

APPEAL NO. 091260
FILED NOVEMBER 5, 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 August 4, 2009. The disputed issues were:

1. Did the appellant/cross-respondent (claimant) sustain a compensable injury on _____?
2. If the claimant sustained a compensable injury on _____, does it extend to include a left knee direct anterior contusion, a tear of the posterior horn of the medial menisci with mild degree of joint fluid and nonspecific loose body involving the medial aspect of the lateral femoral tibial compartment (referred to hereinafter as the claimed conditions)?
3. Has the respondent/cross-appellant (self-insured) waived the right to contest compensability of the diagnoses of [the claimed conditions] by not timely contesting the diagnoses in accordance with Section 409.021?
4. Did the claimant have disability resulting from an injury sustained on _____, and if so, for what periods?

The hearing officer determined that the claimant sustained a compensable injury on _____; the compensable injury includes the claimed conditions; the self-insured waived the right to contest compensability of the claimed conditions by not timely contesting the diagnoses in accordance with Section 409.021; and the claimant had disability resulting from the compensable injury beginning on October 9 and continuing through November 19, 2008, "but at no other times."

The claimant appealed the determination on disability adverse to the claimant, contending that he had continued disability from December 22, 2008, through the date of the CCH. The self-insured cross-appealed the compensability, extent of injury, carrier waiver and disability issues on various grounds. The self-insured also timely filed a supplemental brief in support of its appeal citing State Office of Risk Mgmt. v. Lawton, 2009 Tex. LEXIS 629 (Tex. August 28, 2009). Each party filed a response to the opposing party's appeal.

DECISION

Affirmed in part and reversed and rendered in part.

The claimant testified that he was an inventory control specialist and that on _____, he fell and injured his left knee while putting a dolly underneath a gondola. The self-insured introduced evidence of a prior left knee injury and surgery in 1995.

COMPENSABLE INJURY

The hearing officer found that the claimant injured his left knee on _____, while in the course and scope of his employment. The hearing officer's determination that the claimant sustained a compensable injury on _____, is supported by sufficient evidence and is affirmed.

EXTENT OF INJURY

The hearing officer found that the claimed conditions were caused, worsened, enhanced or accelerated as a result of the _____, compensable injury. The hearing officer's determination that the compensable injury includes the claimed conditions is supported by sufficient evidence and is affirmed.

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 (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.

The hearing officer found, in an unappealed finding, that the "[self-insured] received written notice of the claimed injury on _____." The hearing officer, in the Background Information, commented that the 60th day after written notice was December 7, 2008. The hearing officer further found that on December 5, 2008, the self-insured filed a Notice of Denial of Compensability/Liability and Refusal to Pay Benefits (PLN-1) with the Division "generally disputing the claimed injury of _____." The self-insured's reason for denial states:

[Self-insured's] investigation has determined that you did not suffer damage or harm to the physical structure of your body such that you would have an injury as defined by Texas law. [Self-insured] disputes that you were injured in the course and scope of your employment. [Self-insured] disputes compensability.

We view the self-insured's reason for denial as denying that any injury occurred in the course and scope of the claimant's employment. It was not necessary to identify each

specific diagnosis. Because the self-insured timely disputed that any injury occurred, there could be no waiver under Section 409.021 regarding an injury that was later determined through dispute resolution to be compensable. See Appeals Panel Decision (APD) 061631, decided September 12, 2006.

We reverse the hearing officer's determination that the self-insured waived the right to contest compensability of the claimed conditions by not timely contesting the diagnoses in accordance with Section 409.021, and render a new decision that the self-insured had not waived the right to contest compensability of the claimed conditions, by not timely contesting the diagnoses in accordance with Section 409.021.

DISABILITY

The hearing officer determined in part that the claimant had disability resulting from the _____, compensable injury, beginning October 9 and continuing through November 19, 2008. That portion of the hearing officer's disability determination is supported by sufficient evidence and is affirmed. The hearing officer's determination that the claimant did not have disability from November 19 through December 21, 2008, has not been appealed and therefore has become final pursuant to Section 410.169.

The claimant testified that his orthopedic doctor, (Dr. B), released him to return to work with restrictions beginning November 18, 2008. In evidence is an undated Work Status Report (DWC-73) based on an office visit on November 18, 2008, from Dr. B which releases the claimant to return to work with activity restrictions from November 18, 2008, through January 5, 2009. Also in evidence is Dr. B's amended DWC-73 dated November 21, 2008, based on the same November 18, 2008, office visit, which increases the claimant's activity restrictions during that time period.

It is undisputed that the claimant returned to work on restricted duty on December 20 and 21, 2008. The claimant testified that on December 22, 2008, he was called into the office and told by his employer that it could not accommodate his work restrictions. The claimant testified that he was told to go home and come back when he was able to perform at least 50 percent of his duties. There is no evidence contradicting the claimant's testimony. A self-insured peer review report dated December 1, 2008, states that the claimant should return to limited work, including sedentary or light duty, eight hours a day, five days a week. Also in evidence is a note dated August 3, 2009, from (Mr. RB), a physician's assistant, which states that Mr. RB has been treating the claimant since October 10, 2008, that the claimant has not been able to work due to his (work) injury, and that he has not been able to go back to work.

The hearing officer's discussion in the Background Information regarding disability states:

The only work status reports in evidence were two work status reports from a physician's assistant showing the claimant was off of work through 10/30/08 and [Dr. B]'s return to restricted work duty on 11/19/08.

That statement is partially incorrect in that there are two DWC-73s from Mr. RB, the physician's assistant, which take the claimant completely off work through October 30, 2008, however, there are also two DWC-73s from Dr. B that return the claimant to work with restrictions beginning November 18, 2008, and continuing through January 5, 2009.

Disability is defined in Section 401.011(16) as the inability because of a compensable injury to obtain and retain employment at wages equivalent to the pre-injury wage. The Appeals Panel has frequently cited the proposition that a light duty release is evidence that disability continues. APD 040949, decided June 15, 2004. In this case, no doctor has ever released the claimant to return to work full duty. The claimant worked two and a half days in December 2008, under activity restrictions prescribed by Dr. B, but was subsequently told by his employer to go home and only return when he could perform 50 percent of his work duties. The claimant testified at the CCH that he was unable to perform his regular duties during the disputed period.

We hold that the hearing officer's determination that the claimant did not have disability, as defined in Section 401.011(16) "at no other times" after November 19, 2008, is so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust. The claimant did not appeal the hearing officer's determination that he did not have disability from November 19 through December 21, 2008, and that portion of the hearing officer's determination has become final. There is no evidence that the claimant was not earning his pre-injury wages on December 20 and 21, 2008. As previously noted, the claimant returned to work on December 20, 2008, and worked with restrictions on December 20 and 21, 2008, before he was sent home by his employer on December 22, 2008. We reverse the hearing officer's determination that the claimant did not have disability after November 19, 2008, and we render a new decision that the claimant had disability from December 22, 2008, through the date of the CCH.

SUMMARY

We affirm the hearing officer's determinations that the claimant sustained a compensable injury on _____, the compensable injury includes the claimed conditions and the claimant had disability beginning October 9 and continuing through November 19, 2008.

We reverse the hearing officer's determination that the self-insured waived the right to contest compensability of the claimed conditions by not timely contesting the diagnoses in accordance with Section 409.021 and we render a new decision that the self-insured had not waived the right to contest compensability of the claimed conditions.

We reverse the hearing officer's determination that the claimant did not have disability after November 19, 2008 ("at no other times") and render a new decision that

the claimant had disability from December 22, 2008, and continuing to the date of the CCH.

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