

APPEAL NO. 091229
FILED OCTOBER 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 (CCH) was held on July 16, 2009. The issues before the hearing officer were:

- (1) Did the respondent (claimant) sustain a compensable injury on _____?
- (2) Did the claimant have any disability for the period of July 20, 2007, through December 1, 2008?
- (3) Has the appellant (carrier) waived the right to contest compensability of the claimed injury by not timely contesting the injury in accordance with Sections 409.021 and 409.022?

The hearing officer determined that: (1) the claimant sustained an injury in the course and scope of his employment on _____; (2) due to the _____, compensable injury, the claimant had disability beginning on July 20, 2007, and continuing to December 1, 2008, but at no other time; and (3) the carrier waived the right to contest compensability of the claimed injury by not timely contesting the injury in accordance with Sections 409.021 and 409.022.

The carrier appealed the hearing officer's injury, disability and waiver determinations. The carrier attached to its appeal a Notice of Denial of Compensability/Liability and Refusal to Pay Benefits (PLN-1) that contains a date stamp which shows when it was filed with the Texas Department of Insurance, Division of Workers' Compensation (Division). The carrier states in its appeal that the hearing officer should have taken official notice of the Division records to determine when the PLN-1 was filed with the Division to properly determine the carrier waiver issue. The claimant responded, urging affirmance of the hearing officer's determinations.

DECISION

Affirmed in part, reversed and rendered in part, and reversed and remanded in part.

FACTUAL SUMMARY

The claimant testified that on _____, while in the course and scope of his employment, he sustained an injury to his right hip/groin area. On the merits, the hearing officer found that on _____, the claimant sustained damage or harm to the physical structure of his body while in the course and scope of his employment, and due to the _____, injury the claimant was unable to obtain and retain employment

earning the equivalent of his pre-injury wage beginning on July 20, 2007, and continuing to December 1, 2008.

COMPENSABLE INJURY

The hearing officer's determination that the claimant sustained an injury in the course and scope of employment on _____, is supported by sufficient evidence and is affirmed.

DISABILITY

The hearing officer's determination that due to the _____, compensable injury, the claimant had disability beginning on July 20, 2007, and continuing to December 1, 2008, but at no other time, is supported by sufficient evidence and is affirmed.

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 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 State Office of Risk Mgmt. v. Lawton,¹ 2009 Tex. LEXIS 629 (Tex. August 28, 2009), the Texas Supreme Court held that Section 409.021(c)'s 60-day deadline applies only to compensability, and that the interpretation given in Appeals Panel Decision (APD) 041738-s, decided September 8, 2004, would eliminate the distinction between compensability and extent of injury. In Lawton, the carrier agreed the claimant had a compensable injury. In the instant case, the carrier is denying compensability of the claimed injury in its entirety. Although the carrier initially accepted the claimed injury and paid temporary income benefits (TIBs), it subsequently denied compensability of the claimed injury in its entirety. The carrier contends that the claimant did not sustain a compensable injury. As such, this case is distinguishable from the Lawton decision. In Lawton the carrier accepted a compensable injury and only disputed the extent of the injury. In the present case, the carrier has denied compensability of the injury in its entirety; therefore, the rationale in the Lawton decision does not apply to this case.

In this case, the issue in dispute was whether carrier waived the right to contest compensability of the claimed injury by not timely contesting the injury in accordance with Sections 409.021 and 409.022. The hearing officer found that the "[c]ARRIER

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

received written notice of [c]laimant's _____ injury on August 15, 2007 and did not contest the compensability of that injury until sometime in 2009." In the Background Information section of the decision, the hearing officer states that "[c]arrier received first written notice of the injury at least by August 15, 2007, as reflected by its PLN-1." Further, the hearing officer stated that "[t]here is no evidence that this PLN-1 or any dispute of the compensability of the injury was ever filed with the Division until sometime on or after the first benefit review conference was held in this case in 2009."

The hearing officer's finding that the carrier received written notice of the claimant's _____, injury on August 15, 2007, is factually incorrect. In evidence is a PLN-1 dated August 14, 2007, which states that the carrier received notice of the claimed injury on July 19, 2007. Additionally, a Notification of First [TIBs] Payment (PLN-2) form dated August 3, 2007, informs the claimant that his first payment of workers' compensation benefits would be forthcoming. Both the PLN-1 and PLN-2 establish that the carrier had written notice of the claimed injury prior to August 15, 2007, the date found by the hearing officer. The hearing officer's finding that the carrier received written notice of the claimant's _____, injury on August 15, 2007, is not supported by the evidence.

