

APPEAL NO. 072002-s
FILED DECEMBER 20, 2007

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). The hearing officer resolved the disputed issues by deciding that: (1) the respondent (claimant) sustained a compensable injury on _____; (2) the appellant's (carrier) "second" [sic—was actually the first PLN-1] Notice of Denial of Compensability/Liability and Refusal to Pay Benefits (PLN-1) filed with the Texas Department of Insurance, Division of Workers' Compensation (Division) on June 29, 2007, was not based on newly discovered evidence that could not reasonably have been discovered at an earlier date, so that the carrier's defense on compensability is limited to the disability defense listed on the first Notice of Disputed Issue(s) and Refusal to Pay Benefits (PLN-11) that was filed with the Division on June 1, 2007; and (3) the claimant had disability from April 25, 2007, and continuing through the date of the CCH and for no other periods. The carrier appealed, disputing the hearing officer's determination that the claimant sustained a compensable injury; that the carrier was limited solely to the defense listed in the PLN-11 filed on June 1, 2007; and that the PLN-1 filed on June 29, 2007, was not based on newly discovered evidence that could not reasonably have been discovered at an earlier date. The claimant responded, urging affirmance. There is no appeal of the hearing officer's determination on the disability issue and that determination has become final under Section 410.169.

DECISION

Affirmed in part and reversed and rendered in part.

COMPENSABLE INJURY

The hearing officer's determination that the claimant sustained a compensable injury on _____, is supported by sufficient evidence and is affirmed.

ISSUE ON CARRIER DEFENSES

The evidence reflected that the carrier received written notice of the claimed injury on May 18, 2007. On June 1, 2007, the carrier filed a PLN-11, which stated that "the carrier disputes the claimant's entitlement to temporary income benefits [TIBs] as the alleged injury is not a producing cause of the claimant's disability." On June 29, 2007, the carrier filed a PLN-1 disputing the compensability of the claim, stating its position was that the claimant was not injured in the course and scope of employment and that the condition the claimant alleges is a preexisting ordinary disease of life.

Section 409.021(a) provides that for claims based on a compensable injury that occurred on or after September 1, 2003, that no 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 Division and the employee in writing of its refusal to pay. Section 409.021(a-1) provides that an insurance carrier that fails to comply with Subsection (a) does not waive the carrier's right to contest the compensability of the injury as provided by Subsection (c) but commits an administrative violation subject to Subsection (e). 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 the right to contest compensability. Section 409.022(a) provides that an insurance carrier's notice of refusal to pay benefits under Section 409.021 must specify the grounds for refusal and pursuant to Section 409.022(b) the grounds for the refusal specified in the notice constitute the only basis for the insurance carrier's defense on the issue of compensability in a subsequent proceeding, unless the defense is based on newly discovered evidence that could not reasonably have been discovered at an earlier date.

28 TEX. ADMIN. CODE § 124.3(a)(1) (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 Division Rules, provided prior to the filing of the notice of the 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.

The preamble to Rule 124.3 states that a dispute of benefit entitlement, i.e. disability and entitlement to TIBs, is not a dispute of compensability/liability, and that in filing a dispute of benefit entitlement, the insurance carrier retains the right to contest compensability and liability of the claim within the 60-day period after receiving written notice. The preamble also states that this does not provide a carrier opportunity to dispute disability simply to avoid payment of accruing income benefits while it continues its compensability investigation after the initial 15-day period. 29 Tex. Reg. 2326 (2004). The Appeals Panel has held that, under Section 409.022(b), in general, the carrier is limited to and bound by the grounds set forth in the Payment of Compensation or Notice of Refused/Disputed Claim (DWC-21) it files, unless the new defense is based on newly discovered evidence, and has noted that the PLN-1 is the replacement for the DWC-21. Appeals Panel Decision 051708, decided September 13, 2005. In the instant case, the filing of the PLN-11 within 15 days of written notice of the injury was a dispute of benefit entitlement because the carrier disputed entitlement to TIBs. As noted by the preamble to Rule 124.3, a dispute of benefit entitlement is not a dispute of compensability/liability, and in filing a dispute of benefit entitlement, the carrier retains the right to contest compensability and liability of the claim within the 60-day period.

The carrier filed a dispute of compensability, PLN-1, after the 15th day but before the 60th day after receipt of written notice of the injury. Therefore, the hearing officer erred in determining that the carrier's defense on compensability is limited to the disability defense listed on the PLN-11 that was filed with the Division on June 1, 2007. Because the PLN-11 disputed TIBs and not compensability, we need not address whether the PLN-1 filed with the Division on June 29, 2007, was based on newly discovered evidence that could not reasonably have been discovered at an earlier date. We reverse the hearing officer's decision that the carrier's defense on compensability is limited to the disability defense listed on the PLN-11 that was filed with the Division on June 1, 2007, and render a new decision that the carrier's defense on compensability is not limited to the disability defense listed on the PLN-11 that was filed with the Division on June 1, 2007.

SUMMARY

The hearing officer's decision that the claimant sustained a compensable injury on _____, is affirmed. We reverse the hearing officer's decision on the issue of the carrier's defenses and render a decision that the carrier's defense on compensability is not limited to the disability defense listed on the PLN-11 filed with the Division on June 1, 2007.

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

**BRAD NEHRING
8144 WALNUT HILL LANE, SUITE 1600
DALLAS, TEXAS 75231.**

Margaret L. Turner
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Veronica L. Ruberto
Appeals Judge