

APPEAL NO. 081657
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 October 13, 2008. The disputed issues were:

1. Does the compensable injury of _____, include a cervical sprain/strain, cervical radiculopathy, a thoracic sprain/strain, a lumbar sprain/strain, a right wrist strain, a right scapular strain, a right serratus strain, right shoulder bursitis, right shoulder tendinopathy, a right rotator cuff tear, and/or right shoulder impingement?
2. Has respondent/cross-appellant (carrier) waived the right to contest compensability of a cervical sprain/strain, cervical radiculopathy, a thoracic sprain/strain, a lumbar sprain/strain, a right wrist strain, a right scapular strain, a right serratus strain, right shoulder bursitis, right shoulder tendinopathy, a right rotator cuff tear, and/or right shoulder impingement by not timely contesting the foregoing in accordance with Section 409.021?
3. Did appellant/cross-respondent (claimant) have disability resulting from the compensable injury on or after June 23, 2008, and, if so, for what period(s)?

The hearing officer determined that: (1) the carrier waived the right to contest compensability of a right wrist strain, a right scapular strain, a right serratus strain, right shoulder bursitis, right shoulder tendinopathy, a right rotator cuff tear, and right shoulder impingement by not timely contesting the foregoing in accordance with Section 409.021; (2) the carrier did not waive the right to contest compensability of a cervical sprain/strain, cervical radiculopathy, a thoracic sprain/strain, or a lumbar sprain/strain; (3) the compensable injury of _____, includes the diagnosed conditions of right wrist strain, a right scapular strain, a right serratus strain, right shoulder bursitis, right shoulder tendinopathy, a right rotator cuff tear, and right shoulder impingement; (4) the compensable injury of _____, does not include the diagnosed conditions of cervical sprain/strain, cervical radiculopathy, thoracic sprain/strain, or lumbar sprain/strain; and (5) the claimant had disability resulting from the compensable injury of _____, for the period beginning on June 24, 2008, and continuing through the date of the CCH.

The claimant appealed the determinations that the carrier had not waived the right to contest compensability of a thoracic sprain/strain, and that the compensable injury of _____, does not include a cervical sprain/strain, cervical radiculopathy, a thoracic sprain/strain, or a lumbar sprain/strain. The carrier appealed

that portion of the hearing officer's waiver determination that was unfavorable to it. The carrier also appealed the hearing officer's disability determination. The parties responded to the other parties' appeal, urging affirmance on the issues on which they had prevailed. That portion of the hearing officer's determinations that: (1) the carrier did not waive the right to contest compensability of a cervical sprain/strain, cervical radiculopathy and a lumbar sprain/strain; and (2) the compensable injury includes a right wrist strain, a right scapular strain, a right serratus strain, right shoulder bursitis, right shoulder tendinopathy, a right rotator cuff tear, and right shoulder impingement have not been appealed and have become final pursuant to Section 410.169.

DECISION

Affirmed in part and reversed and rendered in part.

The claimant was a truck driver and on _____, tripped and fell forward on her right side unloading containers from her truck. The parties stipulated that on _____, the claimant sustained, and the carrier accepted, an injury that includes, but is not necessarily limited to, the right shoulder and arm.

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.

There is no stipulation, comment in the Background Information, or finding of fact regarding when the carrier received written notice of the injury. The claimant in her appeal states that the evidence establishes that the carrier's third-party administrator received written notice of the claimant's _____, compensable injury on October 9, 2007. The carrier does not dispute or contradict that statement, and there is evidence to support the claimant's contention. The carrier filed a Notice of Disputed Issue(s) and Refusal to Pay Benefits (PLN-11) after the expiration of the 60-day waiver period.

There is sufficient evidence to support the hearing officer's determinations that the carrier waived the right to contest compensability of a right wrist strain, a right

scapular strain and a right serratus strain and we affirm the hearing officer's determinations on carrier waiver for those conditions.