With regard to timely dispute of the claimed injury, the PLN-1 in evidence does not contain a date stamp which shows when the PLN-1 was filed with the Division. The carrier attached to its appeal a PLN-1 that contained a date stamp showing the date the PLN-1 was filed with the Division. At the CCH during closing arguments, the carrier commented that the hearing officer could take "judicial notice" of the PLN-1 to determine when it was filed with the Division. On appeal, the carrier asserts that if the hearing officer would have taken official notice of the Division's records, the hearing officer could have properly determined when the PLN-1 was filed with the Division. In APD 050833, decided June 2, 2005, the hearing officer did not take official notice of the Division's records to determine when Payment of Compensation or Notice of Refused/Disputed Claim (DWC-21) form was filed with the Division. In that case, the DWC-21 was in evidence; however, it did not contain a date stamp indicating the Division's receipt of that form. The Appeals Panel reversed and remanded the case for the hearing officer to take official notice of Division records with regard to the filing of the carrier's DWC-21. See *also* APD 030295, decided March 27, 2003 (the Appeals Panel stated that it had required that a hearing officer take official notice of essential Division forms where timely filing requirements are in issue). In APD 010696, decided April 26, 2001, the Appeals Panel held that the hearing officer did not err in making the date-stamped copy of the carrier's DWC-21, which the hearing officer obtained from the claim file, a hearing officer exhibit.²

² 28 TEX. ADMIN. CODE § 102.4(l) (Rule 102.4(l)) provides, in part, that if a written communication is required to be filed with both the Division and another person by the Act or Division rules, the other person shall be presumed to have received the written communication on the date the Division received its copy.

In the instant case, the hearing officer erred by not taking official notice of the Division's records with regard to the filing of the carrier's PLN-1 with the Division to determine the carrier waiver issue. Accordingly, we reverse the hearing officer's determination the carrier waived its right to contest compensability of the claimed injury by not timely contesting the injury in accordance with Sections 409.021 and 409.022, and we remand the carrier waiver issue to the hearing officer for the hearing officer to take official notice of Division records regarding when the carrier filed its PLN-1 with the Division; to make the PLN-1 that is officially noticed a hearing officer exhibit; to allow the parties an opportunity to review the officially noticed PLN-1 and to respond to it; to make a finding of fact of when the carrier first received written notice based on the evidence; to make a finding of fact of when the carrier contested compensability of the claimed injury; and to make further findings of fact, conclusions of law, and a decision on the disputed carrier waiver issue consistent with this decision.

SUMMARY

We affirm the hearing officer's determination that the claimant sustained an injury in the course and scope of employment on _____.

We affirm the hearing officer's determination that due to the _____, compensable injury the claimant had disability beginning on July 20, 2007, and continuing to December 1, 2008, but at no other time.

We reverse the hearing officer's determination the carrier waived its right to contest compensability of the claimed injury by not timely contesting the injury in accordance with Sections 409.021 and 409.022, and we remand the carrier waiver issue to the hearing officer for the hearing officer to take official notice of Division records regarding when the carrier filed its PLN-1 with the Division; to make the PLN-1 that is officially noticed a hearing officer exhibit; to allow the parties an opportunity to review the officially noticed PLN-1 and to respond to it; to make a finding of fact of when the carrier first received written notice based on the evidence; to make a finding of fact of when the carrier contested compensability of the claimed injury; and to make further findings of fact, conclusions of law, and a decision on the disputed carrier waiver issue consistent with this decision.

Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Division, pursuant to Section 410.202 which was amended June 17, 2001, to exclude Saturdays and Sundays and holidays listed in Section 662.003 of the Texas Government Code in the computation of the 15-day appeal and response periods. See APD 060721, decided June 12, 2006.

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

**LEO F. MALO
12222 MERIT DRIVE, SUITE 700
DALLAS, TEXAS 75251-2237.**

Veronica L. Ruberto
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Margaret L. Turner
Appeals Judge