

APPEAL NO. 090048
FILED FEBRUARY 2, 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 4, 2008. The issues before the hearing officer were:

- (1) Does the _____, compensable injury extend to: (1) bilateral L5 radiculopathy; (2) bilateral cervical radiculopathy; (3) chronic pain; (4) L4-5 disc protrusion; (5) L4-5 degenerative spondylolisthesis; (6) L4-5 Grade 2 spondylolisthesis and instability; (7) disc protrusions at C3-4, C4-5 and C5-6; (8) L4-5 central posterior bulge of 1-2mm with minimal flattening of the anterior sac; (9) disc desiccation at L3-4 with approximately 10% loss of the interspace; (10) L5-S1 2-3mm central herniation of the nucleus pulposus with flattening of the dural sac anteriorly of approximately 10-15%; (11) [C4-5]¹ 3mm posterior herniation of the nucleus pulposus with 20% deformity of the anterior dural sac; and (12) C5-6 3-4mm herniation of the nucleus pulposus slightly to the right of midline causing a 40-50% dural sac deformity anteriorly and encroachment and possibly cord touching?

- (2) Did the respondent (carrier) waive the right to contest compensability of: (1) L4-5 central posterior bulge of 1-2mm with minimal flattening of the anterior sac; (2) disc desiccation at L3-4 with approximately 10% loss of the interspace; (3) L5-S1 2-3mm central herniation of the nucleus pulposus with flattening of the dural sac anteriorly of approximately 10-15% [((1); (2); and (3) will hereinafter be referred to as "the lumbar MRI impressions dated April 20, 2001" (emphasis added))]; (4) [C4-5]² 3mm posterior herniation of the nucleus pulposus with 20% deformity of the anterior dural sac; and (5) C5-6 3-4mm herniation of the nucleus pulposus slightly to the right of midline causing a 40-50% dural sac deformity anteriorly and encroachment and possibly cord touching [((4); and (5) will hereinafter be referred to as "the cervical MRI impressions dated April 25, 2001" (emphasis added))] by not timely contesting the diagnoses in accordance with Section 409.021?

¹ The hearing officer states in his decision that "[i]t is evident in the cervical MRI report there is a typographical error where the findings clearly indicate pathology at C4/5, but is mistakenly identified as C3/4 in the [conclusions]. The issues above need to be modified as such. This mistake is incorporated in the issues as noted." The hearing officer was referencing a cervical MRI dated April 25, 2001. The parties did not appeal the hearing officer's modification of the issues to conform to the pathology at C4-5, rather than C3-4, as noted in the cervical MRI dated April 25, 2001. The hearing officer made determinations accordingly.

² See Footnote No. 1.

The hearing officer determined that the compensable injury of _____, includes chronic pain. This determination was not appealed and has become final pursuant to Section 410.169.

The hearing officer determined that the compensable injury of _____, does not include: (1) L4-5 disc protrusion; (2) disc protrusions at C4-5 and C5-6; (3) L4-5 central posterior bulge of 1-2mm with minimal flattening of the anterior sac; (4) disc desiccation at L3-4 with approximately 10% loss of the interspace; (5) L5-S1 2-3mm central herniation of the nucleus pulposus with flattening of the dural sac anteriorly of approximately 10-15%; (6) C4-5 3mm posterior herniation of the nucleus pulposus with 20% deformity of the anterior dural sac; and (7) C5-6 3-4mm herniation of the nucleus pulposus slightly to the right of midline causing a 40-50% dural sac deformity anteriorly and encroachment and possibly cord touching. Although listed in the extent-of-injury issue the hearing officer failed to make a conclusion of law and decision as to whether the compensable injury of _____, includes: (1) bilateral L5 radiculopathy; (2) bilateral cervical radiculopathy; (3) L4-5 degenerative spondylolisthesis; (4) L4-5 Grade 2 spondylolisthesis and instability; and (5) disc protrusion at C3-4. We note that the hearing officer did make a finding of fact on these conditions.

The hearing officer determined that the carrier did not waive the right to contest compensability of the lumbar MRI impressions dated April 20, 2001, and cervical MRI impressions dated April 25, 2001, by not timely contesting the diagnoses in accordance with Section 409.021.

