

APPEAL NO. 051383
FILED AUGUST 9, 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 (CCH) was held on May 3, 2005. The issues were:

1. Does the compensable injury of _____, extend to include the thoracic spine, bilateral carpal tunnel syndrome, and psychological disorder?
2. Did the [appellant (carrier)] waive the right to contest compensability on the extent of injury to the thoracic spine, bilateral carpal tunnel syndrome, and depressive disorder?
3. Did the [respondent (claimant)] have disability resulting from an injury sustained on _____ and, if so, for what periods?

The hearing officer determined that the claimant's compensable injury of _____, extended to include her thoracic spine, but not bilateral carpal tunnel syndrome or psychological disorder, that the carrier "waived the right to contest the injury by not timely contesting it after receiving written notice of the claim or beginning to pay benefits as required" and that the claimant had disability beginning on May 9, 2003, and continuing to the date of the CCH.

The carrier appeals the carrier waiver issue on the basis of Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 124.3(e) (Rule 124.3(e)) and "Court of Appeals Precedent." The carrier states that it "appeals solely the waiver and disability issues." The claimant responds, urging affirmance. The hearing officer's determination that the claimant's _____, compensable injury extended to include her thoracic spine, but not bilateral carpal tunnel syndrome or psychological disorder was not appealed.

DECISION

Affirmed in part and reversed and rendered in part.

It is undisputed that on _____, the claimant, a licensed vocational nurse, was involved in an incident attempting to restrain an unruly patient and sustained some compensable injuries. The claimant first saw (Dr. LS) a chiropractor, on March 6, 2002. A progress note and report of that date indicate neck, low and mid back and right elbow complaints. The claimant continued to work, although perhaps for different employers, shorter hours and at less pay. The claimant testified that she was unable to work after May 8, 2003. The claimant continued to see Dr. LS as her treating doctor until, apparently July 2003, when Dr. LS either sold his practice and/or moved and (Dr. JS) another chiropractor took over the claimant's treatment. Dr. LS referred the claimant to several other doctors including (Dr. H) a neuropsychologist.

DISABILITY

Disability is defined in Section 401.011(16) as the inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage. The claimant's testimony and various Work Status Report (TWCC-73) forms were conflicting. The carrier cites a TWCC-73 from the claimant's then treating doctor that releases the claimant to full duty without restrictions but that form and the circumstances under which it was issued were contradicted by the claimant's testimony. The hearing officer is the sole judge of the weight and credibility of the evidence (Section 410.165(a)). The Appeals Panel has held that disability may be established by the claimant's testimony alone, if believed by the finder of fact. Houston General Insurance Company v. Pegues, 514 S.W.2d 492 (Tex. Civ. App.-Texarkana 1974, writ ref'd n.r.e.). The hearing officer, in this case, chose to believe the claimant's testimony rather than an functional capacity evaluation and/or TWCC-73 forms to the contrary. The hearing officer's determination on disability is affirmed as being supported by sufficient evidence.

CARRIER WAIVER

Section 409.021, for compensable injuries that occurred before September 1, 2003, provides in pertinent part, that an insurance carrier shall, not later than the 7th day after the receipt of written notice of an injury, begin the payment of benefits as required by the 1989 Act or notify the Texas Workers' Compensation Commission (Commission) and the employee in writing of its refusal to pay benefits. The parties, and the hearing officer, indicate that the dispute must be within 60 days, however, for injuries that occurred before September 1, 2003, which is the case here, the initial waiver period is 7 days. See Continental Casualty Company v. Downs, 81 S.W.3d 803 (Tex. 2002). Texas Workers' Compensation Commission Appeal No. 041738-s, decided September 8, 2004, 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, which in this case would be 7 days pursuant to Section 409.021 as interpreted by Downs, *supra*. If the carrier does begin the payment of benefits as required by the 1989 Act, Section 409.021(c) provides in part that the initiation of payments by an insurance carrier does not affect the right of the insurance carrier to continue to investigate or deny the compensability of an injury during the 60-day period. In this case there is no evidence what the injury was within 7 days of written notice to the carrier. The claimant first saw a doctor on the 7th day after her injury but there is no evidence when the carrier was given the first written notice of the injury.

In this case, the hearing officer does not recite what the compensable injury is. The claimant, in opening argument states:

There aren't any PLNs or 21s to really show when the particular body part was denied. The best I can decipher is that the body parts that were accepted were the cervical injury, the lumbar injury, and right elbow injury.

