

APPEAL NO. 081665-s
FILED JANUARY 29, 2009

This appeal after a hearing on remand arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A prior contested case hearing (CCH) was held on July 7, 2008. The hearing officer in that CCH determined: (1) that the appellant/cross-respondent (claimant) did not sustain a compensable injury on _____; (2) that because the claimant did not sustain a compensable injury, he did not have disability; and (3) that respondent 2/cross-appellant 2 (Travelers Indemnity Company, referred to as Carrier T) does not have liability for benefits prior to the date Carrier T filed a notice of denial pursuant to 28 TEX. ADMIN. CODE § 124.3 (Rule 124.3) because Carrier T's notice of denial was timely. The claimant appealed, contending for the first time on appeal among other matters, that the true corporate name of the carrier is respondent 1/cross-appellant 1 (Charter Oak Fire Insurance Company, referred to as Carrier C) and that Carrier C failed to timely dispute the claimed injury within 15 days after it received written notice of the injury, and therefore is liable for accrued benefits pursuant to Rule 124.3. The Appeals Panel in Appeals Panel Decision (APD) 081219, decided October 1, 2008, reviewed the evidence regarding who the correct carrier was and determined there was no evidence, other than conflicting forms and notices, or argument regarding who the correct carrier was. The Appeals Panel reversed the hearing officer's decision and remanded the case with the instruction:

Because of the conflicting evidence regarding the correct carrier, we remand the case for the hearing officer to determine who the correct carrier is for the _____, date of injury and, if it is a carrier other than the carrier that was present at the CCH, to hold another hearing with the proper carrier present. On remand the hearing officer is to take official notice of the [Texas Department of Insurance, Division of Workers' Compensation (Division)] records regarding the proper carrier and admit those records in evidence. The parties are to be allowed the opportunity to present evidence as to the correct carrier in this proceeding.

A hearing on remand was held on October 22, 2008. The hearing officer announced that she believed there are two issues before her: (1) who is the correct carrier for the _____, date of injury; and (2) "[d]oes [the] Carrier have liability for benefits prior to the date [the] Carrier filed notice of denial pursuant to Rule 124.3?" The claimant requested to add an issue of "waiver." The attorney representing both Carrier T and Carrier C objected stating that a carrier waiver issue had not previously been raised. The hearing officer decided not to add the carrier waiver issue.

The hearing officer, at the CCH on remand, determined that Carrier C is the correct carrier for the _____, date of injury and that Carrier C has liability for benefits because it failed to timely file a notice of denial pursuant to Rule 124.3. The claimant appeals the hearing officer's decision, contending that since the hearing officer

concluded that Carrier C had waived liability and “was liable for accrued benefits, the hearing officer was also finding and concluding that [the] Claimant has damage or harm to the physical structure of his body.” The claimant asks that the Appeals Panel “render a decision that [the] Claimant has damage or harm to the physical structure of his body.”

The carriers dispute the hearing officer’s determination that Carrier C has liability for benefits because it failed to timely file a notice of denial pursuant to Rule 124.3, contending that Carrier C and Carrier T both had coverage for the claimant’s employer and that Carrier C and Carrier T are part of the same group, The Travelers Companies, Inc. (Carrier TC), and the adjuster who completed the timely dispute was employed by Carrier TC. Further, the carriers argue on appeal that the hearing officer erred in addressing carrier waiver because that issue was not before her. Neither party responded to the others’ appeal.

DECISION

Affirmed in part and reversed and rendered in part.

OFFICIAL NOTICE

The hearing officer, in the CCH on remand, took official notice of the record of the first CCH, the hearing officer’s decision and order of the prior CCH, APD 081219, *supra*, and the Division records pertaining to this case, without objection from any party. The same attorney represented Carrier T at the original CCH and both Carrier T and Carrier C at the hearing on remand. Carrier C is imputed with the knowledge of the facts as established in the first CCH, through official notice of its proceedings and through its representation by the same attorney.

THE CORRECT CARRIER AND LIABILITY

The hearing officer’s determinations on remand that Carrier C is the correct carrier for the _____, date of injury and that Carrier C has liability for benefits because it has failed to timely file notice of denial pursuant to Rule 124.3 are supported by sufficient evidence and are affirmed.

RULE 124.3

At both the July 7, 2008, CCH and the hearing on remand on October 22, 2008, one of the issues was “[d]oes [the] Carrier have liability for benefits prior to the date [the] Carrier filed notice of denial pursuant to Rule 124.3?” We note that the issue was not limited to the liability described in Rule 124.3(a). At the first CCH, the hearing officer determined that Carrier T timely filed a notice of denial pursuant to Rule 124.3; and at the CCH on remand, the hearing officer determined that Carrier C did not timely file a notice of denial pursuant to Rule 124.3.

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 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. Rule 124.3 further provides:

- (b) Except as provided by subsection (c), the carrier waives the right to contest compensability of or liability for the injury, if it does not contest compensability on or before the 60th day after the date on which the insurance carrier receives written notice of the injury.
- (c) If the carrier wants to deny compensability of or liability for the injury after the 60th day after it received written notice of the injury:
 - (1) the carrier must establish that it is basing its denial on evidence that could not have reasonably been discovered earlier; and
 - (2) the carrier is liable for and shall pay all benefits that were payable prior to and after filing the notice of denial until the [Division] has made a finding that the evidence could not have been reasonably discovered earlier.

