

APPEAL NO. 091156
FILED SEPTEMBER 29, 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 July 9, 2009. With regard to the disputed issues before her the hearing officer determined that: the appellant (self-insured) (referred to in the hearing officer's decision as the carrier) has waived the right to contest compensability of bilateral carpal tunnel syndrome (CTS) by not timely contesting the diagnosis in accordance with Section 409.021; the compensable injury of _____, includes bilateral CTS; the compensable injury of _____, does not include bilateral shoulders (pain and myofascitis); and the respondent (claimant) had disability resulting from a compensable injury from December 15, 2006, through May 12, 2008.

The self-insured appeals the carrier waiver issue, that the claimant's compensable injury includes bilateral CTS and the disability issue. The claimant responds, urging affirmance. The hearing officer's determination that the compensable injury of _____, does not include bilateral shoulders (pain and myofascitis) has not been appealed and therefore has become final pursuant to Section 410.169.

DECISION

Affirmed in part and reversed and rendered in part.

The parties stipulated that the claimant sustained a compensable injury on _____, and that the self-insured accepted a compensable injury to include bilateral medial epicondylitis. The hearing officer made an unappealed finding that the self-insured received written notice of the claimed injury "by November 9, 2006." The parties also stipulated that on December 13, 2006, the self-insured filed its first dispute of degenerative conditions, arthritis, bilateral shoulders, cervical and bilateral wrists. The hearing officer also made an appealed finding that the "[c]arrier [self-insured], through a reasonable investigation, could have determined within 60 days following November 9, 2006, that the diagnosis of bilateral [CTS] was part of the claimed injury." The hearing officer made a distinction between bilateral wrists and bilateral CTS.

CARRIER WAIVER

Section 409.021(a) provides that for claims based on a compensable injury that occurred on or after September 1, 2003, 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: (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 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,¹ 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 self-insured agreed the claimant had a compensable injury and later disputed the extent of that injury. We find the reasoning set forth in the Lawton decision applicable to the facts in the case at issue. Accordingly, we reverse the hearing officer's decision that the self-insured waived the right to contest compensability of bilateral CTS by not timely contesting the diagnosis in accordance with Section 409.021 and we render a new decision that the self-insured did not waive the right to contest compensability of bilateral CTS.

EXTENT OF INJURY

The hearing officer made a finding that bilateral CTS arose out of or naturally flowed from the compensable injuries. That finding is supported by sufficient evidence. The hearing officer's determination that the compensable injury of _____, includes bilateral CTS is supported by the evidence and is affirmed.

DISABILITY

The hearing officer's determination that the claimant had disability resulting from the compensable injury from December 15, 2006, through May 12, 2008, is supported by sufficient evidence and is affirmed.

SUMMARY

We affirm the hearing officer's determinations that the compensable injury of _____, includes bilateral CTS and that the claimant had disability resulting from the compensable injury from December 15, 2006, through May 12, 2008.

We reverse the hearing officer's determination that the self-insured waived the right to contest compensability of bilateral CTS by not timely contesting the diagnosis in accordance with Section 409.021 and render a new decision that the self-insured did not waive the right to contest compensability of bilateral CTS.

¹ We note that the decision in Lawton, *supra*, is not yet final until opportunities for rehearing have been exhausted.

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

(ADDRESS)
(CITY), TEXAS (ZIP CODE).

Thomas A. Knapp
Appeals Judge

CONCUR:

Veronica L. Ruberto
Appeals Judge

Margaret L. Turner
Appeals Judge