

APPEAL NO. 090018
FILED FEBRUARY 18, 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 December 10, 2008. The issues in dispute before the hearing officer were:

1. Does the compensable injury of _____, extend to the L4-5 level broad-based disc bulge eccentric to the right foramen causing contact on right L4 nerve root with moderate right neural foraminal narrowing, mild broad-based disc bulge at L5-S1, mild infraspinatus insertional tendinopathy without evidence of tear of the left shoulder, C6-7 level causing moderate central canal stenosis and severe right-sided foraminal stenosis and central disc protrusion noted at C5-6 causing central canal stenosis and mild to moderate right foraminal stenosis?;
2. Has the appellant/cross-respondent (carrier) waived the right to contest compensability of the L4-5 level broad-based disc bulge eccentric to the right foramen causing contact on right L4 nerve root with moderate right neural foraminal narrowing, mild broad-based disc bulge at L5-S1, mild infraspinatus insertional tendinopathy without evidence of tear of the left shoulder, C6-7 level causing moderate central canal stenosis and severe right-sided foraminal stenosis and central disc protrusion noted at C5-6 causing central canal stenosis and mild to moderate right foraminal stenosis by not timely contesting the injury in accordance with Section 409.021?;
3. What is the date of maximum medical improvement (MMI)?; and
4. What is the respondent/cross-appellant's (claimant) impairment rating (IR)?

The hearing officer resolved the disputed issues by deciding that: (1) the compensable injury of _____, does not extend to the C6-7 level causing moderate central canal stenosis and severe right-sided foraminal stenosis, central disc protrusion noted at C5-6 causing central canal stenosis and mild to moderate right foraminal stenosis (hereinafter referred to as the cervical spine conditions), and the mild infraspinatus insertional tendinopathy without evidence of tear of the left shoulder; (2) the compensable injury of _____, does extend to the L4-5 level broad-based disc bulge eccentric to the right foramen causing contact on the right L4 nerve root with moderate right neural foraminal narrowing, and mild broad-based disc bulge at L5-S1 (hereinafter referred to as the lumbar spine conditions); (3) the carrier waived the right to contest compensability of the lumbar conditions but did not waive the right to contest compensability of the mild infraspinatus insertional tendinopathy without evidence of

tear of the left shoulder and cervical spine conditions; (4) the claimant reached MMI on March 28, 2008; and (5) the claimant's IR is five percent.

The carrier appealed, disputing the hearing officer's determination that the carrier waived the right to contest compensability of the lumbar spine conditions as well as the determination that the compensable injury extends to the lumbar spine conditions. The claimant responded, urging affirmance.

The claimant appealed, disputing the hearing officer's determinations that the carrier did not waive the right to contest compensability of the mild infraspinatus insertional tendinopathy without evidence of tear of the left shoulder and the cervical spine conditions as well as the determinations of MMI and IR. The claimant also appealed that portion of the hearing officer's extent-of-injury determination that was unfavorable to him. The carrier responded, filing a conditional response to any appeal by the claimant along with its request for review.

DECISION

Affirmed in part and reversed and rendered in part.

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 (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.

The claimant testified that he was unloading a truck when the ramp he was on collapsed, causing him to fall to the ground. The hearing officer specifically found that the carrier received written notice of the claimed injury of _____, on July 11, 2007, and filed a Notice of Disputed Issue(s) and Refusal to Pay Benefits (PLN-11) with the Division on August 31, 2007. This finding was not appealed. The hearing officer noted in the Background Information portion of her decision that the parties agreed the carrier filed the PLN-11 prior to the expiration of the waiver period. However, the hearing officer noted that the PLN-11 did not specifically reference the left shoulder or the lumbar spine. The PLN-11 filed by the carrier on August 31, 2007, stated: "[carrier] is disputing that the employee's pre-existing bipolar condition and anxiety, the present chest pain, pelvis pain, cervical lordosis, and cervical spondylosis at C5-C6 and C6-C7 levels is related to the work related injury of _____. The lordosis and spondylosis are pre-existing conditions and there is no [medical] evidence that relates the chest and

pelvis pain to this incident. The carrier is accepting a cervical strain, thoracic strain, and abdomen strain only as the compensable injuries.”

