

APPEAL NO. 091368  
FILED NOVEMBER 24, 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 18, 2009. The disputed issues were:

1. Does the compensable injury of \_\_\_\_\_, extend to and include the impression on the MRI of the cervical spine dated October 17, 2007; cervical facet syndrome; loss of normal lordotic curve of the cervical spine; cervical radiculopathy; myoclonus; herniated nucleus pulposus (HNP) at C4-5; HNP at C5-6; and HNP at C6-7?
2. Has the respondent/cross-appellant (carrier) waived the right to dispute impressions on the MRI of the cervical spine dated October 17, 2007; cervical facet syndrome; lordotic curve of the cervical spine; cervical radiculopathy; myoclonus; HNP at C4-5; HNP at C5-6; and HNP at C6-7 in accordance with Section 409.021?

The hearing officer determined that the compensable injury of \_\_\_\_\_, included the impressions of the MRI of the cervical spine dated October 17, 2007; cervical facet syndrome; loss of normal lordotic curve of the cervical spine; and myoclonus, but that the compensable injury did not include cervical radiculopathy; HNP at C4-5; HNP at C5-6; or HNP at C6-7.

The hearing officer also determined that the carrier has waived the right to dispute (the compensability of) the impressions of the MRI of the cervical spine dated October 17, 2007; cervical facet syndrome; and loss of normal lordotic curve of the cervical spine pursuant to Section 409.021, but has not waived the right to dispute the compensability of the diagnosed cervical radiculopathy; myoclonus; HNP at C4-5; HNP at C5-6; or HNP at C6-7.

The appellant/cross-respondent (claimant) appealed those determinations of the extent of injury and carrier waiver that were adverse to him. The claimant also points out a typographical error in a finding of fact. The carrier cross-appealed the carrier waiver determinations, contending that carrier waiver does not apply to extent of injury. The carrier also cross-appealed that portion of the extent-of-injury determination adverse to it. The carrier responded to the claimant's appeal. The appeal file does not have a response from the claimant to the carrier's cross-appeal.

DECISION

Affirmed in part and reversed and rendered in part, as reformed.

The claimant correctly points out that the hearing officer incorrectly recited the date of injury as being October 17, 2007, in Finding of Fact No. 11. We reform that finding to state the \_\_\_\_\_, injury.

The claimant, an auto technician, testified that on \_\_\_\_\_, he tripped over a jack handle, fell to his hands and knees and sustained injuries to his left knee, left shoulder and neck. The parties stipulated that the claimant sustained a compensable injury on \_\_\_\_\_. The carrier accepted injuries to the claimant's left knee and left shoulder but denied an injury to the neck.

### **CARRIER WAIVER**

The hearing officer's determination that the carrier has not waived the right to dispute the compensability of the diagnosed cervical radiculopathy; myoclonus; HNP at C4-5; HNP at C5-6; or HNP at C6-7 is supported by sufficient evidence and is affirmed.

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,<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. In Lawton, the carrier agreed that the claimant had a compensable injury. Similarly, in the instant case, the carrier agreed that 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 dispute the compensability of the impressions of the MRI of the cervical spine dated October 17, 2007; cervical facet syndrome and loss of normal lordotic curve of the cervical spine in accordance with Section 409.021 and render a new decision that the carrier did not waive the right to dispute the compensability of the impressions of the MRI of the cervical spine dated October 17, 2007; cervical facet syndrome; and loss of normal lordotic curve of the cervical spine in accordance with Section 409.021.

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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.

## **EXTENT OF INJURY**

The carrier, in its cross-appeal, contended that the hearing officer's decision is "internally inconsistent" in that the hearing officer finds that the preponderance of the other medical evidence is not contrary to the designated doctor's opinion that the compensable injury includes the impressions of the MRI while at the same time determining that the compensable injury includes myoclonus which the designated doctor opined was not part of the compensable injury. The hearing officer only found the preponderance of the other medical evidence is not contrary to the designated doctor's opinion that the compensable injury includes the impressions of the MRI of the cervical spine dated October 17, 2007. The medical records indicate a pain management doctor diagnosed the claimant with "myoclonic jerks" and recommended a neurology consultation. (Dr. C), the neurologist, diagnosed myoclonus and in interpreting an EMG commented that clinically the claimant "may have myoclonus from a central etiology." We hold that the hearing officer only found the preponderance of the medical evidence is not contrary to the designated doctor's opinion regarding the impressions of the MRI. The hearing officer otherwise found myoclonus was causally related to the compensable injury and that finding is supported by sufficient evidence.

The hearing officer determined that the compensable injury of \_\_\_\_\_, includes "the impressions of the MRI of the cervical spine dated October 17, 2007; cervical facet syndrome; loss of normal lordotic curve of the cervical spine and myoclonus" without regard to carrier waiver. The hearing officer also determined that the compensable injury does not include cervical radiculopathy; HNP at C4-5; HNP at C5-6; or HNP at C6-7. Those determinations are supported by sufficient evidence and are affirmed.

## **SUMMARY**

We affirm the hearing officer's determinations that the carrier has not waived the right to dispute the compensability of the diagnosed cervical radiculopathy; myoclonus; HNP at C4-5; HNP at C5-6; and HNP at C6-7. We also affirm the hearing officer's determinations that the compensable injury includes "the impressions of the MRI of the cervical spine dated October 17, 2007"; cervical facet syndrome; loss of normal lordotic curve of the cervical spine; and myoclonus, but does not include cervical radiculopathy; HNP at C4-5; HNP at C5-6; or HNP at C6-7.

We reverse the hearing officer's determinations that the carrier waived the right to dispute the compensability of the impressions of the MRI of the cervical spine dated October 17, 2007; cervical facet syndrome; and loss of normal lordotic curve of the cervical spine and render a new decision that the carrier did not waive the right to dispute the compensability of the impressions of the MRI of the cervical spine dated October 17, 2007; cervical facet syndrome, and loss of normal lordotic curve of the cervical spine.

The true corporate name of the insurance carrier is **AMERICAN HOME ASSURANCE COMPANY** 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.**

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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