to Carrier S's appeal, urging affirmance.

The claimant cross-appeals that portion of the hearing officer's determination that Carrier S did not waive its right to dispute compensability of lumbar spondylolisthesis by not timely contesting the injury in accordance with Section 409.021. The claimant did not appeal that portion of the hearing officer's determination that Carrier S did not waive its right to dispute compensability of lumbar radiculopathy, and that portion of the hearing officer's waiver determination regarding lumbar radiculopathy has become final pursuant to Section 410.169. Carrier S responded to the claimant's appeal, contending that the claimed lumbar spondylolisthesis could not have been reasonably discovered during the waiver period.

DECISION

Affirmed in part and reversed and rendered in part.

The parties stipulated that Carrier S accepted a compensable injury of (DOI for Docket No. 2), in the form of a lumbar sprain/strain.

**EXTENT OF INJURY
(DOCKET NO. 1)**

The hearing officer's determination that the compensable injury of (DOI for Docket No.1), does not extend to include the claimant's lumbar radiculopathy and spondylolisthesis on or after (DOI for Docket No. 2), is supported by sufficient evidence and is affirmed.

**EXTENT OF INJURY
(DOCKET NO. 2)**

The hearing officer's determination that the compensable injury of (DOI for Docket No. 2), extends to include lumbar radiculopathy and spondylolisthesis is supported by sufficient evidence and is affirmed.

**CARRIER S WAIVER
(DOCKET NO. 2)**

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 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. In Appeals Panel Decision 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 testified that he sustained a new injury on (DOI for Docket No. 2), and that he treated with Dr. D, a referral doctor, who had previously treated the claimant for the prior work-related injury of (DOI for Docket No.1). The hearing officer makes an unappealed finding of fact that Carrier S "received written notice of the claimed injury of (DOI for Docket No. 2) by at least 8/30/04." The hearing officer noted in the Background Information of the decision and order, that "[Dr. Du's] medical reports, all reflect the prior (DOI for Docket No. 1) date of injury." A review of the evidence reflects that there are no medical reports from a Dr. Du in evidence. Further, Dr. D's September 23, 2004, report clearly references the claimed injury of (DOI for Docket No. 2).

After his injury on (DOI for Docket No. 2), the claimant treated with his treating doctor who referred the claimant back to Dr. D. Dr. D, in a report dated September 23, 2004, entitled "Initial Office Visit," referenced a date of injury of (DOI for Docket No. 2). In the history portion of the report Dr. D referenced his prior treatment of the claimant in

2003 and recited the “jumping off a trailer” event of (DOI for Docket No. 2). Dr. D’s clinical impression included “[l]ong term status post lumbar fusion for spondylolisthesis.” The evidence reflects that Dr. D’s September 23, 2004, report and an accompanying Work Status Report (DWC-73) were sent to Carrier U, the carrier for the (DOI for Docket No.1), injury. Dr. D does not anywhere reference the (DOI for Docket No.1), injury in his September 23, 2004, report. Dr. D requested diagnostic tests which were performed on October 1, 2004. A MRI of the lumbar spine dated October 1, 2004, shows grade I anterior spondylolisthesis of L4 over L5 vertebral body. Flexion/extension x-rays dated October 1, 2004, indicate “a 1 cm anterior spondylolisthesis of L4 over L5 vertebral body.” There is no evidence that Carrier S disputed the claimed injury of (DOI for Docket No. 2), prior to the expiration of the 60-day waiver period. Carrier S had written notice of the claimant’s (DOI for Docket No. 2), injury at least by August 30, 2004, and a reasonable investigation with the claimant’s treating doctor would have disclosed the referral to Dr. D and Dr. D’s September 23, 2004, report referencing an injury on (DOI for Docket No. 2), and referral for diagnostic tests.

Accordingly, we reverse that portion of the hearing officer’s determination that Carrier S did not waive the right to contest compensability of spondylolisthesis by not timely contesting the injury in accordance with Section 409.021 as being against the great weight and preponderance of the evidence. We render a new decision that Carrier S waived the right to contest compensability of spondylolisthesis by not timely contesting the injury in accordance with Section 409.021.

SUMMARY

We affirm the hearing officer’s determinations that the compensable injury of (DOI for Docket No.1), does not extend to include the claimant’s lumbar radiculopathy and spondylolisthesis on or after (DOI for Docket No. 2), and that the compensable injury of (DOI for Docket No. 2), extends to include lumbar radiculopathy and spondylolisthesis. We reverse that portion of the hearing officer’s determination that Carrier S did not waive the right to contest compensability of spondylolisthesis by not timely contesting the injury in accordance with Section 409.021 and we render a new decision that Carrier S waived the right to contest compensability of spondylolisthesis by not timely contesting the injury in accordance with Section 409.021.

The true corporate name of insurance carrier U is **UNIVERSAL UNDERWRITERS OF TEXAS INSURANCE 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.**

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

**TREVA DURHAM
1000 HERITAGE CENTER CIRCLE
ROUND ROCK, TEXAS 78664.**

Thomas A. Knapp
Appeals Judge

CONCUR:

Veronica L. Ruberto
Appeals Judge

Margaret L. Turner
Appeals Judge