

APPEAL NO. 091242  
FILED SEPTEMBER 23, 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. The two issues before the hearing officer were:

1. Has the [appellant (carrier)] waived the right to contest compensability of the degenerative arthritic changes of the left shoulder, hydrosyringomyelia from C6 to T1, degenerative disc disease at C4-5, C5-6, C6-7, cervical stenosis, cervical radiculopathy, degenerative disc disease at L3-4, L4-5 and L5-S1, lumbar facet arthritis and disc bulge at L5-S1, right hip and degenerative joint disease of the right hip [referred to as the claimed conditions] by not timely contesting the diagnoses in accordance with Section 409.021?
2. Does the compensable injury sustained on \_\_\_\_\_, extend to include [the claimed conditions]?

The hearing officer determined that the carrier waived the right to contest compensability of the claimed conditions by not timely contesting the diagnoses in accordance with Section 409.021 and that because the carrier waived its right to contest compensability, the compensable injury sustained on \_\_\_\_\_, extends to the claimed conditions.

The carrier appealed both the extent of injury and waiver determinations asserting the extent-of-injury issue was determined solely on the basis of waiver and not causation. The carrier further contended that extent of injury is not subject to the 60-day waiver provision in Section 409.021. The respondent (claimant) responded, urging affirmance on both issues citing Appeals Panel decisions.

DECISION

Reversed and rendered.

It is undisputed that the claimant sustained a compensable injury on \_\_\_\_\_, when he was involved in a motor vehicle accident where the claimant's vehicle was rear ended by another vehicle. The carrier contended that it accepted soft tissue injuries to the upper and lower spine and left arm and hand. It is also undisputed that the carrier received written notice of the claimed injury on August 4, 2008, and that it filed its Notice of Disputed Issue(s) and Refusal to Pay Benefits (PLN-11) with the Texas Department of Insurance, Division of Workers' Compensation (Division) on November 17, 2008. The PLN-11 stated:

Carrier's investigation indicates employee suffered compensable soft tissue injuries to his neck, upper back, lower back, left arm and left hand while in the course and scope of employment on \_\_\_\_\_. Carrier disputes that any pre-existing conditions, injuries, diagnoses or disability other than soft tissue injuries to the neck, upper back, lower back, left arm and left hand are related to the incident of \_\_\_\_\_.

### **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 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,<sup>1</sup> 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 decision 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 compensability of the claimed conditions in accordance with Section 409.021 and we render a new decision that the carrier did not waive its right to contest the claimed conditions.

### **EXTENT OF INJURY**

On the merits of the extent-of-injury issue the hearing officer made a finding of fact that the claimant's claimed conditions are not a result of and were not caused, worsened, enhanced or accelerated as a result of the compensable injury. That finding of fact is supported by sufficient evidence. The hearing officer then concluded that because the carrier had waived its right to contest compensability, the compensable injury sustained on \_\_\_\_\_, included the claimed conditions. The hearing officer's

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

determination that the compensable injury extended to the claimed conditions was based on carrier wavier. Given that we have reversed the determination of carrier waiver and rendered a new decision that the carrier did not waive its right to contest compensability of the claimed conditions we also reverse the hearing officer's determination that the compensable injury sustained on \_\_\_\_\_, extends to the claimed conditions. The hearing officer's finding that the claimant's claimed conditions were not the result of and were not caused, worsened, enhanced or accelerated as a result of the compensable injury, is supported by the evidence. We therefore, render a new decision that the compensable injury does not include the claimed conditions.

### **SUMMARY**

We reverse the hearing officer's determination that the carrier waived its right to contest compensability of the claimed conditions by not timely contesting the claimed conditions in accordance with Section 409.021 and render a new decision that the carrier did not waive its right to contest compensability of the claimed conditions.

We reverse the hearing officer's extent-of-injury determination that the compensable injury sustained on \_\_\_\_\_, extends to the claimed conditions and render a new decision that the compensable injury sustained on \_\_\_\_\_, does not extend to the claimed conditions.

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

**ROBIN M. MOUNTAIN  
6600 CAMPUS CIRCLE DRIVE EAST, SUITE 300  
IRVING, TEXAS 75063-2732.**

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Thomas A. Knapp  
Appeals Judge

CONCUR:

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Veronica L. Ruberto  
Appeals Judge

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Margaret L. Turner  
Appeals Judge