

APPEAL NO. 090991
FILED SEPTEMBER 10, 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 (CCH) was held on June 4, 2009. The hearing officer resolved the disputed issues by deciding that: (1) the compensable injury sustained on _____, does not extend to facet arthropathy, diffuse posterior annular bulges at L4-5 and L5-S1 levels and borderline focal canal stenosis at L4-5 level (lumbar MRI findings) dated January 13, 2006;¹ (2) the appellant (carrier) waived the right to contest the diagnoses of degenerative disc disease, spondylosis, and trochanteric bursitis by not timely contesting the claimed diagnoses in accordance with Section 409.021;² and (3) the compensable injury sustained on _____, does extend to degenerative disc disease, spondylosis, and bilateral trochanteric bursitis.³

The carrier appealed, disputing the hearing officer's waiver determination and the determination that the compensable injury sustained on _____, does extend to degenerative disc disease, spondylosis, and bilateral trochanteric bursitis. The appeal file does not contain a response from the respondent (claimant) to the carrier's appeal. The hearing officer's determination that the compensable injury sustained on _____, does not extend to lumbar MRI findings dated January 13, 2006, was not appealed and has become final.

DECISION

Reversed and rendered.

The parties stipulated that the claimant sustained a compensable injury on _____. The claimant testified that she had previously injured her back in 1990 and that on _____, there was not a specific incident but rather she had been lifting boxes and pushing a heavy cart throughout the day and injured her lower back.

CARRIER WAIVER

The hearing officer found that the carrier received written notice of the claimed injury on December 2, 2005. That finding is supported by sufficient evidence. The claimant testified that she believes she sought medical treatment prior to December 12, 2005, but could not remember the specific date. In evidence was a medical report dated December 12, 2005, which gave the following as an impression/assessment of

¹ The lumbar MRI findings of January 13, 2006, also included an impression of mild to moderate degenerative lumbar spondylosis. However, since spondylosis was included in the carrier waiver issue the hearing officer made a separate finding regarding the condition of spondylosis.

² The parties agreed to limit the carrier waiver issue to the specified conditions at the CCH.

³ There was not a separate issue to be decided regarding extent of injury regarding the conditions of degenerative disc disease and bilateral trochanteric bursitis. As previously noted spondylosis was included in the lumbar MRI findings.

the claimant: low back pain with some degenerative disc disease, spondylosis and bilateral trochanteric bursitis. In evidence was a Notice of Disputed Issue(s) and Refusal to Pay Benefits (PLN-11), filed with the Texas Department of Insurance, Division of Workers' Compensation (Division) on April 26, 2008, which stated: "[t]he compensable injury is limited to a mild lumbar soft tissue myofascial strain. All other injuries, diagnoses, symptoms and conditions are disputed as not being related to the compensable injury on _____."

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 Appeals Panel Decision (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 State Office of Risk Mgmt. v. Lawton,⁴ 2009 Tex. LEXIS 629 (Tex. August 28, 2009), the Texas Supreme Court held that the interpretation given in APD 041738-s, *supra*, would eliminate the distinction between compensability and extent of injury: a dispute about any injury reasonably discoverable within 60 days of the initial notice would be governed by the deadlines for compensability, while information obtained outside that time frame would fall under the deadlines for disputing extent of injury. In Lawton, the carrier agreed the claimant had a compensable injury. Similarly, in the instant case the carrier agreed the claimant had a compensable injury and later disputed the extent of that injury. We find the reasoning set forth in the Lawton case, applicable to the facts in the case at issue. Accordingly, we reverse the hearing officer's decision that the carrier waived the right to contest the diagnoses of degenerative disc disease, spondylosis, and bilateral trochanteric bursitis by not timely contesting the claimed diagnoses in accordance with Section 409.021 and render a new decision that the carrier did not waive its right to contest the diagnoses of degenerative disc disease, spondylosis, and bilateral trochanteric bursitis.

EXTENT OF INJURY

As previously noted, the hearing officer's determination that the compensable injury sustained on _____, does not extend to lumbar MRI findings dated January 13, 2006, was not appealed and has become final. Spondylosis was specifically included in the lumbar MRI findings dated January 13, 2006. The hearing officer found that the compensable injury extended to spondylosis based on her determination of

⁴ We note that the decision in Lawton, *supra* is not yet final until opportunities for rehearing have been exhausted.

carrier waiver. The hearing officer's carrier waiver determination was reversed and a new decision was rendered that the carrier did not waive the right to contest spondylosis. Therefore, we reverse that portion of the hearing officer's extent-of-injury determination that the compensable injury sustained on _____, does extend to spondylosis and render a new decision that the compensable injury sustained on _____, does not extend to spondylosis.

The extent-of-injury issue to be decided at the CCH was limited to the lumbar MRI findings dated January 13, 2006. The hearing officer determined that the compensable injury extended to degenerative disc disease and bilateral trochanteric bursitis because of her waiver determination which specified these conditions. However, the hearing officer did not make a determination on the merits of the extent of injury regarding degenerative disc disease and bilateral trochanteric bursitis independent of the waiver issue because these conditions were not included in the extent-of-injury issue before her. Therefore, we strike that portion of the hearing officer's determination that the compensable injury extends to degenerative disc disease and bilateral trochanteric bursitis as surplusage. The issue of whether the compensable injury sustained on _____, extends to degenerative disc disease and bilateral trochanteric bursitis will not be remanded back to the hearing officer to decide on the merits because it was not an issue originally before her.

SUMMARY

We reverse the hearing officer's determination that the carrier waived the right to contest the diagnoses of degenerative disc disease, spondylosis, and bilateral trochanteric bursitis by not timely contesting the claimed diagnoses in accordance with Section 409.021 and render a new decision that the carrier did not waive its right to contest the diagnoses of degenerative disc disease, spondylosis, and bilateral trochanteric bursitis.

We reverse that portion of the hearing officer's extent-of-injury determination that the compensable injury sustained on _____, does extend to spondylosis and render a new decision that the compensable injury sustained on _____, does not extend to spondylosis. We strike that portion of the hearing officer's determination that the compensable injury extends to degenerative disc disease and bilateral trochanteric bursitis as surplusage.

The true corporate name of the insurance carrier is **NEW HAMPSHIRE INSURANCE 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.**

Margaret L. Turner
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Veronica L. Ruberto
Appeals Judge