

APPEAL NO. 100203  
FILED APRIL 16, 2010

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 January 28, 2010. The disputed issues before the hearing officer were:

- (1) Has the appellant (carrier) waived the right to contest compensability of the claimed injury by not timely contesting the injury in accordance with Section 409.021?
- (2) Did the respondent (claimant) sustain a compensable injury on \_\_\_\_\_, while in the course and scope of employment? (Amended by agreement of the parties)
- (3) Did the claimant have disability resulting from an injury sustained on \_\_\_\_\_, from August 6, 2009, through the present? (Amended by agreement of the parties)

The hearing officer determined that: (1) the carrier waived the right to contest compensability of the claimed injury by not timely contesting the injury in accordance with Section 409.021; (2) the claimant sustained a compensable injury on \_\_\_\_\_, by virtue of carrier waiver; and (3) the claimant sustained disability beginning August 6, 2009, and continuing through the date of the CCH.

The carrier appeals the hearing officer's determinations on carrier waiver, compensable injury and disability. The carrier contends on appeal that either the hearing officer "failed to properly preserve the record" or "a clerical error occurred" by the Texas Department of Insurance, Division of Workers' Compensation (Division) since a timely Notice of Denial of Compensability/Liability and Refusal to Pay Benefits (PLN-1) was filed with the Division on September 2, 2009, in accordance with Section 409.021. In the alternative, the carrier contends that the attached PLN-1 containing a Division date stamp of September 2, 2009, should be considered as newly discovered evidence as it was not available at the time of the CCH. The claimant responds, urging affirmance and contends that the Division records do not show that the carrier had filed a PLN-1 disputing the claimant's claimed injury, in accordance with Section 409.021.

DECISION

Reversed and remanded.

The claimant testified that he sustained a bilateral shoulder and wrist injury at work on \_\_\_\_\_.

## CARRIER WAIVER

Section 409.021(a) provides that for claims based on a compensable injury that occurred on or after September 1, 2003, that not 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(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 State Office of Risk Mgmt. v. Lawton, 295 S.W.3d 646 (Tex. 2009), the Texas Supreme Court held that Section 409.021(c)'s 60-day deadline applies only to compensability, and that the interpretation given in Appeals Panel Decision (APD) 041738-s, decided September 8, 2004, would eliminate the distinction between compensability and extent of injury. In Lawton, the carrier agreed the claimant had a compensable injury. In the instant case, the PLN-1 dated August 31, 2009, states that the carrier is denying that the claimant sustained "an injury or occupational disease within the course and scope of employment or has a work-related injury disease." In this case, the carrier denied compensability of the injury in its entirety; therefore, the rationale in the Lawton decision does not apply.

The carrier waiver issue in dispute was whether carrier waived the right to contest compensability of the claimed injury by not timely contesting the injury in accordance with Section 409.021. The parties stipulated that the carrier received written notice of the claimed injury on August 11, 2009. The claimant argued at the CCH that the carrier did not file a notice of denial of the claimed injury with the Division. In evidence is a PLN-1 dated August 31, 2009, that does not contain a Division date stamp.<sup>1</sup> The hearing officer states in the Background Information section that "[c]arrier failed to prove that it sent a copy of this [PLN-1] to the [Division] within 60 days of receiving written notice of the claimed injury" citing 28 TEX. ADMIN. CODE § 124.2(g) (Rule 124.2(g)).<sup>2</sup>

In APD 091229, decided October 15, 2009, the disputed issue was whether the carrier waived the right to contest compensability of the claimed injury by not timely contesting the injury in accordance with Section 409.021. In that case the PLN-1 in evidence did not contain a Division date stamp; however, on appeal the carrier attached

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<sup>1</sup> We note that the hearing officer mistakenly states in the Background Information section of his decision that the parties stipulated that the carrier "sent a [PLN-1] disputing compensability of the claimed injury to the [c]laimant on August 31, 2009." Review of the record reflects that the parties did not stipulate when the carrier sent the PLN-1 to the claimant.

<sup>2</sup> Rule 124.2(g) provides in part that when a carrier notifies the Division of a denial as required by subsection (d) of this section, it must provide the Division a written copy of the notice provided to the claimant under subsection (f) of this section. The notification requirements of this section are not considered completed until the copy of the notice provided to the claimant is received by the Division.