The treating doctor, Dr. K's, November 8, 2007, report has an impression of a "[r]ight scapular thoracic strain." The hearing officer made a determination that the carrier did not waive the right to contest compensability of "a thoracic sprain/strain." Based on Dr. K's November 8, 2007, impression of a right scapular (shoulder blade) thoracic strain, we hold the thoracic strain could have been reasonably discovered by the carrier's investigation prior to the expiration of the 60-day waiver period. We hold that the hearing officer's determination that the carrier did not waive the right to contest compensability of a thoracic sprain/strain is against the great weight and preponderance of the evidence and we reverse that determination and render a new decision that the carrier waived the right to contest compensability of a thoracic sprain/strain by not timely contesting the thoracic sprain/strain in accordance with Section 409.021.

The hearing officer also made a determination that the carrier waived the right to contest compensability of right shoulder bursitis, right shoulder tendinopathy, a right rotator cuff tear and right shoulder impingement by not timely contesting those conditions in accordance with Section 409.021. A review of the medical records and other documentation in evidence, fails to reveal a diagnosis or other evidence of right shoulder bursitis, right shoulder tendinopathy, a right rotator cuff tear and right shoulder impingement which could have been reasonably discovered by the carrier's investigation prior to the expiration of the 60-day waiver period. Accordingly, we reverse so much of the hearing officer's determination that held the carrier waived the right to contest compensability of right shoulder bursitis, right shoulder tendinopathy, a right rotator cuff tear and right shoulder impingement by not timely contesting those conditions in accordance with Section 409.021 as being against the great weight and preponderance of the evidence. We render a new decision that the carrier did not waive the right to contest compensability of right shoulder bursitis, right shoulder tendinopathy, a right rotator cuff tear and right shoulder impingement.

EXTENT OF INJURY

The hearing officer's determination that the compensable injury does not include a cervical sprain/strain, cervical radiculopathy and a lumbar sprain/strain is supported by sufficient evidence and is affirmed.

In that we have reversed the hearing officer's determination that the carrier did not waive the right to contest compensability of a thoracic sprain/strain and have rendered a decision that the carrier waived the right to contest compensability of the thoracic sprain/strain by not timely contesting that injury, the thoracic sprain/strain has become compensable by operation of law. APD 041738-s, *supra*. We therefore reverse that portion of the hearing officer's decision that determined the compensable injury of _____, does not include a thoracic sprain/strain and we render a new decision that the compensable injury of _____, does include a thoracic sprain/strain by virtue of carrier waiver.

DISABILITY

The hearing officer's determination that the claimant had disability for the period beginning June 24, 2008, through the date of the CCH is supported by sufficient evidence and is affirmed.

SUMMARY

We affirm the hearing officer's determinations that the carrier waived the right to contest compensability of a right wrist strain, a right scapular strain and a right serratus strain. We also affirm the hearing officer's disability determination. The hearing officer's determination that the compensable injury does not include a cervical sprain/strain, cervical radiculopathy and a lumbar sprain/strain is also affirmed.

We reverse the hearing officer's determination that the carrier did not waive the right to contest compensability of a thoracic sprain/strain and render a new decision that the carrier waived the right to contest compensability of a thoracic sprain/strain by not timely contesting the thoracic sprain/strain in accordance with Section 409.021. We also reverse so much of the hearing officer's determination that held the carrier waived the right to contest compensability of right shoulder bursitis, right shoulder tendinopathy, right rotator cuff tear and right shoulder impingement and render a new decision that the carrier did not waive the right to contest compensability of right shoulder bursitis, right shoulder tendinopathy, a right rotator cuff tear and right shoulder impingement.

The true corporate name of the insurance carrier is **MANUFACTURER'S ALLIANCE 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.**

Thomas A. Knapp
Appeals Judge

CONCUR:

Veronica L. Ruberto
Appeals Judge

Margaret L. Turner
Appeals Judge