Although the carrier both at the CCH and on appeal, states that it accepted and paid benefits for a compensable neck, low back and right elbow injury, there is no evidence (as opposed to argument) of that assertion. In fact, the hearing officer asked:

THE COURT: Does the Carrier have anything to show that they paid benefits or disputed? For example, a TWCC-21 form or PLN form?

[Carrier's attorney]: No, we do not have that.

Along this line we note that there is no Employer's First Report of injury or Illness (TWCC-1), no Employee's Notice of Injury or Occupational Disease and Claim for Compensation (TWCC-41) and no evidence to show when the carrier received written notice of an injury much less any evidence that it failed to begin the payment of benefits or notified the Commission and claimant of its denial of the claim (the carrier asserts it accepted and paid benefits for a compensable neck, low back and right elbow injury). Without evidence or agreement when the carrier received written notice of the claimed injury or what the carrier did, or did not do, within the initial 7 day waiver period there is insufficient evidence of carrier waiver in this case. Under these circumstances it is not necessary to discuss Rule 124.3(e) and TIG Premier Insurance Company v. Pemberton and Texas Workers' Compensation Commission, 127 S.W.3d 270 (Tex. App.-Waco 2003, pet. denied).

In Texas Workers' Compensation Commission Appeal No. 031441, decided July 23, 2003, the claimant, in that case, alleged error by the hearing officer in admitting a "cert-21" which had not been timely exchanged pursuant to Rule 142.13(e). The carrier, in that case, requested that the hearing officer take official notice of the document as a record of the Commission essential to the resolution of the waiver issue. The Appeals Panel held that:

In order to resolve an issue of waiver, a hearing officer must know the date on which the carrier agreed to pay or disputed benefits. For this purpose, we have, in analogous cases, required that a hearing officer take official notice of essential Commission records where compliance with the 1989 Act is at issue.

In that case we held that the hearing officer had not abused his discretion in admitting the cert-21. We distinguish Appeal No. 031441, *supra*, from the instant case in that, in the case before us, neither party, nor the hearing officer on his own motion, sought to obtain any necessary information or documentation that might be in the Commission's file. The hearing officer did not assign a burden of proof in this case but we generally note that the claimant has the burden to prove that he or she is entitled to the benefits they are seeking. The Appeals Panel has also generally held that once a claimant has satisfied the burden of proving the date the carrier received written notice of the claimed injury the carrier then has the burden of proving the date it accepted or disputed the claimed injury. Texas Workers' Compensation Commission Appeal No. 032862,

decided December 19, 2003. In this case there is no evidence when the carrier received the written notice of the injury although it clearly did so at some time. The carrier counters that it accepted and paid benefits for a compensable neck, low back and right elbow injury but there is no evidence when that was or whether it was within 7 days of receiving written notice of the injury.

The hearing officer made the following determinations:

FINDINGS OF FACT

6. Carrier did not dispute all, or any part, of Claimant's _____ injury within 60 days after receiving written notice or begin to pay benefits as required.
7. Carrier could have reasonably discovered the disputed conditions within the waiver period.

CONCLUSIONS OF LAW

4. Carrier waived the right to contest the injury by not timely contesting it after receiving written notice of the claim or beginning to pay benefits as required.

There is no evidence when the carrier may have received written notice, or if and when the carrier began to pay benefits. As indicated the initial waiver period for this claim is 7 days which may be extended to 60 days if the carrier begins the payments of benefits within 7 days, pursuant to Section 409.021(c). There being no evidence when written notice was given to the carrier the hearing officer's Findings of Fact No. 6 and 7 and Conclusion of Law No. 4 are reversed as not supported by the evidence.

SUMMARY

We affirm the hearing officer's determination on the period of disability. We reverse the hearing officer determination that the carrier waived the right to contest the injury by not timely contesting it after receiving written notice of the claim or beginning to pay benefits as required, as not being supported by the evidence and we render a new decision that the carrier did not waive the right to contest compensability on the extent of injury to the thoracic spine, bilateral carpal tunnel syndrome, and depressive disorder.

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

**LEO MALO
12222 MERIT DRIVE, SUITE 700
DALLAS, TEXAS 75251.**

Thomas A. Knapp
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Margaret L. Turner
Appeals Judge