

APPEAL NO. 051657  
FILED SEPTEMBER 6, 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 21, 2005. The hearing officer resolved the disputed issues by deciding that the compensable injury of \_\_\_\_\_, does not extend to and include a 2 mm broad-based protrusion at L4-5 and at L5-S1 appearing to minimally efface the anterior surface of the thecal sac, an annular tear at L5-S1, and degenerative disc disease and that because the diagnoses of a 2 mm broad-based protrusion at L4-5 and at L5-S1 appearing to minimally efface the anterior surface of the thecal sac, an annular tear at L5-S1, and degenerative disc disease are ordinary diseases of life and not an injury, respondent 1 (carrier) had no duty to contest compensability of the said diagnoses within any prescribed time period under the 1989 Act and Rules. The appellant (claimant) appealed disputing both the waiver and extent-of-injury determinations. The claimant also alleges he was not given a fair and impartial hearing, alleging bias on the part of the hearing officer. The carrier responds, urging affirmance and denying the allegations of misconduct alleged by the claimant. The appeal file does not contain a response from the respondent 2 (subclaimant).

DECISION

Affirmed in part and reversed and rendered in part.

The parties stipulated that the claimant sustained a compensable injury on \_\_\_\_\_. The record reflects that the Texas Department of Insurance, Division of Workers' Compensation (Division) acknowledged receiving the carrier's "cert-21" on August 9, 2002, in which the carrier acknowledged receiving first written notice of injury on August 8, 2002, and agreed to pay benefits as they accrued. A Employer's First Report of Injury or Illness (TWCC-1) dated August 8, 2002, is in evidence which notes that the back is the body part claimed to be injured. A Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) dated August 18, 2003 (more than a year after carrier received first written notice of injury) is in evidence which reflects that the nature of the claimed injury was low back and neck and that the carrier disputed that the claimant's degenerative disc disease of the thoracic and lumbar spine is related to the compensable injury. However, there is no indication on the TWCC-21 as to when or if the document was filed with the Division.

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. In this case it is clear that the carrier took action within seven days of the carrier's first written notice of the injury. The "cert-21" received by the Division on August 9, 2002, indicated that the carrier is continuing to investigate the claim under Section 409.021(c).

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. In accordance with the decision of the Supreme Court in Continental Casualty Company v. Downs, 81 S.W.3d 803 (Tex. 2002), and our decision in Appeals Panel Decision (APD) No. 030380-s, decided April 10, 2003, taking this action entitled the self-insured to a 60-day period to investigate or deny compensability of the claim.

There is no indication that the carrier disputed the compensability of the injury within the 60-day waiver period. Therefore, we must review the evidence to determine what, if anything the carrier waived by its failure to contest the compensability within the time frames required by the 1989 Act. The nature of the injury that becomes compensable by virtue of waiver is defined by the information that could have been reasonably discovered by the carrier's investigation prior to the expiration of the waiver period. APD No. 041738-s, decided September 8, 2004. The following medical records dated within the 60-day waiver period were in evidence: (1) a magnetic resonance imaging (MRI) dated August 8, 2002, which listed as a finding a mild diffuse bulge at L5-S1 and noted degenerative changes; (2) a nerve conduction study dated September 11, 2002, which gave as the interpretation that the claimant has at least a right L5-S1 radiculopathy; (3) an EMG dated September 20, 2002, which stated the results were suggestive of left S1 radiculopathy; and (4) a medical report from (Dr. S), dated October 3, 2002, states the claimant's MRI is indicative of a lumbar disc bulge and listed lumbar radiculopathy as an impression with a suggested treatment plan of a series of three epidural steroid injections. We note that the October 3, 2002, report from Dr. S specifically mentions the claimant related his back pain to an on the job injury which occurred on \_\_\_\_\_. Further, the MRI dated August 8, 2002, gave a history of fall, injury, and back pain.

The hearing officer found that the diagnoses alleged were ordinary diseases of life and not an injury and that the carrier had no duty to contest compensability of the diagnoses alleged within any prescribed time period under the 1989 Act and Rules. We cannot agree. Nor can we agree with the carrier's assertion in its response that the claimant must as a threshold establish the degenerative disc disease (or its individual components) resulted from the injury or that the disputed conditions were aggravated or accelerated in any way as result of the compensable injury, arguing the failure to timely contest compensability of ordinary diseases of life cannot as a matter of law result in those ordinary diseases of life becoming injuries within the meaning of the 1989 Act. See APD No. 022183, decided October 9, 2002. Carrier waiver was an issue specifically before the hearing officer. Although the stated issue regarding waiver was limited to specific diagnoses, the evidence presented at the CCH supports a determination that the carrier waived its right to contest compensability of the claimed injury. It is undisputed that the back was the primary injury claimed and the record is replete with evidence, which indicates that a disc bulge and degenerative conditions reflected in the medical records could have been discovered by the carrier within the 60-day period from the carrier's first written notice of the claimed injury. The legal

consequence of waiver in this case is that the carrier may not now prevail on an issue regarding extent of injury that concerns the claimed injury itself.

There were no medical records dated within the waiver period that would have put the carrier on notice that the claimant was alleging a disc bulge at L4-5 or an annular tear at L5-S1 to be part of the compensable injury. We affirm the hearing officer's determination that the compensable injury of \_\_\_\_\_, does not extend to and include a 2 mm broad-based protrusion at L4-5 and an annular tear at L5-S1. The diagnostic tests that revealed the claimant potentially suffered from these conditions were dated outside the waiver period. Whether or not the compensable injury extended to include a 2 mm broad-based protrusion at L4-5 and an annular tear at L5-S1 was a question of fact for the hearing officer to determine. Although there is conflicting evidence on the issue of the extent of the claimant's compensable injury, we conclude that the hearing officer's determination that the claimant's compensable injury does not include a 2 mm broad-based protrusion at L4-5 and an annular tear at L5-S1 is supported by sufficient evidence and is not so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175 (Tex. 1986).

However, there were medical records dated within the waiver period that could have been discovered by the carrier relating to conditions to the claimant's back (degenerative disc disease and disc bulge at L5-S1), which was the primary injury claimed. We reverse the hearing officer's determination that "because the diagnoses of a 2 mm broad-based protrusion at L4-L5 appearing to minimally efface the anterior surface of the thecal sac, an annular tear at L5-S1 appearing to minimally efface the anterior surface of the thecal sac, an annular tear at L5-S1, and degenerative disc disease are ordinary diseases of life and not an injury, carrier had no duty to contest compensability of the said diagnoses within any prescribed time period under the [1989] Act and Rules" and render a new determination that the carrier waived the right to contest the compensability of a disc bulge at L5-S1 and degenerative disc disease.

Because the carrier waived the right to contest compensability of the protrusion at L5-S1 and degenerative disc disease these conditions have become compensable as a matter of law. We reverse the hearing officer's determination that the compensable injury of \_\_\_\_\_, does not extend to include a broad-based protrusion at L5-S1 and degenerative disc disease and render a new determination that the compensable injury of \_\_\_\_\_, does extend to include a broad-based protrusion at L5-S1 and degenerative disc disease.

As far as the allegations of bias are concerned, we find nothing in the record that shows the hearing officer was biased.

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

**FRED B. WERKENTHIN  
100 CONGRESS AVENUE  
AUSTIN, TEXAS 78701.**

---

Margaret L. Turner  
Appeals Judge

CONCUR:

---

Thomas A. Knapp  
Appeals Judge

---

Robert W. Potts  
Appeals Judge