

APPEAL NO. 091640
FILED DECEMBER 28, 2009

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A consolidated contested case hearing was held on July 14, 2009, with the record closing on September 16, 2009.¹ With regard to (Docket No. 1), the sole disputed issue before the hearing officer was:

- (1) Does the compensable injury of _____, extend to include the right shoulder joint derangement of _____? (amended by the hearing officer)

The hearing officer determined that the compensable injury of _____, does not extend to include the right shoulder joint derangement of _____. This determination in Docket No. 1 has not been appealed and has become final pursuant to Section 410.169.

With regard to (Docket No. 2), the sole disputed issue before the hearing officer was:

- (1) Does the compensable injury of _____, extend to include the right shoulder joint derangement of _____? (amended by the hearing officer)

The hearing officer determined that the compensable injury of _____, extends to include the right shoulder joint derangement of _____.

The appellant (carrier) appealed the extent-of-injury determination in Docket No. 2. Additionally, the carrier contends that the hearing officer abused her discretion in amending the extent-of-injury issues in Docket Nos. 1 and 2. The subclaimant responded with a "Motion to Abate" the carrier's appeal, contending that because the carrier has not paid benefits in accordance with the hearing officer's decision, the carrier's appeal should be abated. Additionally, the subclaimant filed a separate document entitled "Subclaimant's Conditional Cross-Point" requesting that if the Appeals Panel writes a decision, that the Appeals Panel include a specific award under Section 409.0091(m).² The appeal file does not contain a response from respondent 1 (claimant).

¹ We note that respondent 2 (subclaimant) was incorrectly identified in the Decision and Order as Texas Group Healthcare Cost Containment, rather than Unicare Life and Health Insurance Company.

² Section 409.0091(m) provides, in part, that in a dispute filed under Chapter 410 that arises from a subclaim under this section, a hearing officer may issue an order regarding compensability or eligibility for benefits and order the workers' compensation insurance carrier to reimburse health care services paid by the health care insurer as appropriate under this subtitle.

DECISION

Reversed and rendered.

It is undisputed that the claimant sustained a compensable right shoulder injury on _____. The claimant testified that he dislocated his right shoulder on _____, and that he received physical therapy treatment for his right shoulder injury for a few months. It is undisputed that on _____, the claimant was not in the course and scope of employment when he sustained a right shoulder dislocation injury. The claimant testified that on _____, as he was driving his vehicle with his two children sitting in the backseat, he reached behind his driver's seat to separate his children from each other and sustained an injury to his right shoulder. The claimant underwent right shoulder surgery on May 19, 2004.

DOCKET NOS. 1 AND 2 ABUSE OF DISCRETION

The hearing officer did not abuse her discretion in amending the extent-of-injury issues to include the date of the compensable injury of _____, in Docket No.1 and _____, in Docket No. 2, and to include the date of the disputed right shoulder injury of February 24, 2004, in Docket Nos. 1 and 2. See Morrow v. H.E.B., Inc., 714 S.W.2d 297 (Tex. 1986).

DOCKET NO. 2 EXTENT OF INJURY

Section 401.011(26) defines injury to mean, in part, "damage or harm to the physical structure of the body and a disease or infection naturally resulting from the damage or harm." Appeals Panel Decision (APD) 000594, decided May 8, 2000, cited Maryland Casualty Company v. Rogers, 86 S.W.2d 867, 871 (Tex. Civ. App.-Austin 1935, writ ref'd) as follows:

By the word "naturally," as used in the statute, it is not meant that the disease which is shown to have attacked the victim of the accident is such disease as usually and ordinarily follows the accident; but it is only meant that the injury or damage caused by the accident is shown to be such that it is natural for the disease to follow therefrom, considering the human anatomy and the structural portions of the body in their relations to each other.

Further, APD 000594 states that "the fact that an injury may affect a person's resistance will not mean that a subsequent injury outside the work place is compensable, where the subsequent disease or infection is not one which flowed naturally from the compensable injury."

In determining whether the subsequent injury is one that naturally flowed from the compensable injury, it is important to consider whether there was a distinct, nonwork-related activity involved in the subsequent injury, whether a distinct different body part was injured, the length of time between the injuries, whether there was only a degree of weakening or lowered resistance, and whether there was medical evidence to establish causation. APD 000594, *supra*.

In APD 090238, decided April 27, 2009, a case involving a recurrent herniated disc injury to the low back in June 2008, the claimant's treating doctor did not discuss causation beyond his opinion that the claimant's August 2004 injury and 2005 spinal surgery predisposed the claimant to further disc issues. In that case, the Appeals Panel noted that "the only factor supporting the claimant's position is that the follow-on injury was to the same body part as the original 2004 injury." The Appeals Panel reversed the hearing officer's finding that the recurrent herniated disc in June 2008, was a naturally flowing result of the _____, compensable injury and reversed the conclusion of law that the compensable injury of _____, includes a recurrent disc herniation at L5-S1 as so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust. See *also* APD 022225, decided October 4, 2002, and APD 021169, decided June 27, 2002.

In the Background Information section of the decision the hearing officer states that the claimant's treating surgeon, (Dr. M), noted in April of 2003 "that he spoke with the claimant 'about the risk of re-dislocation and the possibility of doing surgery rather than let it re-dislocate again and he would prefer to go the non-surgical route.'" We note that Dr. M's medical report dated April of 2003, is almost a year prior to the incident at issue. The hearing officer determined that the claimant's _____, right shoulder injury was a follow-on injury of the 2003 injury, based on a medical report that the claimant was predisposed to re-dislocation of his right shoulder. The hearing officer's finding that the right shoulder derangement on _____, naturally flowed from and arose out of the compensable right shoulder dislocation injury of _____, is so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust. Accordingly, we reverse the hearing officer's determination that the compensable injury of _____, extends to include the right shoulder joint derangement of _____, and render a new decision the compensable injury of _____, does not extend to include the right shoulder joint derangement of _____.

SUMMARY

We reverse the hearing officer's determination that the compensable injury of _____, extends to include the right shoulder joint derangement of _____, and render a new decision the compensable injury of _____, does not extend to include the right shoulder joint derangement of _____.

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

**C.T. CORPORATION SYSTEM
350 NORTH ST. PAUL ST.
DALLAS, TEXAS 75201.**

Veronica L. Ruberto
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Margaret L. Turner
Appeals Judge