APPEAL NO. 051656
FILED SEPTEMBER 14, 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 June 16, 2005. The unresolved issues at the CCH were:

1. Is the Claimant barred from pursuing Texas workers' compensation benefits because of an election to receive benefits under his contract and collective bargaining agreement?

2. Has the Carrier waived the right to contest compensability of the claimed injury by not timely contesting the injury in accordance with §409.021 §409.022 of the Texas Labor Code?

3. Did the Carrier specifically contest compensability pursuant to Texas Labor Code Ann. §409.022 and Rule 124.2(f)?

4. Did the Claimant have disability resulting from an injury sustained on _____, and, if so, for what period?

The hearing officer determined that:

CONCLUSIONS OF LAW

3. The Claimant is barred from pursuing Texas workers' compensation weekly or income benefits because it is presumed that he would elect the option that would provide the highest benefits, which would be the benefits available to the Claimant under his contract or collective bargaining agreement [CBA].

4. The Claimant is not barred from pursuing Texas workers' compensation medical care benefits because it is presumed that he would elect the option that would provide the highest benefits, which would be the benefits available to the Claimant under the Texas Workers' Compensation Act.

5. The Carrier has not waived the right to contest compensability of the claimed injury because it did timely contest the injury in accordance with §409.021 and §409.022 of the Texas Labor Code Ann.

6. The Carrier did specifically contest compensability pursuant to Texas Labor Code Ann. §409.022 and Rule 124.2(f).

7. The Claimant is barred from pursuing disability, under the Texas Workers' Compensation Act, resulting from the compensable injury sustained on _____.

The appellant (claimant) appealed the determinations that the claimant is barred from pursuing income benefits since the benefits under his contract/CBA were equal to or greater than workers' compensation benefits (Conclusion of Law No. 3), and that the claimant is barred "from pursuing disability" (Conclusion of Law No. 7), contending that the hearing officer erred in holding that the claimant is not eligible for income benefits "because of the 'bifurcation' language found in [28 TEX. ADMIN. CODE § 112.402 (Rule 112.402)] Rule 112.402(a) and (b)" and that the hearing officer erred in finding that the claimant's "disability began on March 1, 2004." The claimant also appealed the carrier waiver determination (Conclusion of Law No. 5) on the basis that the respondent (carrier) had failed to prove when it received the first written notice of the injury. The file does not contain a response from the carrier. The hearing officer's Conclusion of Law No. 4, and Conclusion of Law No. 6, above, have not been appealed.

DECISION

Affirmed in part and reversed and rendered in part.

The background facts as set out in the Background Information portion of the hearing officer's decision are not disputed. The claimant is a professional football player for a National Football League (NFL) team (employer). During the late summer 2002 the claimant sustained a right knee injury and apparently had right knee surgery around the end of August 2002. The claimant began rehabilitation of the right knee. During rehabilitation on _____, the claimant sustained a low back injury with pain in his buttocks and into his right leg. The claimant reported the injury to the head trainer and was eventually referred to (Dr. D), a specialist, who performed a L5-S1 discectomy on February 1, 2003. On February 26, 2003, the claimant and the employer signed a new NFL Player Contract for $130,000 for the 2003 season, which ran from March 1, 2003, through the end of February 2004. In February 2003 the claimant began to exhibit symptoms "quite like [reflex sympathetic dystrophy (RSD)] and a radiculopathy combined." The RSD continued to progress and by March 2003, Dr. D began to believe that the RSD "is clearly a career-threatening problem." On May 2, 2003, the employer and the claimant signed an "Agreement and Release" (Agreement) whereby the employer agreed to pay the claimant his full contract salary ($130,000) through February 29, 2004, due to the claimant's physical condition; "L-SPINE DISCECTOMY [,] RSD." The agreement stated in part to include:

(2) Payment by Club of such reasonable and customary medical and rehabilitation expenses as are incurred by Player in convalescing from the injury described above, such payment to be made upon presentation by Player of bills submitted by his health care providers. The Club will pay four weeks of rehab from the date stated below.

The claimant, on two occasions when he was feeling better (in January 2004 and January 2005), attempted to work out to get in football playing shape, but the pain returned. It is undisputed that the claimant cannot return to being a professional football player. Tax returns and other documentary evidence shows that claimant earned $148,470 for calendar year 2003 ($140,000 from the employer and an additional $8,470 other earnings) and $13,319.62 for calendar year 2004 and no earnings for calendar year 2005.

