

APPEAL NO. 081713
FILED JANUARY 22, 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 was held on October 13, 2008. The issues before the hearing officer were:

- (1) Has the respondent (carrier) waived the right to contest compensability of: (1) cervical spine central bulge at C5-6; (2) right C5-6 unvertebral joint hypertrophy with foraminal stenosis; (3) bilateral C6-7 foraminal stenosis from spurring right worse than left; (4) facet hypertrophy at L3-4, L4-5 and L5-S1 bilaterally; (5) gas vacuum phenomenon in the L3-4 and L4-5 facets; (6) headaches; and (7) light headedness by not timely contesting the diagnosis(es) in accordance with Section 409.021?
- (2) Does the compensable injury of _____, extend to include: (1) cervical spine central bulge at C5-6; (2) right C5-6 unvertebral joint hypertrophy with foraminal stenosis; (3) bilateral C6-7 foraminal stenosis from spurring right worse than left; (4) facet hypertrophy at L3-4, L4-5 and L5-S1 bilaterally; (5) gas vacuum phenomenon in the L3-4 and L4-5 facets; (6) light headedness; (7) memory loss; (8) possible complex partial seizures; and (9) post concussive headaches?

The hearing officer determined that the carrier did not waive the right to contest compensability of all the diagnoses/conditions listed in the carrier waiver issue.

The hearing officer determined that the compensable injury of _____, does not include: (1) cervical spine central bulge at C5-6; (2) gas vacuum phenomenon in the L3-4 and L4-5 facets; (3) light headedness; (4) memory loss; (5) possible complex partial seizures; and (6) post concussive headaches.

The hearing officer determined that the compensable injury of _____, includes: (1) right C5-6 unvertebral joint hypertrophy with foraminal stenosis; (2) bilateral C6-7 foraminal stenosis from spurring right worse than left; and (3) facet hypertrophy at L3-4, L4-5 and L5-S1 bilaterally. This determination was not appealed and has become final pursuant to Section 410.169.

The appellant (claimant) appealed the adverse determinations on the issues of carrier waiver and extent of injury. Additionally, the claimant specifically appeals the hearing officer's finding that "[t]he date the [c]arrier received first written notice of the injury cannot be determined." The carrier responded, urging affirmance.

DECISION

Affirmed in part and reversed and rendered in part.

The claimant testified that while in the course and scope of his employment he was involved in a motor vehicle accident (MVA) on _____. The parties stipulated that the carrier filed a Notice of Disputed Issue(s) and Refusal to Pay Benefits (PLN-11) prior to October 30, 2007. Texas Department of Insurance, Division of Workers' Compensation (Division) records indicate that the PLN-11 was filed on October 30, 2007.

RECEIPT OF FIRST WRITTEN NOTICE

The hearing officer erroneously found that "[t]he date the [c]arrier received first written notice of the injury cannot be determined." The claimant has the burden to prove when the carrier received the first written notice of injury and, once that is done, the burden shifts to the carrier to prove that it timely filed a dispute. See Appeals Panel Decision (APD) 051656, decided September 14, 2005. Written notice of injury is defined in 28 TEX. ADMIN. CODE § 124.1 (Rule 124.1) which provides that written notice of injury consists of the carrier's earliest receipt of:

- (1) the Employer's First Report of Injury or Illness (DWC-1)
- (2) the notification provided by the Division under subsection (e) of Rule 124.1; or
- (3) if no DWC-1 has been filed, any other communication regardless of source, which fairly informs the carrier of the name of the injured employee, the identity of the employer, the approximate date of the injury and information which asserts the injury is work related.

