

APPEAL NO. 081611
FILED JANUARY 7, 2009

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 September 23, 2008. The issues before the hearing officer were:

1. Did the compensable injury extend to carpal tunnel syndrome (CTS) of the right hand?
2. Has the appellant/cross-respondent (carrier) waived the right to contest compensability of the CTS of the right hand by not timely contesting the condition in accordance with Section 409.021?

The hearing officer determined that: (1) the compensable injury extends to include CTS of the right hand; and (2) the carrier did not waive the right to contest compensability of the CTS of the right hand by not timely contesting the condition in accordance with Section 409.021.

The respondent/cross-appellant (claimant) appeals the hearing officer's determination on carrier waiver, and the carrier responds, urging affirmance. The carrier appeals the hearing officer's determination on the extent-of-injury issue. Also, the carrier asserts on appeal that: (1) the hearing officer improperly considered and included into the record the designated doctor's response to the letter of clarification (LOC); (2) the carrier was not provided a copy of the designated doctor's response; and (3) the carrier was not provided an opportunity to respond to the designated doctor's opinion before the hearing officer issued her decision.

DECISION

Affirmed in part, reversed and remanded in part.

The parties stipulated that the claimant sustained a compensable injury on _____, and that the carrier received first written notice of the claim on October 1, 2007. The 60th day after receipt of the first written notice is November 30, 2007.

CARRIER WAIVER

The hearing officer's determination that the carrier did not waive the right to contest compensability of the CTS of the right hand by not timely contesting the condition in accordance with Section 409.021 is supported by sufficient evidence and is affirmed.

ADDITIONAL EVIDENCE ON EXTENT-OF-INJURY ISSUE

At the end of the CCH, the hearing officer stated that she would hold the record open to consider whether she would send a LOC to the designated doctor to determine whether the compensable injury extends to right CTS. On the record, the hearing officer stated that she would allow the parties an opportunity to respond to additional evidence from the designated doctor, if she sent a LOC to the designated doctor. The carrier objected to the hearing officer sending a LOC to the designated doctor, contending that the record should be limited to the evidence provided by the parties at the CCH.

On September 23, 2008, after the parties had submitted their evidence, the hearing officer sent a LOC to the designated doctor, Dr. O, asking him whether the claimant's compensable injury extends to right CTS. In a response dated October 3, 2008, Dr. O opined that the claimant's injury includes right CTS. The response from Dr. O shows that it was faxed to the Texas Department of Insurance, Division of Workers' Compensation (Division) on October 3, 2008, and received by the Division on that same date. The response is addressed to the hearing officer and reflects at the bottom of the page that a copy was mailed to the claimant, claimant's attorney and carrier's attorney. However, the carrier asserts on appeal it was not provided a copy of the designated doctor's response. A copy of both the LOC and response are contained in the appeal file.

In the Background Information section of the decision, the hearing officer states that she admitted the designated doctor's response as Hearing Officer's Exhibit No. 3, and she quotes the designated doctor's opinion that the compensable injury extends to right CTS. The hearing officer closed the record on October 22, 2008, and issued a decision on the disputed extent-of-injury issue. The hearing officer determined that the claimant's compensable injury extends to CTS of the right hand.

In this case, the designated doctor's response is additional evidence. The appeal file does not contain any information which shows that the parties were given an opportunity to respond to the additional evidence from the designated doctor before the hearing officer closed the record and issued her decision on the disputed extent-of-injury issue. The hearing officer erred in not offering the parties an opportunity to respond to the additional evidence from the designated doctor before closing the record and issuing her decision. Accordingly, we reverse the hearing officer's determination that the compensable injury extends to include CTS of the right hand and we remand the extent-of-injury issue to the hearing officer. On remand, the hearing officer is to provide the designated doctor's response to the parties and specifically allow the parties an opportunity to respond by a specified time and then make a determination regarding the extent-of-injury issue.

SUMMARY

We affirm the hearing officer's determination that the carrier did not waive the right to contest compensability of the CTS of the right hand by not timely contesting the condition in accordance with Section 409.021. We reverse the hearing officer's determination that the compensable injury extends to include CTS of the right hand and we remand the extent-of-injury issue to the hearing officer. On remand, the hearing officer is to provide the designated doctor's response to the parties and specifically allow the parties an opportunity to respond by a specified time and then make a determination regarding the extent-of-injury issue.

Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Division, pursuant to Section 410.202 which was amended June 17, 2001, to exclude Saturdays and Sundays and holidays listed in Section 662.003 of the Texas Government Code in the computation of the 15-day appeal and response periods. See Appeals Panel Decision 060721, decided June 12, 2006.

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

**RUSSELL RAY OLIVER, PRESIDENT
6210 HIGHWAY 290 EAST
AUSTIN, TEXAS 78723.**

Veronica L. Ruberto
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Margaret L. Turner
Appeals Judge