

APPEAL NO. 090764  
FILED JULY 24, 2009

This appeal after a hearing on remand, arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on December 5, 2008. In Appeals Panel Decision (APD) 090021, decided March 17, 2009, the Appeals Panel remanded the case to the hearing officer to reconstruct the record because efforts to locate the record of the proceeding were unsuccessful and to reconcile the inconsistencies between the findings of fact, conclusions of law, decision and the discussion portion of the decision and order, and correct any errors therein.

A CCH on remand was held on April 9, 2009. The issues before the hearing officer were:

- (1) Does the compensable injury (of \_\_\_\_\_) extend to: (1) disc herniations at C4-5; (2) protrusion with impingement at C5-6; (3) stenosis at C3-7; (4) bilateral foraminal stenosis at C4-7; (5) cervical spondylosis; (6) cervical lordosis at C3-4 and C4-5; (7) subluxation at C4, C5, and C6; (8) protrusion at L3-4; (9) disc herniation at L4-5, L5-S1; (10) stenosis at L3-4; (11) lumbar spondylosis; and (12) lumbar degenerative disc disease?
- (2) Has respondent 1 (self-insured) waived the right to contest compensability of the cervical spine injury by not timely contesting the injury in accordance with Section 409.021?

The hearing officer determined that the compensable injury of \_\_\_\_\_, does not extend to any of the conditions listed in the extent-of-injury issue, and that the self-insured "has not waived the right to contest the compensability of the specific cervical spine injury (conditions)" as detailed in the extent-of-injury issue, "because it did not timely contest the injury in accordance with Section 409.021."

The appellant (claimant) appealed the hearing officer's carrier waiver and extent-of-injury determinations. The self-insured responded to the claimant's appeal, urging affirmance. The appeal file does not contain a response from respondent 2 (subclaimant).

DECISION

Affirmed in part and reversed and rendered in part.

## CARRIER WAIVER

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 Texas Department of Insurance, Division of Workers' Compensation 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 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. We note that the carrier waiver issue was limited to the cervical spine. The hearing officer's finding that: (1) the self-insured first received written notice of the compensable injury on August 24, 2004, and (2) the self-insured filed its first denial of compensability on February 8, 2005, is supported by sufficient evidence. Therefore, the expiration of the 60-day waiver period is October 25, 2004.<sup>1</sup>

Review of the record shows that prior to the expiration of the 60-day waiver period the claimant was seen by her treating doctor and underwent diagnostic exams of the cervical spine on August 24, 2004, and September 27, 2004. The treating doctor, (Dr. O), notes in his medical reports dated August 24, 2004, and September 27, 2004, that the claimant injured her neck and back when she slipped on water in a hall and fell down. Dr. O's medical reports show that he referred the claimant for an x-ray and MRI of the cervical spine, and that he diagnosed the claimant with neck pain, right arm pain, cervical pain and thoracic and low back pain and sprain. In evidence is an x-ray of the cervical spine dated August 24, 2004, which shows:

Findings: Reversal of the cervical lordosis. Moderate narrowing of the C4-5 and C5-6 disc spaces and moderate to marked narrowing of the C6-7 and C7-T1 disc space. Anterior and posterior osteophytes at these levels.

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<sup>1</sup> Because the 60th day after August 24, 2004, was Saturday, October 23, 2004, the expiration of the 60-day waiver period in Section 409.021(c) was extended to the next working day, Monday, October 25, 2004. See 28 TEX. ADMIN. CODE §§ 102.3(a)(3) and 102.3(b) (Rules 102.3(a)(3) and 102.3(b)). See APD 080414, decided May 22, 2008.

There is encroachment on the right C5-6, C6-7, and C7-T1 neural foramina and on the left C4-5, C5-6, and C6-7 neural foramina. No definite subluxation seen.

Impression: Extended degenerative disc disease and osteoarthritis of cervical spine as described above.

In evidence is another x-ray of the cervical spine dated September 27, 2004, which concludes that the claimant had "cervical spondylosis with bilateral foraminal stenosis at [C4-7] levels more marked on the left side at [C4-6] level." Also, in evidence is an MRI of the cervical spine dated September 27, 2004, which concludes that the claimant had:

1. Evidence of considerable cervical spondylosis;
2. Loss of cervical lordosis with flexion deformity involving C3-4, C4-5 disc spaces;
3. Posterior subluxation of C4, C5, C6 vertebral bodies with reference to C3;
4. Disc herniation in the central portion at C4-5 level;
5. Disc protrusion on both sides at C5-6 level with impingement on both C6 nerve roots;
6. Central spinal canal stenosis from C3 through C7 vertebral bodies; and
7. Bilateral foraminal stenosis at C4-5, C5-6, C6-7 levels.

