

APPEAL NO. 090491  
FILED JUNE 15, 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 March 5, 2009. The issues before the hearing officer were:

- (1) Did the respondent (carrier) waive the right to contest compensability of the claimed injury by not timely contesting the injury in accordance with Section 409.021?
- (2) Does the compensable injury of \_\_\_\_\_, extend to: (1) L3-4 herniated disc; (2) L4-5 herniated disc; (3) L5-S1 herniated disc; (4) lumbar radiculopathy; and (5) reflex sympathetic dystrophy (RSD)?

The hearing officer determined that the carrier waived the right to contest the compensability of the injury in the form of: (1) L3-4 herniated disc; (2) L4-5 herniated disc; and (3) L5-S1 herniated disc by not timely contesting compensability in accordance with Section 409.021. The hearing officer determined that the carrier did not waive the right to contest the compensability of the injury in the form of: (1) lumbar radiculopathy; and (2) RSD.

The hearing officer determined that the compensable injury of \_\_\_\_\_, extends to: (1) L3-4 herniated disc; (2) L4-5 herniated disc; and (3) L5-S1 herniated disc by virtue of carrier waiver. The hearing officer determined that the compensable injury of \_\_\_\_\_, does not extend to: (1) lumbar radiculopathy; and (2) RSD.

The appellant (claimant) appealed the hearing officer's determinations on the issues of carrier waiver and extent of injury that were adverse to the claimant with regard to lumbar radiculopathy and RSD. That portion of the hearing officer's carrier waiver determination that the carrier waived the right to contest the compensability of the injury in the form of: (1) L3-4 herniated disc; (2) L4-5 herniated disc; and (3) L5-S1 herniated disc by not timely contesting compensability in accordance with Section 409.021 has not been appealed and has become final pursuant to Section 410.169. Also, that portion of the hearing officer's extent-of-injury determination that the compensable injury of \_\_\_\_\_, extends to: (1) L3-4 herniated disc; (2) L4-5 herniated disc; and (3) L5-S1 herniated disc by virtue of carrier waiver has not been appealed and has become final pursuant to Section 410.169.

DECISION

Affirmed in part and reversed and rendered in part.

## CARRIER'S RESPONSE

The claimant's request for review was sent to the Texas Department of Insurance, Division of Workers' Compensation (Division) by facsimile transmission (fax) on April 3, 2009, and was received by the Division on that same date. The claimant's appeal was timely received by the Division. The claimant's appeal and certificate of service shows that the claimant sent his appeal by fax to the carrier's attorney on Friday, April 3, 2009. The certificate of service indicates that the claimant only served the carrier's attorney with a copy of the appeal. Records of the Division reflect that the Division served the carrier with a copy of the claimant's appeal by placing a copy of the claimant's appeal in the carrier's Austin representative box on Friday, April 3, 2009. See 28 TEX. ADMIN. CODE § 143.3(b) (Rule 143.3(b)). Pursuant to Rule 102.5(d), the carrier is deemed to have received the claimant's appeal on Monday, April 6, 2009.

In a response to the claimant's appeal, the carrier asserts that although the "[c]arrier received the [c]laimant's appeal on or about April 6, 2009," the carrier's attorney did not receive the claimant's appeal until May 21, 2009. Additionally, the carrier states the claimant is "charged with the responsibility of serving the [c]arrier's representative with a copy of its appeal simultaneously with the filing of his appeal with the Appeals Panel." The carrier states that "good cause exists for the [c]arrier to be allowed to file this untimely response."

As previously mentioned, the claimant's appeal and certificate of service indicates that the claimant served the carrier's attorney by fax on April 3, 2009, and the carrier's attorney admits that the carrier received the claimant's appeal on April 6, 2009. The carrier's attorney had the burden of proof to establish the date on which he received the claimant's appeal. The carrier's attorney's mere assertion that he did not receive the claimant's appeal until May 21, 2009, is insufficient to extend the time period to file a response. See Appeals Panel Decision (APD) 052268, November 18, 2005.

In the instant case, the deemed receipt of the claimant's appeal is April 6, 2009, in accordance with Section 410.202(b) and Rule 143.4(c), excluding Saturdays and Sundays and holidays listed in Section 662.003 of the Texas Government Code, and the carrier's response had to be filed or mailed no later than Wednesday, April 29, 2009. We note that April 10, 2009, Good Friday is an optional holiday, and April 21, 2009, San Jacinto Day is a state holiday, are holidays that are listed in Section 662.003 of the Texas Government Code and are excluded in the computation of the 15-day period to file a response.

