

APPEAL NO. 090644
FILED JULY 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 April 1, 2009. The hearing officer determined that the compensable injury of _____, does not extend to cervical spine herniation/protrusion at C5-6 and C6-7, depression and anxiety and that the appellant (claimant) and subclaimant waived the right to contest compensability of the cervical spine herniation/protrusion at C5-6 and C6-7, depression and anxiety by failing to show due diligence and raising the dispute of the extent of the injury after final payment of impairment income benefits (IIBs) for the compensable injury of _____.

The claimant appealed, citing certain medical evidence that supports her position on the extent-of-injury issue and contends that the extent-of-injury issue has been in dispute since May 2003 and that there is no waiver provision in the 1989 Act or rules relating to extent-of-injury issues. The respondent (self-insured) responded, urging affirmance.

DECISION

Affirmed in part and reversed and rendered in part.

BACKGROUND INFORMATION

The claimant was a school district employee and the parties stipulated that the claimant sustained a compensable injury on _____. The claimant testified how an unruly autistic child hit her in the jaw and neck. The self-insured accepted a contusion to the jaw and cervical sprain/strain. The claimant was seen by a designated doctor on October 2, 2003. In a report dated October 2, 2003, the designated doctor certified the claimant at clinical maximum medical improvement (MMI) on that date with a 5% impairment rating (IR) based on Diagnosis-Related Estimate Cervicothoracic Category II: Minor Impairment. The designated doctor also referenced a left jaw contusion. The self-insured contends that IIBs, based on the 5% IR, were paid and ended on January 16, 2004.

EXTENT OF INJURY

The hearing officer's determination that the compensable injury of _____, does not extend to cervical spine herniation/protrusion at C5-6 and C6-7, depression and anxiety is supported by sufficient evidence and is affirmed.

WAIVER

The hearing officer, in his Background Information, comments:

The [s]ub-[c]laimant failed to timely pursue recovery and undertook care of conditions that were not defined within the scope of the compensable injury. The Appeals Panel has stated, “[w]here either party has failed to activate a dispute over the extent of injury prior to the point at which IR is being decided, a dispute over extent of injury may not be reserved and is waived” ([Appeals Panel Decision (APD) 951494, decided October 20, 1995; citing APD 950679, decided June 13, 1995]).

The hearing officer’s reliance on APD 951494, *supra*, is misplaced. We would first note that APD 951494 was decided prior to the effective date of Rule 130.102(g) (discussed later) and had a concurring opinion that there was no legal basis for the majority to find waiver. In APD 951494 the issues were (1) the correct IR and (2) entitlement to the first quarter of supplemental income benefits (SIBs). The carrier, in that case, had paid the claimant IIBs based on a 15% IR. When the claimant raised the issue of SIBs the carrier denied entitlement to SIBs asserting that the claimant did not have a 15% IR and that the 15% IR assigned for the claimant was incorrect. The majority decision, in APD 951494, held that the carrier, by its delay in disputing the 15% IR waived its right to dispute the 15% IR. The concurring opinion held that there was no statutory basis prohibiting the dispute so long as the matter is determined prior to the first quarter of SIBs. The instant case is distinguishable in that the IR is not an issue before the hearing officer. Neither the IR nor SIBs are at issue in the present case and unlike APD 951494, waiver was asserted against the claimant and not the carrier.

In APD 090515, decided June 12, 2009, the hearing officer determined that the claimant (in that case) had waived his ability to dispute the extent of the compensable injury by raising the dispute after the final payment of IIBs for the compensable injury and by seeking dispute resolution more than three years after the last Texas Department of Insurance, Division of Workers’ Compensation action on the claim. The Appeals Panel reversed the hearing officer’s decision citing APD 040150-s, decided March 8, 2004, a case concerning finality of MMI/IR certifications pursuant to 28 TEX. ADMIN. CODE § 130.102(g) (Rule 130.102(g)) and APD 051082, decided June 28, 2005. Rule 130.102(g) effective January 31, 1999 (and not changed by further amendments to the rule in November 1999), provides:

[MMI and IR] Disputes. If there is no pending dispute regarding the date of [MMI] or the [IR] prior to the expiration of the first quarter [of SIBs], the date of [MMI] and the [IR] shall be final and binding.

The Appeals Panel quoted APD 051028-s, decided June 9, 2005, stating:

The fact that the date of MMI and IR become final under these circumstances applies equally to the claimant and the carrier. A determination that the compensable injury extends to various other conditions not included in the IR will not allow the claimant to then challenge the date of MMI and/or the IR if there was no pending dispute regarding MMI and/or IR prior to the expiration of the first quarter of SIBs.

However, once the first quarter of SIBs has expired and there has been no challenge of the MMI date and/or the IR, the claimant is not precluded from alleging that the compensable injury extends to include other conditions not included in the IR.

In the present case, the claimant was not trying to change the IR previously determined but rather was claiming the compensable injury extended to include other conditions not previously litigated for this date of injury. As acknowledged in APD 040150-s, *supra*, injuries can evolve over time and claimants may allege that additional injuries or conditions are compensable. To hold otherwise would deprive claimants of rights specifically afforded to them under the 1989 Act. The claimant correctly notes in her appeal that there is no statutory authority or rule that provides a time frame for the claimant to pursue an extent-of-injury dispute.

The hearing officer's determination that the claimant (and subclaimant) waived the right to contest compensability of the cervical spine herniation/protrusion at C5-6 and C6-7, depression and anxiety by failing to show due diligence and raising the dispute of the extent of the injury after the final payment of IIBs is incorrect as a matter of law. (APD 090515, *supra*.) We reverse the hearing officer's decision that the claimant waived the right to contest compensability of the cervical spine herniation/protrusion at C5-6 and C6-7, depression and anxiety by failing to show due diligence and raising the dispute of the extent of the injury after the final payment of IIBs for the compensable injury of _____. We render a new decision that the claimant did not waive the right to contest compensability of the cervical spine herniation/protrusion at C5-6 and C6-7, depression and anxiety by failing to show due diligence and raising the dispute of the extent of the injury after the final payment of IIBs.

SUMMARY

We affirm the hearing officer's decision that the compensable injury of _____, does not extend to cervical spine herniation/protrusion at C5-6 and C6-7, depression and anxiety.

We reverse the hearing officer's decision that the claimant waived the right to contest compensability of the cervical spine herniation/protrusion at C5-6 and C6-7, depression and anxiety by failing to show due diligence and raising the dispute of the extent of the injury after the final payment of IIBs for the compensable injury of _____. We render a new decision that the claimant did not waive the right to contest compensability of the cervical spine herniation/protrusion at C5-6 and C6-7, depression and anxiety by failing to show due diligence and raising the dispute of the extent of the injury after the final payment of IIBs.

The true corporate name of the insurance carrier is **(a self-insured governmental entity)** and the name and address of its registered agent for service of process is

**DR. RM
(ADDRESS)
(CITY), TEXAS (ZIP CODE).**

Thomas A. Knapp
Appeals Judge

CONCUR:

Veronica L. Ruberto
Appeals Judge

Margaret L. Turner
Appeals Judge