

APPEAL NO. 081764
FILED FEBRUARY 19, 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 29, 2008. The issues in dispute before the hearing officer were:

1. Has the respondent/cross-appellant (carrier) waived the right to contest compensability of the diagnosed right lower extremity radiculopathy, L4-5 disc bulge and canal stenosis, L5-S1 posterior annular tear and disc herniation impinging on the nerve root, and foraminal stenosis at L5-S1?
2. Does the _____, compensable injury extend to and include L4-5 disc bulge, lumbar canal stenosis, L5-S1 posterior annular tear and herniation, L5-S1 nerve impingement, foraminal stenosis, right lower extremity radiculopathy, depression, and anxiety?

The hearing officer resolved the disputed issues by deciding that: (1) the carrier waived its right to contest the compensability of the appellant/cross-respondent's (claimant) right lower extremity radiculopathy, canal stenosis, L5-S1 posterior annular tear and disc herniation impinging on the nerve root, and foraminal stenosis at L5-S1 by not timely contesting those conditions in accordance with Section 409.021;¹ (2) the _____, compensable injury does extend to right lower extremity radiculopathy, lumbar canal stenosis, L5-S1 posterior annular tear and herniation, L5-S1 nerve impingement, and foraminal stenosis since carrier waived the right to contest these conditions; and (3) the compensable injury of _____, does not extend to the L4-5 disc bulge, anxiety, and depression.

The claimant appealed, disputing the unfavorable extent-of-injury determinations regarding the L4-5 disc bulge, anxiety, and depression. The claimant also appealed the hearing officer's waiver finding regarding the L4-5 disc bulge. The carrier responded, urging affirmance of the determinations appealed by the claimant. The carrier appealed the hearing officer's carrier waiver and extent-of-injury determinations that were unfavorable to it. The appeal file does not contain a response from the claimant to the carrier's appeal.

DECISION

Affirmed in part and reversed and rendered in part.

The parties stipulated that the claimant sustained a compensable injury on _____, and that the carrier received first written notice of the claimant's claimed _____

¹ Although listed in the carrier waiver issue, the hearing officer failed to make a conclusion of law and decision as to whether the carrier waived the right to contest compensability of the L4-5 disc bulge by not timely contesting that condition in accordance with Section 409.021.

injury on November 3, 2006. The 60-day waiver period expired on Tuesday, January 2, 2007. The only evidence in the record that the carrier disputed the _____, injury was a Notice of Disputed Issue(s) and Refusal to Pay Benefits (PLN-11), dated October 31, 2007.

CARRIER WAIVER

Section 409.021 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(a-1) further provides that if an insurance carrier fails to comply with the 15th day requirement, the carrier does not waive its right to contest compensability but rather commits an administrative violation. Section 409.021(c) defines the waiver period. It provides that if an insurance carrier does not contest 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 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.

That portion of the hearing officer's determination that the carrier waived the right to contest compensability of the claimant's right lower extremity radiculopathy, canal stenosis, L5-S1 posterior annular tear and disc herniation impinging on the nerve root, and foraminal stenosis at L5-S1 by not timely contesting those conditions in accordance with Section 409.021 is supported by sufficient evidence and is affirmed.

Although the hearing officer failed to make a conclusion of law or a determination in the Decision portion of her decision and order regarding carrier waiver of the L4-5 disc bulge, the hearing officer specifically found that the carrier did not receive sufficient notice that the claimed injury extended to the L4-5 disc bulge within 60 days after receiving first written notice of the claimed injury on November 3, 2006. In evidence was an MRI of the lumbar spine performed on December 5, 2006, which noted as a finding that there is a 2mm circumferential disc bulge at L4-5. The hearing officer based her determination on several of the lumbar spine conditions at issue on the same MRI, noting these conditions were reasonably discoverable by the carrier within the waiver period. Based on the medical evidence, the carrier could have reasonably discovered in its investigation that the L4-5 disc bulge as listed in the carrier waiver issue was part of the claimed injury prior to the expiration of the waiver period. Accordingly, we reverse that portion of the hearing officer's determination regarding carrier waiver as being incomplete, since she failed to make a determination on the L4-5 disc bulge. We render a new decision that the carrier waived the right to contest compensability of the L4-5 disc bulge by not timely contesting the injury in accordance with Section 409.021.

EXTENT OF INJURY

That portion of the hearing officer's decision that the claimant's compensable injury of _____, does extend to right lower extremity radiculopathy, lumbar canal stenosis, L5-S1 posterior annular tear and herniation, L5-S1 nerve impingement, and foraminal stenosis is supported by sufficient evidence and is affirmed. That portion of the hearing officer's decision that the claimant's compensable injury of _____, does not extend to anxiety and depression is supported by sufficient evidence and is affirmed.

Given that we have reversed the hearing officer's carrier waiver determination with regard to the L4-5 disc bulge and rendered a new decision that the carrier waived the right to contest compensability of the L4-5 disc bulge by not timely contesting the diagnosis/condition in accordance with Section 409.021, the L4-5 disc bulge becomes compensable by virtue of carrier waiver. Accordingly, we reverse that portion of the hearing officer's determination that the compensable injury of _____, does not extend to the L4-5 disc bulge, and we render a new decision that the compensable injury of _____, extends to the L4-5 disc bulge.

SUMMARY

We affirm that portion of the hearing officer's determination that the carrier waived the right to contest compensability of the claimant's right lower extremity radiculopathy, canal stenosis, L5-S1 posterior annular tear and disc herniation impinging on the nerve root, and foraminal stenosis at L5-S1 by not timely contesting those conditions in accordance with Section 409.021. We affirm that portion of the hearing officer's decision that the claimant's compensable injury of _____, does not extend to anxiety and depression. We affirm that portion of the hearing officer's decision that the claimant's compensable injury of _____, does extend to right lower extremity radiculopathy, lumbar canal stenosis, L5-S1 posterior annular tear and herniation, L5-S1 nerve impingement, and foraminal stenosis.

We reverse that portion of the hearing officer's determination regarding carrier waiver as being incomplete as to the L4-5 disc bulge, since she failed to make a determination on the L4-5 disc bulge. We render a new decision that the carrier waived the right to contest compensability of the L4-5 disc bulge. We reverse that portion of the hearing officer's determination that the compensable injury of _____, does not include the L4-5 disc bulge, and we render a new decision that the compensable injury of _____, includes the L4-5 disc bulge.

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

**CT CORPORATION SYSTEM
350 NORTH ST. PAUL STREET
DALLAS, TEXAS 75201.**

Margaret L. Turner
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Veronica L. Ruberto
Appeals Judge