a PLN-1 containing a Division date stamp. The Appeals Panel reversed and remanded the carrier waiver issue to the hearing officer to take official notice of the Division's records with regard to the filing of the carrier's PLN-1 with the Division to determine the carrier waiver issue. In APD 050833, decided June 2, 2005, the hearing officer did not take official notice of the Division's records to determine when Payment of Compensation or Notice of Refused/Disputed Claim (DWC-21) form was filed with the Division. In that case, the DWC-21 was in evidence; however, it did not contain a date stamp indicating the Division's receipt of that form. The Appeals Panel reversed and remanded the case for the hearing officer to take official notice of Division records with regard to the filing of the carrier's DWC-21. See also APD 030295, decided March 27, 2003 (the Appeals Panel stated that it had required that a hearing officer take official notice of essential Division forms where timely filing requirements are in issue). In APD 010696, decided April 26, 2001, the Appeals Panel held that the hearing officer did not err in making the date-stamped copy of the carrier's DWC-21, which the hearing officer obtained from the claim file, a hearing officer exhibit.<sup>3</sup>

In evidence in the instant case is a PLN-1 dated August 31, 2009, that does not contain a Division date stamp, however on appeal the carrier attached a PLN-1 dated August 31, 2009, containing a Division date stamp of September 2, 2009. Although the carrier states in its appeal that the hearing officer reviewed the Division's "electronic filing system" to search for a filed PLN-1 dated August 31, 2009, a review of the record reflects that the hearing officer did not take official notice of the Division's records with regard to the filing of the carrier's PLN-1 with the Division to determine the carrier waiver issue.

In the instant case, the hearing officer erred by not taking official notice of the Division's records with regard to the filing of the carrier's PLN-1 with the Division to determine the carrier waiver issue. Accordingly, we reverse the hearing officer's determination the carrier waived its right to contest compensability of the claimed injury by not timely contesting the injury in accordance with Section 409.021, and we remand the carrier waiver issue for the hearing officer: (1) to take official notice of Division records regarding when the carrier filed its PLN-1 with the Division; (2) to make the PLN-1 that is officially noticed a hearing officer exhibit; (3) to allow the parties an opportunity to review the officially noticed PLN-1 and to respond to it; (4) to make a finding of fact of when the carrier contested compensability of the claimed injury; and (5) to make further findings of fact, conclusions of law, and a decision on the disputed carrier waiver issue consistent with this decision.

## **INJURY**

The hearing officer's finding that the claimant did not sustain damage or harm to the physical structure of his body in the course and scope of employment on

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<sup>3</sup> Rule 102.4(l) provides, in part, that if a written communication is required to be filed with both the Division and another person by the Act or Division rules, the other person shall be presumed to have received the written communication on the date the Division received its copy.

\_\_\_\_\_, is supported by sufficient evidence. Because the hearing officer determined that the carrier waived the right to contest compensability of the claimed injury in accordance with Section 409.021, the hearing officer found that the claimant sustained a compensable injury by virtue of carrier waiver.

Given that we have reversed and remanded the carrier waiver issue to the hearing officer, we likewise reverse and remand the compensable injury issue to the hearing officer.

### **DISABILITY**

The hearing officer's finding that the claimant sustained disability beginning on August 6, 2009, and continuing through the date of the CCH is supported by sufficient evidence. Given our reversal of the hearing officer's determination that the claimant sustained a compensable injury, we likewise reverse and remand the hearing officer's determination that the claimant sustained disability beginning on August 6, 2009, and continuing through the date of the CCH. By definition, the 1989 Act requires a finding of the existence of a compensable injury as a prerequisite to a finding of disability. Section 401.011(16).

### **SUMMARY**

We reverse the hearing officer's determination the carrier waived its right to contest compensability of the claimed injury by not timely contesting the injury in accordance with Section 409.021, and we remand the carrier waiver issue for the hearing officer: (1) to take official notice of Division records regarding when the carrier filed its PLN-1 with the Division; (2) to make the PLN-1 that is officially noticed a hearing officer exhibit; (3) to allow the parties an opportunity to review the officially noticed PLN-1 and to respond to it; (4) to make a finding of fact of when the carrier contested compensability of the claimed injury; and (5) to make further findings of fact, conclusions of law, and a decision on the disputed carrier waiver issue consistent with this decision.

We reverse the hearing officer's determination that the claimant sustained a compensable injury on \_\_\_\_\_, by virtue of carrier waiver and remand the compensable injury issue to the hearing officer.

We reverse the hearing officer's determination that the claimant sustained disability beginning on August 6, 2009, and continuing through the date of the CCH and remand the disability issue to the hearing officer.

Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Division, pursuant to Section 410.202 which was amended

June 17, 2001, to exclude Saturdays and Sundays and holidays listed in Section 662.003 of the Texas Government Code in the computation of the 15-day appeal and response periods. See APD 060721, decided June 12, 2006.

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

**CT CORPORATION SYSTEMS  
350 N. ST. PAUL  
DALLAS, TEXAS 75201.**

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Veronica L. Ruberto  
Appeals Judge

CONCUR:

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Carisa Space-Beam  
Appeals Judge

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Margaret L. Turner  
Appeals Judge