

APPEAL NO. 091344
FILED OCTOBER 27, 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 3, 2009. The hearing officer resolved the disputed issues by deciding that: (1) the compensable injury sustained on _____, extends to an L4-5 disc herniation but does not extend to lumbar radiculopathy; and (2) the appellant (carrier) waived the right to contest compensability of the L4-5 disc herniation because the carrier failed to timely contest that injury under Section 409.021, but the carrier has not waived the right to contest compensability of the lumbar radiculopathy diagnosis because the respondent (claimant) does not have lumbar radiculopathy.

The carrier appealed, disputing the hearing officer's determinations that the carrier waived its right to contest compensability of the L4-5 disc herniation and that the compensable injury extends to the L4-5 disc herniation. The claimant responded, urging affirmance of the appealed determinations. The hearing officer's determinations that the carrier has not waived its right to contest compensability of the lumbar radiculopathy and that the compensable injury does not extend to lumbar radiculopathy were not appealed and have 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 _____, to her lumbar spine and right hip in the form of sprains/strains. The claimant acknowledged at the CCH that the carrier had accepted a compensable injury but argued that the carrier was now attempting "to get out of the liability of the original compensable injury."

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 [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. 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 L4-5 disc herniation and render a new decision that the carrier did not waive its right to contest compensability of the L4-5 disc herniation.

EXTENT OF INJURY

The hearing officer found that "[o]n _____, the claimant did sustain damage or harm to the physical structure of her body, to-wit: an L4-5 disc protrusion/herniation." That finding is supported by sufficient evidence. The hearing officer's determination that the compensable injury of _____, extends to an L4-5 disc herniation is supported by sufficient evidence and is affirmed.

SUMMARY

We reverse the hearing officer's determination that the carrier waived the right to contest compensability of the L4-5 disc herniation and render a new decision that the carrier did not waive its right to contest compensability of the L4-5 disc herniation.

We affirm the hearing officer's determination that the compensable injury of _____, extends to an L4-5 disc herniation.

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 **HARTFORD INSURANCE COMPANY OF THE MIDWEST** and the name and address of its registered agent for service of process is

**CORPORATION SERVICE COMPANY
701 BRAZOS STREET, SUITE 1050
AUSTIN, TEXAS 78701-3232.**

Margaret L. Turner
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Veronica L. Ruberto
Appeals Judge