In evidence is a medical report from Dr. R, dated August 23, 2006, which states that "[o]n _____ while employed at [employer], he was involved in an MVA." This report contains a date stamp that states "Received Claims Dept, Aug 30, 2006, Risk Enterprise Management, (City 1), Texas." The carrier's PLN-11 dated October 30, 2007, lists the carrier as "Ace American/Risk Enterprise Management." The evidence establishes that Dr. R's report dated August 23, 2006, fairly informs the carrier of the name of the injured employee, the identity of the employer, the approximate date of the injury and information which asserts the injury is work-related as provided in Rule 124.1(a)(3). Additionally, the evidence shows that the carrier received Dr. R's report by at least August 30, 2006. Accordingly, the hearing officer's finding that the date the carrier received first written notice of the injury cannot be determined is against the great weight and preponderance of the evidence. We hold that the carrier received first written notice on August 30, 2006.

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 Division 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. Rule 124.3(e) provides that Section 409.021 does not apply to disputes of extent of injury. In 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. With the first written notice on August 30, 2006, the expiration of the 60-day waiver period is October 30, 2006.¹ There is no evidence that the carrier disputed the claimed injury of _____, prior to the expiration of the waiver period.

In evidence is an MRI of the lumbar spine dated June 12, 2006, which reflects that the claimant was in a "MVA one week ago, bilateral leg pain and back pain since." The lumbar MRI shows at L3-4 "disk bulging with facet hypertrophy" and "narrowing is most pronounced at L3-4" and at L4-5 "bulging of the annulus" and a "posterior annular tear is noted at L4-5." In evidence is a medical report dated June 22, 2006, in which a MVA is referenced and the claimant complains about dizziness, shoulder pain and back pain. A medical report dated July 27, 2006, states that the claimant complained of neck and low back pain and that the plan stated: "[r]eviewed MRI-will refer to pain [management] for consideration of [epidural steroid injections (ESI)]."

In evidence is a medical report from Dr. R dated August 23, 2006, that states that the claimant was involved in a MVA at work on _____, and that he has "constant cervical pain" and low back pain that "radiates down both legs." Dr. R states that the claimant has been symptomatic since the MVA on _____. Further, Dr. R reviewed the MRI of lumbar spine dated June 12, 2006, and opined that it revealed "bilateral L3-4 and L4-5 facet hypertrophy," "stenosis present at L3-4 centrally and at both lateral recesses and possibly some stenosis present at L4-5" and "disc bulging at L3-4 and L4-5." Dr. R diagnosed the claimant with "L3-4, L4-5 facet hypertrophy with probable L3-4 stenosis especially in the lateral recesses." Also, Dr. R ordered an x-ray of the cervical spine to "look for any cervical instability, as well as, CT scan of the cervical spine" for disc protrusion and/or spondylosis and CT scan of the lumbar spine for stenosis. In evidence are diagnostic exams, specifically flexion/extension x-rays of the cervical spine and CT of the cervical and lumbar spine dated September 25, 2006. In a medical report dated October 4, 2006, Dr. R states that he reviewed the diagnostic

¹ Because the 60th day after August 30, 2006, was Sunday, October 29, 2006, the expiration of the 60-day waiver period in Section 409.021(c) was extended to the next working day, Monday, October 30, 2006. See Rules 102.3(a)(3) and 102.3(b). See also APD 080414, decided May 22, 2008.

exams dated September 25, 2006. Dr. R diagnosed the claimant with the conditions for the cervical and lumbar spine as listed in the carrier waiver issue.² In a follow-up letter dated October 4, 2006, Dr. R states that the claimant was involved in a MVA at work and that he was “rear-ended by another pick-up truck” and that the claimant complains of neck and low back pain.

Based on the medical evidence, the carrier could have reasonably discovered in its investigation that the conditions for the cervical and lumbar spine as listed in the carrier waiver issue were part of the claimed injury prior to the expiration of the waiver period. Accordingly, we reverse that portion of the hearing officer’s determination that the carrier did not waive the right to contest compensability of: (1) cervical spine central bulge at C5-6; (2) right C5-6 unvertebral joint hypertrophy with foraminal stenosis; (3) bilateral C6-7 foraminal stenosis from spurring right worse than left; (4) facet hypertrophy at L3-4, L4-5 and L5-S1 bilaterally; and (5) gas vacuum phenomenon in the L3-4 and L4-5 facets by not timely contesting the diagnoses/conditions in accordance with Section 409.021 and we render a new decision that the carrier waived the right to contest compensability of: (1) cervical spine central bulge at C5-6; (2) right C5-6 unvertebral joint hypertrophy with foraminal stenosis; (3) bilateral C6-7 foraminal stenosis from spurring right worse than left; (4) facet hypertrophy at L3-4, L4-5 and L5-S1 bilaterally; and (5) gas vacuum phenomenon in the L3-4 and L4-5 facets by not timely contesting the diagnoses in accordance with Section 409.021. See APD 041738-s, *supra*.

