

APPEAL NO. 100544
FILED JULY 1, 2010

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). This case returns following our remand in Appeals Panel Decision 092082, decided March 3, 2010, to reconstruct the record. A contested case hearing (CCH) on remand was held on April 5, 2010. In the original CCH held on November 30, 2009, the disputed issues before the hearing officer were:

- (1) Did the appellant (claimant) sustain a compensable injury on _____?
- (2) Has the respondent (carrier) waived its right to dispute the compensability of such alleged injury?
- (3) Did the claimant make an election of remedies by accepting benefits payable pursuant to a group health insurance policy?
- (4) Has the carrier waived its right to raise the claimant's alleged election of remedies as a defense?
- (5) Did the claimant sustain disability from April 17 through July 10, 2006?
- (6) Is the carrier liable for benefits accrued pursuant to 28 TEX. ADMIN. CODE § 124.3 (Rule 124.3) resulting from the carrier's alleged failure to timely dispute the claim or initiate payment of benefits?

The hearing officer's determinations in the prior CCH that were not appealed and became final pursuant to Section 410.169 are as follows: (1) the claimant sustained a compensable injury on _____; (2) the carrier waived its right to dispute the compensability of the claimant's injury of _____, on all bases, including the claimant's alleged election of remedies; and (3) the claimant did not make an election of remedies by obtaining benefits payable pursuant to a group health insurance policy.

In the CCH on remand held April 5, 2010, the hearing officer again determined that: (1) the claimant sustained a compensable injury on _____; (2) the carrier waived its right to dispute the compensability of the claimant's injury of _____; (3) the claimant did not make an election of remedies by obtaining benefits payable pursuant to a group health insurance policy; (4) the carrier waived its right to dispute compensability of the claimant's injury on all bases, including the claimant's alleged election of remedies; (5) the claimant sustained no disability as of the date of the CCH; and (6) Rule 124.3 does not apply to render the claimant entitled to income or medical benefits attributable to any alleged injury to her cervical and lumbar spine.

The claimant appealed, disputing the hearing officer's determination that Rule 124.3 does not apply to render the claimant entitled to income or medical benefits attributable to any alleged injury to her cervical or lumbar spine. The claimant also appealed the hearing officer's disability determination. The carrier responded, urging affirmance.

DECISION

Reversed and rendered.

RULE 124.3

At both the November 30, 2009, CCH and the hearing on remand on April 5, 2010, one of the issues was "[i]s [the] [c]arrier liable for benefits accrued pursuant to Rule 124.3, resulting from [the] [c]arrier's alleged failure to timely dispute the claim or initiate payment of benefits?" We note that the issue was not limited to the liability described in Rule 124.3(a). Rule 124.3(a)(1) provides that if the carrier does not file a notice of denial by the 15th day after receipt of the written notice of the injury, the carrier is liable for any benefits that accrue and shall initiate benefits in accordance with this section. Rule 124.3(a)(2) provides that if the carrier files a notice of denial after the 15th day but on or before the 60th day after receipt of written notice of the injury: (A) the insurance carrier is liable for and shall pay all income benefits that had accrued and were payable prior to the date the carrier filed the notice of denial; and (B) the insurance carrier is liable for and shall pay for all medical services, in accordance with the 1989 Act and Texas Department of Insurance, Division of Workers' Compensation Rules, provided prior to the filing of the notice of denial. Finally, Rule 124.3(a)(4) provides that the carrier commits a violation if, not later than the 15th day after it receives written notice of the injury, it does not begin to pay benefits as required or file a notice of denial of the compensability of a claim in the form and manner required by Rule 124.2.

Rule 124.3(b) provides that except as provided by subsection (c), the carrier waives the right to contest compensability or liability for the injury, if it does not contest compensability on or before the 60th day after the date on which the insurance carrier receives written notice of the injury. In unappealed findings, the hearing officer found that the carrier did not dispute the compensability of the claimed injury within 60 days of its first written notice of the claimed injury. Because the carrier did not dispute compensability of the claimed injury within 60 days of its written notice, the carrier is liable for benefits pursuant to Rule 124.3(b).

The hearing officer concluded that Rule 124.3 does not apply to render claimant entitled to income or medical benefits attributable to any alleged injury to her cervical or lumbar spine. Rule 124.3(e) provides that the waiver provision of Section 409.021 "does not apply to disputes of extent of injury." To the extent that this conclusion can be interpreted as making a determination on the extent of the claimant's compensable injury we strike the language "to her cervical or lumbar spine" as surplusage. We note

that the extent of the claimant's injury was not a disputed issue before the hearing officer.

In her discussion, the hearing officer stated that the claimant appeared to allege some form of carrier's alleged waiver of its right to dispute the alleged extent of the compensable injury and referenced State Office of Risk Mgmt. v. Lawton, 295 S.W.3d 646 (Tex. 2009). In the present case, the carrier has denied compensability of the injury in its entirety, although it failed to do so within the 60 days of its first written notice of the claimed injury; therefore, the rationale in the Lawton decision does not apply to this case. The extent of the claimant's compensable injury was not at issue in the CCH.

The specific issue in dispute as noted above was is the carrier liable for benefits accrued pursuant to Rule 124.3 resulting from the carrier's alleged failure to timely dispute the claim or initiate payment of benefits. Although the hearing officer made a specific conclusion of law regarding Rule 124.3 as discussed above, she failed to include a specific determination in the decision portion of her decision and order regarding the disputed issue concerning Rule 124.3. Accordingly, we reverse the hearing officer's decision as being incomplete and render a new decision that the carrier is liable for benefits accrued pursuant to Rule 124.3(b) resulting from the carrier's alleged failure to timely dispute the claim or initiate payment of benefits.

DISABILITY

The disability issue in dispute before the hearing officer was limited to a specified time period from April 17 through July 10, 2006. The hearing officer found that although from April 17 through July 10, 2006, the claimant was unable to obtain and retain employment at wages equivalent to the wages she earned prior to _____, the claimant's incapacity was not the result of her compensable injury of _____. That finding is supported by sufficient evidence. We affirm that portion of the hearing officer's disability determination that the claimant did not sustain disability from April 17 through July 10, 2006. However, in the decision portion of the decision and order, the hearing officer determined that the claimant "has sustained no disability as of the date of the [CCH]." While consent may be inferred if the parties actually litigated an issue not otherwise identified, the record in this case does not establish that the parties litigated disability before April 17 or after July 10, 2006. Accordingly, we reverse the hearing officer's determination that the claimant has sustained no disability as of the date of the CCH as exceeding the scope of the issue, and render a new determination that the claimant did not sustain disability from April 17 through July 10, 2006.

SUMMARY

We reverse the hearing officer's decision as being incomplete and render a new decision that the carrier is liable for benefits accrued pursuant to Rule 124.3(b) resulting from the carrier's alleged failure to timely dispute the claim or initiate payment of benefits.

We reverse the hearing officer's determination that the claimant has sustained no disability as of the date of the CCH as exceeding the scope of the issue, and render a new determination that the claimant did not sustain disability from April 17 through July 10, 2006.

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
211 EAST 7TH STREET, SUITE 620
AUSTIN, TEXAS 78701.**

Margaret L. Turner
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Veronica L. Ruberto
Appeals Judge