

APPEAL NO. 050052
FILED MARCH 1, 2005

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 December 8, 2004. The hearing officer determined that: (1) the appellant (carrier) waived its right to contest the extent of the injury by not timely contesting in accordance with Section 409.021; (2) the respondent (claimant) sustained a compensable injury on _____; (3) the compensable injury of _____, extends to include the claimant's head and left shoulder; and (4) the claimant had disability resulting from an injury sustained on _____, beginning April 2, 2004, and continuing. The carrier appealed all of the hearing officer's determinations. The claimant responded, urging affirmance.

DECISION

Affirmed in part and reversed and rendered in part.

The claimant testified that on _____, he sustained an injury to his head, neck, and left shoulder when contents of a dolly shifted and struck him. In evidence are medical records dated January 5, 2004, and March 29, 2004, that showed that the claimant complained of neck, back, and shoulder pain. At issue was whether the claimant sustained a compensable injury on _____, whether the compensable injury extends to include the head and left shoulder, whether the claimant had disability, and whether the carrier waived its right to dispute the extent of injury according to Section 409.021.

INJURY, DISABILITY, AND EXTENT OF INJURY

We have reviewed the complained-of injury, extent-of-injury, and disability determinations and conclude that the issues involved fact questions for the hearing officer. We conclude that the hearing officer's injury, extent-of-injury, and disability determinations are supported by the record and are not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

CARRIER WAIVER

With regard to carrier waiver, for a claim for workers' compensation benefits based on a compensable injury that occurred on or after September 1, 2003, Section 409.021(a) provides 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 Workers' Compensation Commission (Commission) and the employee in writing of its refusal to pay. However, pursuant to Section 409.021(a-1), an insurance carrier that

fails to comply with Section 409.021(a) (the 15-day provision) does not waive the carrier's right to contest the compensability of the injury, but commits an administrative violation. 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. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 124.3(e) (Rule 124.3(e)) provides that Section 409.021 does not apply to disputes of extent of injury.

In evidence is the Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) that reflects that it was filed with the Commission on April 2, 2004, and indicating that the carrier received the first written notice on March 25, 2004. The TWCC-21 does not list the nature of the injury, however the carrier asserted that although the claimant was involved in an incident at work, it "did not result in damage or harm to the physical structures of the body such that claimant would have an 'injury'" as defined by Section 410.011(26); therefore the carrier denied that the claimant sustained an injury. Additionally, the carrier asserted that the claimant did not suffer an injury in the course and scope of employment and that if it was determined that the claimant suffered a compensable injury, it was "limited to the cervical only."

In determining carrier waiver, the hearing officer reviewed the medical records and commented that there were records in existence identifying the primary injury, which were discoverable and available to the carrier prior to the expiration of the waiver period and that the carrier "filed no other dispute with the Commission". Consequently, the hearing officer found that the carrier could have reasonably discovered that the primary injury sustained by the claimant was an injury to his neck, head, and left shoulder within the 60 days following March 25, 2004, the day the carrier received written notice of the injury; and that the carrier disputed compensability of the claimant's injury on April 2, 2004, when it filed a TWCC-21 with the Commission by facsimile; however, it did not specifically dispute the primary injury within the 60 days following March 25, 2004. The hearing officer concluded that the carrier waived the right to contest the extent of the injury by not timely contesting in accordance with Section 409.021.

In Texas Workers' Compensation Commission Appeal No. 041738-s, decided September 8, 2004, the Appeals Panel established that when a carrier does not timely dispute the compensability of a claim, 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 the instant case, the TWCC-21 reflects that the carrier timely contested the compensability of the injury on or before the 60th day after it received written notice of the injury.

We disagree with the hearing officer's finding that the carrier did not specifically dispute the primary injury within the expiration period. In the instant case, the carrier filed a TWCC-21 disputing the claimant's compensable injury within 8 days of receiving notice of an injury. Therefore, the hearing officer's decision that the carrier waived the

right to contest the extent of injury is reversed and a new decision is rendered that the carrier did not waive the right to contest the extent of the injury.

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

**CORPORATION SERVICE COMPANY
800 BRAZOS, SUITE 750, COMMODORE 1
AUSTIN, TEXAS 78701.**

Veronica L. Ruberto
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Margaret L. Turner
Appeals Judge