

APPEAL NO. 091414  
FILED NOVEMBER 18, 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 19, 2009. The hearing officer resolved the disputed issues by deciding that: (1) the compensable injury of \_\_\_\_\_, extends to lumbar myofascial pain syndrome, lumbar radicular syndrome, lumbar chronic pain syndrome, and L5-S1 herniated nucleus pulposus (HNP); (2) the appellant (carrier) waived the right to contest compensability of the L3-4 facet hypertrophy with spinal stenosis by not contesting compensability in accordance with Section 409.021; and (3) the compensable injury of \_\_\_\_\_, extends to L3-4 facet hypertrophy with spinal stenosis by operation of law due to carrier waiver.

The carrier appealed the hearing officer's determinations that the carrier waived the right to contest compensability of the L3-4 facet hypertrophy with spinal stenosis by not contesting compensability in accordance with Section 409.021 and the extent-of-injury determinations that were unfavorable to it. The respondent (claimant) responded to the carrier's appeal, urging affirmance.

**DECISION**

Affirmed in part, reversed and rendered in part.

**FACTUAL SUMMARY**

The parties stipulated that on \_\_\_\_\_, the claimant sustained a compensable injury to her lumbar spine and that the claimant has been diagnosed with lumbar myofascial pain syndrome, lumbar radicular syndrome, lumbar chronic pain syndrome, L3-4 facet hypertrophy with spinal stenosis and L5-S1 HNP. The parties also stipulated that the carrier received first written notice of a claimed injury on \_\_\_\_\_, and that the carrier disputed an injury to L3-4 facet hypertrophy with spinal stenosis by filing a Notice of Disputed Issue(s) and Refusal to Pay Benefits (PLN-11) with the Texas Department of Insurance, Division of Workers' Compensation (Division) on July 15, 2009.

**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. 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 L3-4 facet hypertrophy with spinal stenosis and we render a new decision that the carrier did not waive its right to contest L3-4 facet hypertrophy with spinal stenosis in accordance with Section 409.021.

### **EXTENT OF INJURY**

The hearing officer's determination that the compensable injury of \_\_\_\_\_, extends to lumbar myofascial pain syndrome, lumbar radicular syndrome, lumbar chronic pain syndrome, and L5-S1 HNP is supported by sufficient evidence and is affirmed.

The hearing officer found that the "[c]laimant had L3-4 facet hypertrophy with spinal stenosis on the date of her compensable injury, and such condition was not enhanced or accelerated by the work injury." That finding is supported by sufficient evidence and is affirmed. The hearing officer determined that the compensable injury extends to L3-4 facet hypertrophy with spinal stenosis by virtue of carrier waiver. Given that we have reversed the hearing officer's carrier waiver determination, we reverse the hearing officer's determination that the compensable injury extends to L3-4 facet hypertrophy with spinal stenosis and we render a new decision that the compensable injury does not extend to L3-4 facet hypertrophy with spinal stenosis.

### **SUMMARY**

We affirm the hearing officer's determination that the claimant's compensable injury of \_\_\_\_\_, extends to lumbar myofascial pain syndrome, lumbar radicular syndrome, lumbar chronic pain syndrome, and L5-S1 HNP.

We reverse the hearing officer's determination that the compensable injury of \_\_\_\_\_, extends to L3-4 facet hypertrophy with spinal stenosis and we render a

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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.

new decision that the compensable injury does not extend to L3-4 facet hypertrophy with spinal stenosis.

We reverse the hearing officer's decision that the carrier waived the right to contest compensability of the L3-4 facet hypertrophy with spinal stenosis and we render a new decision that the carrier did not waive its right to contest L3-4 facet hypertrophy with spinal stenosis.

The true corporate name of the insurance carrier is **NEW HAMPSHIRE INSURANCE 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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Margaret L. Turner  
Appeals Judge

CONCUR:

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Thomas A. Knapp  
Appeals Judge

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Veronica L. Ruberto  
Appeals Judge