

APPEAL NO. 081546
FILED DECEMBER 15, 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 October 1, 2008. With regard to the three issues before him, the hearing officer determined that: (1) the respondent (carrier) did not waive the right to contest the compensability of the alleged annular tear and disc protrusion at L4-L5 by not contesting compensability in accordance with Section 409.021; (2) the compensable injury of _____, does not include an annular tear and disc protrusion at L4-L5 and depression; and (3) the first certification of maximum medical improvement (MMI) and impairment rating (IR) assigned by Dr. P on December 14, 2006, became final under Section 408.123.

The appellant (claimant) appeals the hearing officer's adverse determinations on carrier waiver, extent of injury and finality. The carrier responded, urging affirmance.

DECISION

Affirmed in part and reversed and rendered in part.

The parties stipulated that on _____, the claimant sustained a compensable injury. The claimant testified that he was a forklift operator and was injured trying to hold boxes that had slipped.

CARRIER WAIVER

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. 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.

The hearing officer in the Background Information portion of his decision commented that the "[c]laimant failed to prove the date that [c]arrier first received written notice of the injury; therefore, [c]laimant did not meet his burden of proof on the waiver

issue.” The hearing officer made a corresponding Finding of Fact No. 4 that the “[c]laimant failed to prove the date that [c]arrier first received written notice of the compensable injury of _____.” The claimant first sought medical attention for his compensable injury from Dr. E on August 2, 2006. The doctor’s assessment was a right shoulder, thoracic, lumbar, cervical spine and chest wall strains. A Work Status Report (DWC-73) dated August 2, 2006, shows the claimant had a work injury diagnosis of a sprain of the shoulder and upper arm, cervical strain and thoracic strain, and Dr. E took the claimant off work as of August 2, 2006.

In evidence is a Notification of First Temporary Income Benefit Payment (PLN-2) dated August 11, 2006, which lists the _____, date of injury, the claimant’s name and social security number, the employer’s name, the carrier’s claim number, the carrier’s name as “American Home [c/o] Cambridge,” and the injured body part as “low back/rt shoulder.” The PLN-2 advised the claimant that his first payment of workers’ compensation benefits would be forthcoming and asking the claimant to inform the carrier regarding any change in earnings. Although neither the parties nor the hearing officer reference the PLN-2, it clearly establishes that the carrier had written notice of the injury at least by August 11, 2006. Therefore, we hold that the carrier had received first written notice of the injury no later than August 11, 2006. With the first written notice to the carrier being August 11, 2006, the 60-day waiver period would have expired on October 10, 2006.

After seeing Dr. E, the claimant began treating with Dr. W on August 4, 2006. In a progress report dated “08-10-05 [sic should be 06]” Dr. W assessed various diagnoses to the thoracic, lumbar spine and right shoulder and ordered an “MRI of the thoracic, lumbar, and right shoulder region.” The lumbar MRI was performed on August 17, 2006, and had an impression of:

L4-L5: Posterior central annular tear and 3-4 mm discal substance protrusion.

We hold that the lumbar MRI diagnosing a L4-L5 annular tear and disc protrusion could have been reasonably discovered by the carrier’s investigation prior to the expiration of the 60-day waiver period. The carrier did not dispute the L4-L5 annular tear and disc protrusion until it filed a Notice of Disputed Issues and Refusal to Pay Benefits (PLN-11) on February 19, 2008.

Accordingly, we hold that the hearing officer’s determination that the carrier did not waive the right to contest the compensability of the alleged annular tear and disc protrusion at L4-L5 is against the great weight and preponderance of the evidence. We reverse the hearing officer’s determination that the carrier did not waive the right to contest the compensability of the alleged annular tear and disc protrusion at L4-L5 by not contesting compensability pursuant to Section 409.021. We render a new decision that the carrier waived the right to contest compensability of a L4-L5 annular tear and disc protrusion by not timely contesting the L4-L5 annular tear and disc protrusion pursuant to Section 409.021.

EXTENT OF INJURY

In that we have reversed the hearing officer's determination that the carrier did not waive the right to contest compensability of the L4-L5 annular tear and disc protrusion and have rendered a new decision that the carrier waived the right to contest compensability of the L4-L5 annular tear and disc protrusion by not timely contesting that injury, the L4-L5 annular tear and disc protrusion have become compensable by virtue of carrier waiver. APD 041738-s, *supra*. We therefore also reverse that portion of the hearing officer's determination that the compensable injury of _____, does not include an annular tear and disc protrusion and we render a new decision that the compensable injury of _____, includes an annular tear and disc protrusion at L4-L5 by virtue of carrier waiver. We affirm that portion of the hearing officer's decision that the compensable injury of _____, does not include depression as being supported by the evidence.

FINALITY

The hearing officer's determination that the first certification of MMI and IR assigned by Dr. P on December 14, 2006, became final under Section 408.123 is supported by the evidence and is affirmed.

SUMMARY

We affirm the hearing officer's determination that the first certification of MMI and IR assigned by Dr. P on December 14, 2006, became final pursuant to Section 408.123 and we affirm that portion of the hearing officer's decision that the compensable injury of _____, does not include depression. We reverse the hearing officer's decision that the carrier did not waive the right to contest compensability of an annular tear and disc protrusion at L4-L5 and render a new decision that the carrier waived the right to contest compensability of an annular tear and disc protrusion at L4-L5 by not timely contesting those conditions pursuant to Section 409.021. We also reverse that portion of the hearing officer's determination that the compensable injury of _____, does not include an annular tear and disc protrusion at L4-L5 and render a new decision that the compensable injury of _____, does include an annular tear and disc protrusion at L4-L5 by virtue of carrier waiver.

The true corporate name of the insurance carrier is **AMERICAN HOME ASSURANCE 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.**

Thomas A. Knapp
Appeals Judge

CONCUR:

Veronica L. Ruberto
Appeals Judge

Margaret L. Turner
Appeals Judge