The appellant (claimant) appealed the carrier waiver and extent-of-injury determinations that were adverse to the claimant. The carrier responded, urging affirmance.

DECISION

Affirmed in part and reversed and rendered in part.

The parties stipulated that the claimant sustained a compensable injury on _____. The claimant testified that she sustained injuries to her cervical and lumbar spine when she slipped and fell at work.

CARRIER WAIVER

Section 409.021, applicable to claims based on an injury which occurred before September 1, 2003, provides in part 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 begin the payment of benefits as required by this subtitle or notify the Texas Department of Insurance, Division of Workers' Compensation (Division) and the employee in writing of its refusal to pay. In Continental Casualty Company v. Downs,³

³ In Southwestern Bell Telephone Company, L.P. v. Mitchell, 2008 Tex. LEXIS 1141, the Texas Supreme Court overruled the Downs, *supra*, decision. The court noted that if it were to follow Downs then a different rule would apply

81 S.W.3d 803 (Tex. 2002), the Texas Supreme Court held that taking some action within 7 days is what entitles the carrier to a 60-day period to investigate or deny compensability. 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 initiation of payments by an insurance carrier does not affect the right of the insurance carrier to continue to investigate or deny the compensability of an injury during the 60-day period

In unappealed findings, the hearing officer found that the carrier first received notice of the claimed injury on April 14, 2001, and that the carrier began payments to the claimant on April 23, 2001. In the Background Information section of his decision the hearing officer states that “[t]he Division records note the [Payment of Compensation or Notice of Refused/Disputed Claim (DWC-21)] filed with the [Division] on April 23, 2001, shows the [c]arrier received notice of the claimed injury on April 14, 2001. Seven days after that would have been April 21, 2001.” We note that April 21, 2001, was a Saturday, which is not a working day as defined by 28 TEX. ADMIN. CODE § 102.3(b) (Rule 102.3(b)). Rule 102.3(a)(3) provides in part that if the last day of any period is not a working day, the period is extended to include the next day that is a working day. In this case, the 7-day time period for the carrier to contest compensability was extended to the next working day, which is Monday, April 23, 2001. See Appeals Panel Decision (APD) 032510, decided November 13, 2003. See *also* APD 080414, decided May 22, 2008; and APD 081713, decided January 22, 2009. Therefore, with the unappealed finding that the carrier began payments on April 23, 2001, the waiver period was not 7 days but rather 60 days from receipt of the first written notice of the injury on April 14, 2001. The expiration of the 60-day waiver period is June 13, 2001. There is no evidence that the carrier disputed the claimed injury of _____, prior to the expiration of the waiver period.

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. In evidence was a medical record from the claimant’s treating doctor, Dr. M dated April 18, 2001, which noted complaints of pain in the claimant’s low back after a fall at work and which noted an MRI to be scheduled. Also there is a medical record from Dr. M dated April 20, 2001, indicating disc displacement and radiculitis for the cervical spine and disc displacement and sciatica for the lumbar spine. In a medical record dated April 23, 2001, Dr. M noted complaints of neck, lower back and wrist pain. In evidence is a lumbar MRI, dated April 20, 2001, which shows lumbar spine conditions as listed in the

to only those cases where the 7-day waiver is applicable. The court held that “[i]t is hardly fair or efficient to give effect to a judicial construction of a statute for a brief period of time when the Legislature has reinstated for future cases the same rule that had been followed before the court’s decision.” We note that the decision in Mitchell is not yet final until opportunities for rehearing have been exhausted.

carrier waiver issue.⁴ Also in evidence is a cervical MRI, dated April 25, 2001, which shows cervical spine conditions as listed in the carrier waiver issue.⁵

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 the hearing officer's determination that the carrier did not waive the right to contest compensability of the lumbar MRI impressions dated April 20, 2001, and cervical MRI impressions dated April 25, 2001, by not timely contesting the diagnoses in accordance with Section 409.021 and we render a new decision that the carrier waived the right to contest compensability of the lumbar MRI impressions dated April 20, 2001, and cervical MRI impressions dated April 25, 2001, by not timely contesting the diagnoses in accordance with Section 409.021.