That portion of the hearing officer’s determination that the carrier has not waived the right to contest compensability of headaches and light headedness by not timely contesting the diagnoses/conditions in accordance with Section 409.021 is supported by sufficient evidence and is affirmed.

EXTENT OF INJURY

That portion of the hearing officer’s decision that the claimant’s compensable injury of _____, does not include: (1) headaches; (2) light headedness; (3) memory loss; (4) possible complex partial seizures; and (5) post concussive headaches is support by sufficient evidence and is affirmed.

Given that we have reversed the hearing officer’s determination and rendered a new decision that the carrier waived the right to contest compensability of: (1) cervical spine central bulge at C5-6; and (2) gas vacuum phenomenon in the L3-4 and L4-5 facets by not timely contesting the diagnoses/conditions in accordance with Section 409.021, those conditions become compensable by virtue of carrier waiver. Accordingly, we reverse that portion of the hearing officer’s determination that the compensable injury of _____, does not include: (1) cervical spine central bulge at C5-6; and (2) gas vacuum phenomenon in the L3-4 and L4-5 facets, and we render a

² (1) cervical spine central bulge at C5-6; (2) right C5-6 unvertebral joint hypertrophy with foraminal stenosis; (3) bilateral C6-7 foraminal stenosis from spurring right worse than left; (4) facet hypertrophy at L3-4, L4-5 and L5-S1 bilaterally; and (5) gas vacuum phenomenon in the L3-4 and L4-5 facets.

new decision that the compensable injury of _____, includes: (1) cervical spine central bulge at C5-6; and (2) gas vacuum phenomenon in the L3-4 and L4-5 facets.

SUMMARY

We affirm that portion of the hearing officer's determination that the carrier has not waived the right to contest compensability of headaches and light headedness by not timely contesting the diagnoses/conditions in accordance with Section 409.021. We reverse that portion of the hearing officer's determination that the carrier did not waive the right to contest compensability of the remaining diagnoses/conditions listed in the carrier waiver issue by not timely contesting the diagnoses/conditions in accordance with Section 409.021 and we render a new decision that the carrier waived the right to contest compensability of: (1) cervical spine central bulge at C5-6; (2) right C5-6 unvertebral joint hypertrophy with foraminal stenosis; (3) bilateral C6-7 foraminal stenosis from spurring right worse than left; (4) facet hypertrophy at L3-4, L4-5 and L5-S1 bilaterally; and (5) gas vacuum phenomenon in the L3-4 and L4-5 facets by not timely contesting the diagnoses in accordance with Section 409.021.

We affirm that portion of the hearing officer's determination that the claimant's compensable injury of _____, does not include: (1) headaches; (2) light headedness; (3) memory loss; (4) possible complex partial seizures; and (5) post concussive headaches. We reverse that portion of the hearing officer's determination that the compensable injury of _____, does not include: (1) cervical spine central bulge at C5-6; and (2) gas vacuum phenomenon in the L3-4 and L4-5 facets, and we render a new decision that the compensable injury of _____, includes: (1) cervical spine central bulge at C5-6; and (2) gas vacuum phenomenon in the L3-4 and L4-5 facets.

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

**ROBIN M. MOUNTAIN
6600 CAMPUS CIRCLE DRIVE EAST, SUITE 300
IRVING, TEXAS 75063.**

Veronica L. Ruberto
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Margaret L. Turner
Appeals Judge