ELECTION OF REMEDIES

Section 406.095 pertaining to professional athletes provides:

> a. A professional athlete employed under a contract for hire or a collective bargaining agreement who is entitled to benefits for medical care and weekly benefits that are equal to or greater than the benefits provided under this subtitle may not receive benefits under this subtitle and the equivalent benefits under the contracts or collective bargaining agreement. An athlete covered by such a contract or agreement who sustains an injury in the course and scope of the athlete's employment shall elect to receive either the benefits available under this subtitle or the benefits under the contract or agreement.
>
> b. The commission by rule shall establish the procedures and requirements for an election under this section.
>
> c. In this section, "professional athlete" means a person employed as a professional athlete by a franchise of:
>
> 1. the National Football League[.]

Pursuant to Section 406.095(b) the Texas Department of Insurance, Division of Workers' Compensation (Division) enacted Rules 112.401 and 112.402 with amendments effective June 5, 2005. Rule 112.401(a) provides:

> (a) A professional athlete employed by a franchise with workers' compensation insurance coverage and subject to the Texas Labor Code, §406.095, shall elect to receive either the benefits available under the Act or the equivalent benefits available under the athlete's contract or collective bargaining agreement. The election shall be made not later than the 15th day after the athlete sustains an injury in the course and scope of employment. If the athlete fails to make an election, the athlete will be presumed to have elected the option which provides the highest benefits. (Emphasis added.)

The remainder of Rule 112.401 provides how the election is to be made. The hearing officer in an unappealled determination found that the "Claimant made no election of benefits within 15 days after he sustained a compensable injury." (Finding of Fact No. 4.) Therefore pursuant to Rule 112.401(a) the claimant is "presumed to have elected the option which provides the highest benfits."

The claimant and the hearing officer cite Rule 112.402(a) which provides:

§112.402 Determination of Equivalent Benefits for Professional Athletes.

(a) Medical care available to a professional athlete subject to the Texas Workers' Compensation Act (the Act), Texas Labor Code, §406.095, is equal to or greater than medical benefits under Act if:

(1) the athlete is entitled to all health care reasonably required by the nature of the work-related injury as and when needed, including all health care that:

(A) cures or relieves the effects naturally resulting from the work-related injury;

(B) promotes recovery; or

(C) enhances the ability of the employee to return to or retain employment; and

(2) the employer's liability for health care is not limited or terminated in any way by the contract or collective bargaining agreement.

The hearing officer makes an unappealed determination that the claimant is not barred from pursuing Texas workers' compensation medical care benefits because it is presumed that he would elect the option that would provide the highest benefits, which would be the benefits available to the claimant under "Texas Workers' Compensation Act." (Conclusion of Law No. 4.) That determination is supported by both the agreement which limits the claimant's medical "rehab" to four weeks and paragraph 9 of the NFL Player Contract which, in the event of an injury, limits the player (claimant) to "receive such medical and hospital care during the term of this contract . . . and for no subsequent period. . . ."

The hearing officer then determined that the claimant is barred from pursuing Texas workers' compensation "weekly or income benefits because . . . the benefits available under his contract or collective bargaining agreement" would provide higher benefits. The hearing officer cites as authority the provision in Section 406.095(a), quoted above which speaks of entitlement to "benefits for medical care and weekly benefits" as being "clearly bifurcated into benefits for medical care and weekly benefits." We disagree and believe the hearing officer has misinterpreted Section 406.095(a).

We believe that Section 406.095(a) encompasses both medical care and weekly benefits, not medical care or weekly benefits and specifically so states:

> An athlete covered by such a contract or agreement who sustains an injury in the course and scope of the athletes' employment shall elect to receive either the benefits available under this subtitle or the benefits under the contract or agreement. (Emphasis added.)

"Benefit" means a medical benefit, an income benefit, a death benefit, or burial benefit based on a compensable injury. Section 401.011(5). Pursuant to Rule 112.401(a) the athlete is presumed to have elected the option, which provides the highest benefits. The option (singular) includes both medical and income benefits. We hold that the presumption to have elected an option means that the total option (to include medical and income benefits) is presumed to have been elected, rather than a portion of one option and another portion of the other option. We find no authority in either the 1989 Act or the Division Rules to bifurcate benefits as the hearing officer has done.

We are cognizant of paragraph 10 of the NFL Player Contract which states:

> 10 WORKERS' COMPENSATION Any compensation paid to Player under this contract or under any collective bargaining agreement in existence during the term of this contract for a period during which he is entitled to workers' compensation benefits by reason of temporary total, permanent total, temporary partial, or permanent partial disability will be deemed an advance payment of workers compensation benefits due Player, and Club will be entitled to be reimbursed the amount of such payment out of an award or workers' compensation.

However the issue of reimbursement to the employer is not an issue before us or the hearing officer.

