

APPEAL NO. 091380
FILED NOVEMBER 19, 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 August 17, 2009. The disputed issues before the hearing officer were:

1. Does the compensable injury of _____ extend to and include injuries to the lumbar spine diagnosed as L1-2, L2-3, L3-4, and L5-S1 disc bulges and disc desiccation [referred to as the claimed conditions]?
2. Has the [appellant/cross-respondent (carrier)] waived the right to contest compensability of [the claimed conditions] by not timely contesting the injury in accordance with [Section 409.021]?

The hearing officer determined that the carrier has waived the right to contest compensability of the claimed conditions because the carrier failed to timely contest these diagnoses under Section 409.021 and that by virtue of the carrier waiver the compensable injury of _____, does extend to the claimed conditions.

The carrier appeals the hearing officer's determinations on both the extent of injury and carrier waiver issues citing State Office of Risk Mgmt. v. Lawton, 2009 Tex. LEXIS 629 (Tex. August 28, 2009). The respondent/cross-appellant (claimant) in a cross-appeal entitled "Claimant's Response to Carrier's Request for Review, and Brief of Appellant" expresses disagreement with the hearing officer's findings that the claimed conditions were not the result of, nor aggravated by the compensable injury and that the claimed conditions were not sustained in the course and scope of the claimant's employment. We will consider that document as both a response to the carrier's appeal and a cross-appeal. The carrier responds to the claimant's cross-appeal.

DECISION

Reversed and a new decision rendered.

The parties stipulated that on _____, the claimant sustained a compensable injury to his lumbar spine in the form of a sprain/strain, disc pathology at L4-5, and erectile dysfunction.

CARRIER WAIVER

The hearing officer, in the Background Information of his decision, comments that the carrier first received written notice of the claim on _____; that the degenerative conditions in the claimant's spine were first revealed in an MRI performed on March 29, 2000; and that the carrier did not file a Notice of Disputed Issue(s) and Refusal to Pay

Benefits (PLN-11) “disputing the L1-4 and L5-S1 levels of the claimant’s lumbar spine until February 18, 2009.”

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 Lawton,¹ *supra*, 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 its right to contest compensability of the claimed conditions and render a new decision that the carrier did not waive its right to contest compensability of the claimed conditions.

EXTENT OF INJURY

Regarding the extent-of-injury issue the hearing officer made findings of fact that the claimant’s degenerative conditions (the claimed conditions) were not the result of, nor aggravated by the compensable injury and that the degenerative conditions (the claimed conditions) were not sustained in the course and scope of the claimant’s employment. Those findings are supported by sufficient evidence. The hearing officer’s determination that the compensable injury extended to the claimed conditions was based on carrier waiver (“[b]y virtue of the carrier waiver”). 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 by virtue of carrier waiver the compensable injury of _____, extends to the claimed conditions. We render a new decision that the compensable injury does not include the claimed conditions.

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

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 of _____, does not extend to the claimed conditions.

The true corporate name of the insurance carrier is **CONTINENTAL CASUALTY COMPANY** and the name and address of its registered agent for service of process is

**CT CORPORATION SYSTEM
350 NORTH ST. PAUL STREET
DALLAS, TEXAS 75201.**

Thomas A. Knapp
Appeals Judge

CONCUR:

Veronica L. Ruberto
Appeals Judge

Margaret L. Turner
Appeals Judge