Prior Appeals Panel decisions have recognized that disputes containing limitation language are sufficient to dispute any injury other than the one specifically accepted. In Appeals Panel Decision (APD) 000119, decided March 6, 2000, the dispute contained the following language: “Carrier disputes that the compensable injury extends to both shoulders or any other body part. The compensable _____ injury is limited to the lumbar area only.” In that case, the hearing officer’s determination that the carrier waived its right to contest compensability of the cervical injury was reversed and a new decision rendered that the carrier did not waive its right to contest the compensability of the cervical injury. See *also* APD 080648, decided July 2, 2008.

It is undisputed that the carrier in the instant case filed the PLN-11 within 60 days of written notice of the claimed injury. The dispute filed by the carrier in this case was sufficiently specific to dispute any claimed injury other than cervical strain, thoracic strain, and abdomen strain, which were accepted by the carrier. We affirm that portion of the hearing officer’s decision that the carrier did not waive the right to contest compensability of the mild infraspinatus insertional tendinopathy without evidence of tear of the left shoulder and cervical spine conditions listed in the carrier waiver issue. We reverse that portion of the hearing officer’s decision that the carrier waived the right to contest the compensability of the lumbar spine conditions listed in the carrier waiver issue and render a new decision that the carrier did not waive the right to contest the compensability of the lumbar spine conditions listed in the waiver issue by not timely contesting the injury in accordance with Section 409.021.

EXTENT OF INJURY

That portion of the hearing officer’s determination that the compensable injury of _____, does not extend to the mild infraspinatus insertional tendinopathy without evidence of tear of the left shoulder, and the cervical spine conditions listed in the extent-of-injury issue is supported by sufficient evidence and is affirmed.

The hearing officer specifically found that the claimant’s lumbar conditions as listed in the extent-of-injury issue were not caused by or aggravated as a result of the work-related injury of _____. This finding is supported by the evidence. The hearing officer’s determination that the compensable injury extended to the lumbar conditions listed in the extent-of-injury issue was based upon her determination that the carrier waived the right to contest compensability of those conditions. As noted above, the hearing officer’s determination that the carrier waived the right to contest compensability of those conditions was reversed and a new decision rendered that the carrier did not waive the right to contest compensability of the lumbar spine conditions. Accordingly, we reverse that portion of the hearing officer’s determination that the compensable injury of _____, extends to the lumbar spine conditions listed in the extent-of-injury issue and render a new decision that the compensable injury of

_____, does not extend to the lumbar spine conditions listed in the extent-of-injury issue.

MMI AND IR

The hearing officer's determination that the claimant reached MMI on March 28, 2008, with a five percent IR is supported by sufficient evidence and is affirmed.

SUMMARY

We affirm that portion of the hearing officer's decision that the compensable injury of _____, does not extend to the mild infraspinatus insertional tendinopathy without evidence of tear of the left shoulder and cervical spine conditions listed in the extent-of-injury issue. We affirm that portion of the hearing officer's determination that the carrier did not waive the right to contest compensability of the mild infraspinatus insertional tendinopathy without evidence of tear of the left shoulder, and cervical spine conditions listed in the carrier waiver issue. We affirm the hearing officer's determination that the claimant reached MMI on March 28, 2008. We affirm the hearing officer's determination that the claimant's IR is five percent.

We reverse that portion of the hearing officer's decision that the compensable injury extends to the lumbar spine conditions listed in the extent-of-injury issue and render a new decision that the compensable injury does not extend to the lumbar spine conditions listed in the extent-of-injury issue. We reverse that portion of the hearing officer's decision that the carrier waived the right to contest compensability of the lumbar spine conditions listed in the carrier waiver issue and render a new decision that the carrier did not waive the right to contest compensability of the lumbar spine conditions listed in the carrier waiver issue by not timely contesting the injury in accordance with Section 409.021.

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

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

Margaret L. Turner
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Veronica L. Ruberto
Appeals Judge