Appeals Panel Decision (APD) 022707, decided December 10, 2002, is a very similar situation where a professional football player with a similar NFL Player Contract had not made an election pursuant to Section 406.095. In that case the Appeal's Panel affirmed a hearing officer's determination that the player/claimant was not barred from pursuing workers' compensation benefits because he had received benefits under his professional athlete's contract and/or the collective bargaining agreement and that the claimant had a certain period of disability. APD 040347, decided April 1, 2004, was also a case of a professional athlete but that case was decided on a carrier waiver issue and that the claimant was "not barred from pursuing workers' compensation weekly or income benefits. . . ."

We reverse the hearing officer's determination that the "Claimant is barred from pursuing Texas workers' compensation weekly or income benefits because it is presumed that he would elect the option that would provide the highest benefits, which would be the benefits available to the claimant under his contract or collective

bargaining agreement" and render a new decision that the claimant is not barred from pursuing Texas workers' compensation benefits because of an election to receive benefits under his contract and collective bargaining agreement.

CARRIER WAIVER

The claimant sustained the compensable injury on _____. Clearly the employer was aware of the injury and paid the claimant's medical benefits. Section 409.021 provides, in pertinent part, that for injuries occurring prior to September 1, 2003, 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 Division and the employee in writing of its refusal to pay benefits. There is, however, a dearth of evidence when the carrier received the first written notice of the injury. In evidence is an Employee's Notice of Injury or Occupational Disease and Claim for Compensation (TWCC-41) dated July 11, 2003. That form has date received stamps showing receipt by the Division's Central Office on July 14, 2003, receipt by the Division regional office on February 10, 2005, and receipt by the carrier on February 10, 2005. Neither that form nor other documentation shows written notice of the injury to the carrier prior to February 10, 2005. On that basis the hearing officer determined that the carrier received first written notice that the claimant was claiming a work-related injury on February 10, 2005. In evidence is a Notice of Denial of Compensability/Liability and Refusal to Pay Benefits (PLN-1) dated February 11, 2005, alleging the carrier is not liable, citing Section 406.095. The claimant on appeal alleges that the hearing officer's finding regarding when the carrier had first written notice is not supported by the evidence, that the carrier had failed to show when or on what date it first received written notice and that no witnesses established when the first written notice was received by the carrier. The hearing officer, at the beginning of the CCH, in assigning the burden of proof, stated that on the carrier waiver issue the claimant has the burden to show when the carrier received the first written notice and that then the burden shifts to the carrier to show that it timely disputed. The hearing officer's determinations that the carrier received the first written notice on February 10, 2005, and that the carrier timely and specifically contested compensability of the claimed injury are supported by the evidence and are affirmed.

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. It is undisputed that on May 2, 2003, the parties entered into the Agreement whereby the claimant would receive the remainder of his salary "in a lump sum as of [May 2, 2003]" and that the agreement constituted a release and settlement of all claims against the employer. No further monies were paid by either the employer or carrier and no subsequent wages where paid by the employer based on work performed. (*See* the post-injury earnings Rules 129.1 and 129.2). The payment made to the claimant on May 2, 2003, did not constitute salary continuation or salary supplementation under Rule 129.1. The claimant testified, and there is no evidence to

the contrary, that he cannot return to his preinjury work as a professional football player and while the claimant did have some earnings in 2003 and 2004 those earnings were less than his preinjury wage. The hearing officer's determination that "[d]ue to the claimed injury, the Claimant was only unable to retain employment at wages equivalent to the preinjury wage beginning on March 1, 2004 [(the day after the claimant's 2003 contract would have expired)] and continuing through the date of [the CCH], and at no other times" is not supported by the evidence. The claimant was paid his contract salary on May 2, 2003, in a lump sum, instead of in 17 weekly installments of $7,647.05 as required by the collective bargaining agreement. The amount paid the claimant on May 2, 2003 constituted severance pay or a lump sum settlement payment, rather than continuing weekly compensation based on work performed. The hearing officer's determination that the claimant did not have disability and is "barred from pursuing disability" is reversed and a new decision is rendered that the claimant had disability beginning an May 3, 2003, and continuing to the date of the CCH.

SUMMARY

We affirm the hearing officer's determination that the carrier has not waived the right to contest compensability of the claimed injury by not timely contesting the injury in accordance with Sections 409.021 and 409.022. We render a new decision on the disputed election of remedies and disability issues that the claimant is not barred from pursuing Texas Workers' compensation benefits, and that the claimant had disability from May 3, 2003, to the date of the CCH.

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

GEOFF ZANETTI
4600 FULLER DRIVE
IRVINE, TEXAS 75038.

_____
Thomas A. Knapp
Appeals Judge

CONCUR:

_____
Robert W. Potts
Appeals Judge

_____
Margaret L. Turner
Appeals Judge