The carrier's response dated May 29, 2009, was sent to the Division by fax on May 29, 2009, and was received by the Division on that same date. Also, the carrier's response was mailed to the Division and received on June 1, 2009. Accordingly, the response not having been mailed or filed by April 29, 2009, is untimely. The Appeals Panel has held that an untimely response will not be considered. See APD 041598, decided August 24, 2004.

## CARRIER WAIVER

That portion of the hearing officer's decision that the carrier did not waive the right to contest the compensability of the injury in the form of RSD is supported by sufficient evidence and is affirmed.

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. 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.

The claimant testified that on \_\_\_\_\_, he injured his low back at work when he missed a step while exiting from his 18-wheeler truck. The parties stipulated that on \_\_\_\_\_, the claimant sustained a compensable injury to his lumbar spine in the form of a sprain/strain and the carrier received (first) written notice of the claimed injury on July 3, 2007. The expiration of the 60-day waiver period is therefore September 3, 2007.<sup>1</sup> In evidence is a medical report from an orthopedic surgeon, (Dr. S), dated July 9, 2007, which states that the claimant missed a step as he was getting off his 18-wheeler truck and "is complaining of low back pain. This is associated with right leg numbness." Dr. S notes in his report that the claimant "has decreased sensation over the right lower extremity. He has 1+ reflexes." A medical report from a referral doctor, (Dr. E), dated July 18, 2007, states that the claimant has "[b]ack pain with right leg weakness at the level of the thigh. According to the patient, this occurred upon [an] incidental fall from a truck while working on \_\_\_\_\_." In another medical report dated July 19, 2007, Dr. E opined the claimant had "[b]ack pain and right leg radiculopathy" and referred the claimant for an EMG of the lower extremities. In evidence is an EMG dated July 27, 2007, which gives an impression of "[r]ight leg with mild L5 chronic radiculopathy" and "[l]eft leg with mild L3-4 and L5 chronic radiculopathies." The evidence establishes that the carrier could have reasonably discovered by the carrier's investigation prior to the expiration of the waiver period the lumbar radiculopathy. Accordingly, we reverse that portion of the hearing officer's determination that the carrier did not waive the right to contest the compensability of the injury in the form of lumbar radiculopathy, and we render a new decision that the carrier waived the right to contest compensability of the injury in the form of lumbar radiculopathy.

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<sup>1</sup> Because the 60th day after July 3, 2007, was Saturday, September 1, 2007, the expiration of the 60-day waiver period in Section 409.021(c) was extended to the next working day, Monday, September 3, 2007. See Rules 102.3(a)(3) and 102.3(b). See APD 080414, decided May 22, 2008.

## **EXTENT OF INJURY**

That portion of the hearing officer's determination that the compensable injury of \_\_\_\_\_, does not extend to RSD is supported by sufficient evidence and is affirmed.

Given that we have reversed that portion of the hearing officer's carrier waiver decision with regard to lumbar radiculopathy, that disputed condition listed in the extent-of-injury issue became compensable by virtue of carrier waiver. Accordingly, we reverse that portion of the hearing officer's decision that the compensable injury of \_\_\_\_\_, does not extend to lumbar radiculopathy, and we render a new decision that the compensable injury of \_\_\_\_\_, extends to lumbar radiculopathy, by virtue of carrier waiver.

## **SUMMARY**

We affirm that portion of the hearing officer's decision that the carrier did not waive the right to contest the compensability of the injury in the form of RSD. We affirm that portion of the hearing officer's determination that the compensable injury of \_\_\_\_\_, does not extend to RSD.

We reverse that portion of the hearing officer's decision that the carrier did not waive the right to contest the compensability of the injury in the form of lumbar radiculopathy, and we render a new decision that the carrier waived the right to contest compensability of the injury in the form of lumbar radiculopathy. We reverse that portion of the hearing officer's decision that the compensable injury of \_\_\_\_\_, does not extend to lumbar radiculopathy, and we render a new decision that the compensable injury of \_\_\_\_\_, extends to lumbar radiculopathy, by virtue of carrier waiver.

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

**PRENTICE HALL CORPORATION SYSTEM, INC.  
800 BRAZOS  
AUSTIN, TEXAS 78701.**

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Veronica L. Ruberto  
Appeals Judge

CONCUR:

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Cynthia A. Brown  
Appeals Judge

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Margaret L. Turner  
Appeals Judge