

APPEAL NO. 081275  
FILED OCTOBER 23, 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 July 9, 2008. The issues before the hearing officer were:

- (1) Does the compensable injury of \_\_\_\_\_, extend to the cervical spine, lumbar spine, thoracic spine and right knee?
- (2) Has the appellant (carrier) waived the right to contest the compensability of an injury to the cervical spine, lumbar spine, thoracic spine and right knee by not timely contesting the cervical spine, lumbar spine, thoracic spine and right knee injury in accordance with Sections 409.021 and 409.022?
- (3) Did the first certification of maximum medical improvement (MMI) and impairment rating (IR) from Dr. K on January 24, 2008, become final under Section 408.123?

The hearing officer determined that: (1) the compensable injury of \_\_\_\_\_, extends to include the cervical spine, thoracic spine and right knee, but does not include the lumbar spine; (2) “[s]ince [c]arrier failed to timely contest compensability of the lumbar spine, however, [c]arrier is also liable for the lumbar degenerative disc disease”; and (3) the first certification of MMI and IR assigned by Dr. K on January 24, 2008, did not become final under Section 408.123. The hearing officer did not make a determination on whether the carrier waived the right to contest compensability of an injury to the cervical spine, thoracic spine and right knee.

The carrier appeals the carrier waiver and extent-of-injury issues. In its appeal, the carrier states that it disputes the finding of fact and conclusion of law that the compensable injury extends to the right knee. The carrier states that the medical records show an injury to the left knee, not the right knee. The carrier states that it agrees that the compensable injury “extends to strain/sprains of the cervical and thoracic spines and includes the left knee.” The carrier states that the compensable injury does not extend to the lumbar spine or to cervical, thoracic and lumbar degenerative disc disease. The respondent (claimant) responds, urging affirmance.

The hearing officer’s determination that the first certification of MMI and IR assigned by Dr. K on January 24, 2008, did not become final under Section 408.123 was not appealed and has become final pursuant to Section 410.169.

DECISION

Affirmed in part and reversed and rendered in part.

The parties stipulated that the claimant sustained a compensable injury on \_\_\_\_\_. The evidence reflects that the claimant was involved in an 18-wheeler rollover motor vehicle accident on \_\_\_\_\_. The claimant was taken to an emergency room (ER) for medical treatment and diagnostic tests were performed to his head, thoracic spine and lumbar spine. The ER notes dated September 16, 2006, show that the claimant was diagnosed with multiple facial/skull fractures, a cerebral contusion and a subarachnoid hemorrhage to his head. Additionally, the ER notes show that he had a left knee laceration and left fibula fracture as well as a right hand fracture.

### **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 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 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.

It is undisputed that the carrier first received written notice of the claimed injury on September 16, 2006, and that the 60th day after September 16, 2006, is November 15, 2006. At issue was whether the carrier waived the right to contest compensability of an injury to the cervical spine, lumbar spine, thoracic spine and right knee by not timely contesting the claimed injuries in accordance with Section 409.021. There is no evidence that the carrier disputed the injury of \_\_\_\_\_, or an injury to the cervical spine, thoracic spine, lumbar spine and right knee prior to the expiration of the waiver period.

The hearing officer's decision states that "[s]ince [c]arrier failed to timely contest compensability of the lumbar spine, however, [c]arrier is also liable for the lumbar degenerative disc disease." A CT scan of the claimant's lumbar spine done on September 17, 2006, showed multilevel degenerative disc disease. The hearing officer's determination that the carrier waived the right to contest compensability of an injury to the lumbar spine is supported by sufficient evidence and is affirmed.

The hearing officer determined carrier waiver with regard to the lumbar spine, however, she failed to make a conclusion of law or decision regarding the cervical spine, thoracic spine and right knee as stated in the carrier waiver issue. The hearing officer found that the carrier did not timely contest compensability of the "cervical and

thoracic strain” and that “[e]vidence of [c]laimant’s cervical and thoracic strain,” showed that it “existed and was reasonably discoverable by [c]arrier within 60 days of its first written notice of the \_\_\_\_\_ injury.” The carrier states in its appeal that it does not appeal “the finding of a cervical and thoracic strain/sprain.” A CT scan of the thoracic spine dated September 17, 2006, shows thoracic degenerative disc disease. A “Physical Therapy Prescription Form” dated November 10, 2006, from Dr. R, a referral doctor, lists cervical degenerative disc disease as a diagnosis. There is no evidence that the carrier contested compensability of an injury to the cervical spine and thoracic spine prior to the expiration of the waiver period. Accordingly, we render a determination that the carrier waived its right to contest compensability of an injury to the cervical and thoracic spine by not timely contesting compensability of an injury to the cervical spine and thoracic spine in accordance with Section 409.021.