The hearing officer erred in finding that prior to the expiration of the 60-day waiver period, that a reasonable investigation by the self-insured "would not have discovered the August 24, 2004 cervical [spine] x-ray containing" the cervical spine conditions as listed above. Based on the evidence, the self-insured could have reasonably discovered in its investigation the cervical spine injury prior to the expiration of the waiver period. Accordingly, we reverse the hearing officer's decision that the self-insured "has not waived the right to contest the compensability of the specific cervical spine injury (conditions)" as detailed in the extent-of-injury issue, "because it did not timely contest the injury in accordance with Section 409.021," and we render a new decision that the self-insured waived the right to contest compensability of the cervical spine injury, 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: (1) protrusion at L3-4; (2) disc herniation at L4-5, L5-S1; (3) stenosis at L3-4; (4) lumbar spondylosis; and (5) lumbar degenerative disc disease is supported by sufficient evidence and is affirmed.

As previously mentioned, the cervical spine conditions listed in the extent-of-injury issue are referenced in an MRI of the cervical spine dated September 27, 2004, which was prior to the expiration of the carrier waiver period. Given that we have

reversed the hearing officer's carrier waiver determination and rendered a new decision that the self-insured waived the right to contest compensability of the cervical spine injury, those cervical spine conditions listed in the extent-of-injury issue have 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 extend to: (1) disc herniations at C4-5; (2) protrusion with impingement at C5-6; (3) stenosis at C3-7; (4) bilateral foraminal stenosis at C4-7; (5) cervical spondylosis; (6) cervical lordosis at C3-4 and C4-5; and (7) subluxation at C4, C5, and C6, and we render a new decision that the compensable injury of \_\_\_\_\_, extends to: (1) disc herniations at C4-5; (2) protrusion with impingement at C5-6; (3) stenosis at C3-7; (4) bilateral foraminal stenosis at C4-7; (5) cervical spondylosis; (6) cervical lordosis at C3-4 and C4-5; and (7) subluxation at C4, C5, and C6, by virtue of carrier waiver.

### **SUMMARY**

We reverse the hearing officer's decision that the self-insured "has not waived the right to contest the compensability of the specific cervical spine injury (conditions)" as detailed in the extent-of-injury issue, "because it did not timely contest the injury in accordance with Section 409.021," and we render a new decision that the self-insured waived the right to contest compensability of the cervical spine injury, by not timely contesting the injury in accordance with Section 409.021.

We affirm that portion of the hearing officer's decision that the compensable injury of \_\_\_\_\_, does not extend to: (1) protrusion at L3-4; (2) disc herniation at L4-5, L5-S1; (3) stenosis at L3-4; (4) lumbar spondylosis; and (5) lumbar degenerative disc disease. We reverse that portion of the hearing officer's decision that the compensable injury of \_\_\_\_\_, does not extend to: (1) disc herniations at C4-5; (2) protrusion with impingement at C5-6; (3) stenosis at C3-7; (4) bilateral foraminal stenosis at C4-7; (5) cervical spondylosis; (6) cervical lordosis at C3-4 and C4-5; and (7) subluxation at C4, C5, and C6, and we render a new decision that the compensable injury of \_\_\_\_\_, extends to: (1) disc herniations at C4-5; (2) protrusion with impingement at C5-6; (3) stenosis at C3-7; (4) bilateral foraminal stenosis at C4-7; (5) cervical spondylosis; (6) cervical lordosis at C3-4 and C4-5; and (7) subluxation at C4, C5, and C6, by virtue of carrier waiver.

The true corporate name of the insurance carrier is **(self-insured through the Texas Association of Counties RMP)** and the name and address of its registered agent for service of process is

**KN, EXECUTIVE DIRECTOR  
(ADDRESS)  
(CITY), TEXAS (ZIP CODE).**

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Veronica L. Ruberto  
Appeals Judge

CONCUR:

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Thomas A. Knapp  
Appeals Judge

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Margaret L. Turner  
Appeals Judge