EXTENT OF INJURY

That portion of the hearing officer's determination that the compensable injury of _____, does not include L4-5 disc protrusion and disc protrusion at C4-5 and C5-6 is supported by sufficient evidence and is affirmed.

Given that we have reversed the hearing officer's carrier waiver determination and rendered a new decision that the carrier waived the cervical and lumbar conditions listed in the carrier waiver issue, 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 the lumbar MRI impressions dated April 20, 2001, and cervical MRI impressions dated April 25, 2001, and we render a new decision that the compensable injury of _____, includes the lumbar MRI impressions dated April 20, 2001, and cervical MRI impressions dated April 25, 2001.

We reverse the hearing officer's decision as being incomplete as to whether the compensable injury of _____, includes: (1) bilateral L5 radiculopathy; (2) bilateral cervical radiculopathy; (3) L4-5 degenerative spondylolisthesis; (4) L4-5 Grade 2 spondylolisthesis and instability; and (5) disc protrusion at C3-4. The hearing officer failed to make a conclusion of law or decision regarding these conditions. However, the hearing officer's Finding of Fact No. 5 states, in part, that: (1) bilateral L5 radiculopathy; (2) bilateral cervical radiculopathy; (3) L4-5 disc protrusion; (4) L4-5 degenerative spondylolisthesis; (5) L4-5 Grade 2 spondylolisthesis and instability; (6) disc protrusions at C3-4, C4-5 and C5-6 did not arise from or flow naturally from the _____, compensable injury, and this portion of the hearing officer's finding is supported by

⁴ (1) L4-5 central posterior bulge of 1-2mm with minimal flattening of the anterior dural sac; (2) disc desiccation at L3-4 with approximately 10% loss of the interspace; and (3) L5-S1 2-3mm central herniation of the nucleus pulposus with flattening of the dural sac anteriorly of approximately 10-15%.

⁵ (1) [C4-5] 3mm posterior herniation of the nucleus pulposus with 20% deformity of the anterior dural sac; and (2) C5-6 3-4mm herniation of the nucleus pulposus slightly to the right of midline causing a 40-50% dural sac deformity anteriorly and encroachment and possibly touching of the cord.

sufficient evidence. Accordingly, we render a new decision that the compensable injury of _____, does not include: (1) bilateral L5 radiculopathy; (2) bilateral cervical radiculopathy; (3) L4-5 degenerative spondylolisthesis; (4) L4-5 Grade 2 spondylolisthesis and instability; and (5) disc protrusion at C3-4.

SUMMARY

We reverse the hearing officer's determination that the carrier did not waive the right to contest compensability of the lumbar MRI impressions dated April 20, 2001, and cervical MRI impressions dated April 25, 2001, by not timely contesting the diagnoses in accordance with Section 409.021 and we render a new decision that the carrier waived the right to contest compensability of the lumbar MRI impressions dated April 20, 2001, and cervical MRI impressions dated April 25, 2001, by not timely contesting the diagnoses in accordance with Section 409.021.

We affirm that portion of the hearing officer's determination that the compensable injury of _____, does not include L4-5 disc protrusion and disc protrusion at C4-5 and C5-6.

We reverse that portion of the hearing officer's determination that the compensable injury of _____, does not include the lumbar MRI impressions dated April 20, 2001, and cervical MRI impressions dated April 25, 2001, and we render a new decision that the compensable injury of _____, includes the lumbar MRI impressions dated April 20, 2001, and cervical MRI impressions dated April 25, 2001, by virtue of carrier waiver.

We reverse the hearing officer's decision as being incomplete as to whether the compensable injury of _____, includes: (1) bilateral L5 radiculopathy; (2) bilateral cervical radiculopathy; (3) L4-5 degenerative spondylolisthesis; (4) L4-5 Grade 2 spondylolisthesis and instability; and (5) disc protrusion at C3-4, and we render a new decision that the compensable injury of _____, does not include: (1) bilateral L5 radiculopathy; (2) bilateral cervical radiculopathy; (3) L4-5 degenerative spondylolisthesis; (4) L4-5 Grade 2 spondylolisthesis and instability; and (5) disc protrusion at C3-4.

The true corporate name of the insurance carrier is **AMERICAN HOME ASSURANCE 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.**

Veronica L. Ruberto
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Margaret L. Turner
Appeals Judge