The hearing officer incorrectly noted in the Background Information section of her decision that Dr. K, the designated doctor, opined that the claimant sustained an injury to his right knee as a result of his compensable injury of \_\_\_\_\_. A review of the record reflects that Dr. K did not mention a right knee injury in his report dated January 24, 2008. There was only one report from Dr. K in evidence. A “Physical Therapy Prescription Form” dated November 10, 2006, from Dr. R lists “knee chondro” as a diagnosis. We note that there is an unintelligible notation before the word “knee” on the diagnosis line and that on the form referencing “Area R L” is not checked off for any body part (Claimant’s Exhibit No. 14, page 2). In evidence is a “Hospital Registration Facesheet” dated November 20, 2006 (dated after the waiver period), listing a working diagnosis of “chondromalacia patella” but does not reference either the right or left knee. The hearing officer found that evidence of the claimant’s right knee injury existed and was reasonably discoverable by the carrier within 60 days of its first written notice of the \_\_\_\_\_, injury. This finding is not supported by the evidence. As previously noted the hearing officer failed to make a conclusion of law or decision regarding carrier waiver of an injury to the right knee. There is no evidence that the carrier contested compensability of an injury to the right knee prior to the expiration of the waiver period. However, there is no evidence that the carrier could have reasonably discovered a right knee injury prior to the expiration of the waiver period. Accordingly, we render a determination that the carrier did not waive its right to contest compensability of an injury to the right knee by not timely contesting compensability of an injury to the right knee in accordance with Section 409.021.

### **EXTENT OF INJURY**

That portion of the hearing officer’s determination that the compensable injury of \_\_\_\_\_, extends to include the cervical spine and thoracic spine is supported by sufficient evidence and is affirmed.

Given that we have affirmed the hearing officer’s determination that “[s]ince [c]arrier failed to timely contest compensability of the lumbar spine, however, [c]arrier is also liable for the lumbar degenerative disc disease” in accordance with Section 409.021, the lumbar spine injury became compensable as a matter of law due to carrier

waiver. Accordingly, we reverse that portion of the hearing officer's extent-of-injury determination that the compensable injury of \_\_\_\_\_, does not extend to the lumbar spine, and we render a new decision that the compensable injury of \_\_\_\_\_, extends to include the lumbar spine.

That portion of the hearing officer's decision that the compensable injury of \_\_\_\_\_, extends to include the right knee is not supported by the evidence. The ER notes dated September 16, 2006, reference a left knee injury (left fibula fracture). There are physical therapy notes and progress notes (dated November 20, 2006) that note a "R" knee wound and pain diagnosis, and in other notes indicate a "R" "knee chondro." However, within these same physical therapy and progress notes it was mentioned that the claimant had a left knee closed wound and was unable to fully bend his left knee. The physical therapy and progress notes did not reference a complaint or problem of the right knee. In evidence is a narrative report dated January 24, 2008, from the designated doctor in which he references throughout his report the claimant's left knee injury. The designated doctor states in his narrative report that the claimant's diagnosis is a "knee strain." Further, the designated doctor states in his report that the claimant's diagnoses includes a "left fibula fracture status post open reduction internal fixation." The medical evidence does not support a right knee injury. That portion of the hearing officer's determination that the compensable injury of \_\_\_\_\_, extends to the right knee is against the great weight and preponderance of the evidence. Accordingly, we reverse that portion of the hearing officer's decision that the compensable injury of \_\_\_\_\_, extends to include the right knee and we render a new decision that the compensable injury of \_\_\_\_\_, does not extend to include the right knee.

## SUMMARY

We affirm the hearing officer's determination that the carrier waived the right to contest compensability of an injury to the lumbar spine. We render a decision that the carrier waived its right to contest compensability of an injury to the cervical and thoracic spine by not timely contesting compensability of an injury to the cervical spine and thoracic spine in accordance with Section 409.021. We render a decision that the carrier did not waive its right to contest compensability of an injury to the right knee by not timely contesting compensability of an injury to the right knee in accordance with Section 409.021.

We affirm that portion of the hearing officer's determination that the compensable injury of \_\_\_\_\_, extends to include the cervical spine and thoracic spine. We reverse that portion of the hearing officer's extent-of-injury determination that the compensable injury of \_\_\_\_\_, does not extend to the lumbar spine, and we render a new decision that the compensable injury of \_\_\_\_\_, extends to include the lumbar spine. We reverse that portion of the hearing officer's decision that the compensable injury of \_\_\_\_\_, extends to include the right knee and we render a new decision that the compensable injury of \_\_\_\_\_, does not extend to include the right knee.

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

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

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Veronica L. Ruberto  
Appeals Judge

CONCUR:

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Thomas A. Knapp  
Appeals Judge

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Margaret L. Turner  
Appeals Judge