As previously noted, the claimant requested at the CCH on remand that the issue of carrier waiver be added and the hearing officer decided not to add the carrier waiver issue. However, the hearing officer's decision states that: "[c]arrier has waived the right to contest compensability of or liability for the claimed injury of _____." The carriers' Request for Review on remand contends that the hearing officer decided an issue not before her by incorporating carrier waiver in her decision. We disagree. The hearing officer's finding comports with the provisions of Rule 124.3(b).¹ The hearing officer specifically found Carrier C received notice of the claimed injury on November 9, 2007, and within 60 days of November 9, 2007, Carrier C had not filed a Plain Language Notice denying compensability of the claimed injury. These findings are supported by sufficient evidence. As previously set forth, Rule 124.3(b) provides that the carrier waives the right to contest compensability of or liability for the injury, if it does

¹ Rule 124.3 covers both liability if not disputed by the 15th day after receiving first written notice of the claimed injury and waiver of the right to contest compensability of the claimed injury if not disputed on or before the 60th day after receiving first written notice of the claimed injury.

not contest compensability on or before the 60th day after the date on which the insurance carrier receives written notice of the injury.

The hearing officer found in the first CCH that the claimant did not sustain damage or harm to the physical structure of his body in the course and scope of employment on _____. The hearing officer's finding must have been based on her belief that the mechanism of injury did not occur as the claimant described while in the course and scope of employment. If the hearing officer believed that there was no injury, that is no damage or harm to the physical structure of the body, she could not have found liability pursuant to Rule 124.3 in the CCH on remand. In Continental Casualty Company v. Williamson, 971 S.W.2d 108 (Tex. App.-Tyler 1998, no pet.) the court stated that "if a hearing officer determines that there is no injury, and that finding is not against the great weight and preponderance of the evidence, the carrier's failure to contest compensability cannot create an injury as a matter of law." Applying the rationale in Williamson, carrier waiver cannot create an injury that does not exist. APD 070903-s, decided July 27, 2007. By finding that Carrier C was liable for benefits pursuant to Rule 124.3, because Carrier C did not file a notice of denial prior to the expiration of the waiver period, the hearing officer impliedly found that the claimant had sustained a compensable injury.

COMPENSABLE INJURY AND DISABILITY

The issues at the first CCH, held on July 7, 2008, included whether the claimant sustained a compensable injury on _____, and whether the claimant had disability. The hearing officer did not address or make findings of fact or conclusions of law on the issues of compensable injury and disability at the CCH on remand. Normally we would reverse the hearing officer's decision as being incomplete and remand the case for the hearing officer to consider and make findings on those issues. See APD 062446, decided January 18, 2007. However, since in this case, the Appeals Panel has previously remanded the case, pursuant to Section 410.203(c), the Appeals Panel is precluded from remanding a case more than once. Therefore, we reverse the hearing officer's decision as incomplete and we render a new decision on the issues of compensable injury and disability, as discussed below.

In evidence is an emergency room record dated December 18, 2007, in which the claimant was diagnosed with a lumbar strain. The claimant again sought medical treatment at the emergency room on January 23, 2008, where he was diagnosed with a chronic back strain with some neurological symptoms and a right ankle strain. The designated doctor examined the claimant on March 19, 2008, and noted that he was asked to address both the existence of and extent of the injury. The designated doctor opined that the claimant in all medical probability sustained a lumbar strain and ankle sprain injury. There is no evidence to the contrary. The evidence establishes that the claimant did sustain damage or harm to the physical structure of his body as supported by the medical records.

The claimant testified in the first CCH that he was not able to work as a result of the claimed injury from October 19, 2007, through March 19, 2008, and that he returned to work on March 19, 2008, when the designated doctor determined he could work. The treating doctor on a Work Status Report (DWC-73) took the claimant off work on January 25, 2008. The claimant's testimony is supported by the medical records.

Because the Appeals Panel cannot remand a second time, Section 410.203(c), we must render a decision on the issues of compensable injury and disability. We reverse the hearing officer's decision as incomplete and we render a new decision that the claimant sustained a compensable injury on _____, and that the claimant had disability from October 19, 2007, through March 19, 2008.

SUMMARY

We affirm the hearing officer's determinations that Carrier C is the correct carrier for the _____, date of injury and that Carrier C has liability for benefits because it has failed to timely file a notice of denial pursuant to Rule 124.3.

We reverse the hearing officer's decision on remand as being incomplete and render a new decision that the claimant sustained a compensable injury on _____, and that the claimant had disability from October 19, 2007, through March 19, 2008.

The true corporate name of Carrier C is **CHARTER OAK FIRE INSURANCE COMPANY** and the name and address of its registered agent for service of process is

**CORPORATION SERVICE COMPANY
D/B/A CSC – LAWYERS INCORPORATING SERVICE COMPANY
701 BRAZOS STREET, SUITE 1050
AUSTIN, TEXAS 78701.**

The true corporate name of Carrier T is **TRAVELERS INDEMNITY COMPANY** and the name and address of its registered agent for service of process is

**CORPORATION SERVICE COMPANY
D/B/A CSC – LAWYERS INCORPORATING SERVICE COMPANY
701 BRAZOS STREET, SUITE 1050
AUSTIN, TEXAS 78701.**

Thomas A. Knapp
Appeals Judge

CONCUR:

Veronica L. Ruberto
Appeals Judge

Margaret L. Turner
Appeals Judge