

APPEAL NO. 041738-s
FILED SEPTEMBER 8, 2004

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on June 14, 2004. The hearing officer determined that: (1) the respondent/cross-appellant (claimant) sustained a compensable low back and left leg injury on _____, because the appellant/cross-respondent (carrier) waived its right to dispute compensability of this claim; (2) the carrier did not contest compensability in accordance with Section 409.021; (3) the employer had actual knowledge of the injury event pursuant to Section 409.001, and the carrier is not relieved of liability for this claim; and (4) the claimant only had disability beginning on February 18 and continuing through April 14, 2004, and at no other times. Both the carrier and the claimant appealed the hearing officer's determinations that were adverse to each party. The carrier responded to the claimant's appeal, urging affirmance of the hearing officer's findings that were favorable to the carrier.

DECISION

Affirmed.

The claimant testified that on _____, he was inside a portable toilet when a gust of wind lifted the portable toilet a few feet off the ground then it landed on its side. The claimant testified that he sustained a cut to his right arm and contusions to his head. The claimant testified that after a few hours of work that same day he began to feel left leg pain. In evidence is a time sheet dated _____, that shows that the claimant checked off that he sustained an injury on that same date. The claimant testified that he continued to work for several months with leg cramps, then sought medical treatment for leg cramps on September 2, 2003. The claimant was terminated from his employment because of a reduction in force on November 13, 2003. The claimant again sought medical treatment at a hospital's emergency room for pain and cramps from his hip down to his left leg. The claimant filed an Employee's Notice of Injury or Occupational Disease & Claim for Compensation (TWCC-41) claiming that he injured his "low back down It leg" with a date of injury of "approximately" May 1, 2003. An MRI of the lumbar spine dated December 30, 2003, reflects a herniated nucleus pulposus at L5-S1. The claimant had spinal surgery at L5-S1 on February 18, 2004. The claimant testified that he returned to work in April 2004.

CARRIER WAIVER

The hearing officer did not err in determining that the carrier waived the right to contest compensability of the claimed injury. The Dispute Resolution Information System (DRIS) shows that on December 19, 2003, an "EES-11," Notice to Carrier of Injury, was printed, and that it was mailed on December 22, 2003. The hearing officer determined that the carrier was deemed to have received notice of the claim on

December 27, 2003, although the carrier argued that it first received written notice on January 8, 2004. In evidence is the Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) dated January 15, 2004, that reflects it was stamped as having been hand delivered to the Texas Workers' Compensation Commission (Commission) on January 16, 2004. Whether the date the carrier first received written notice was on December 27, 2003, or January 8, 2004, the TWCC-21 reflects that the carrier did not file its dispute within seven days as required by Section 409.021. The hearing officer's waiver determination is supported by sufficient evidence.

COMPENSABLE INJURY

Section 409.021 provides, in pertinent part, that for injuries occurring prior to September 1, 2003, an insurance carrier shall, not later than the seventh day after the receipt of written notice of an injury, begin the payment of benefits as required by the 1989 Act or notify the Texas Workers' Compensation Commission (Commission) and the employee in writing of its refusal to pay benefits.

On appeal the carrier asserts that if the carrier waiver determination is affirmed, it should only apply to the claimant's original injury, which was "a minor cut to his elbow, contusions to his face and knees on _____." The carrier argues that it did not waive the right to contest the low back and left leg as an extent of injury. The carrier cites *Tex. W.C. Comm'n*, 28 TEX. ADMIN. CODE § 124.3(c) (Rule 124.3(c)) that provides that Section 409.021 does not apply to disputes of extent of injury. Given that we have affirmed the hearing officer's carrier waiver determination, the question remains: What was the nature of the injury that becomes compensable by virtue of carrier waiver?

Rule 124.1(a)(3), provides that if an Employer's First Report of Injury (TWCC-1) has not been filed, written notice of injury consists of the carrier's receipt of any other communication regardless of source, which fairly informs the carrier of the name of the injured employee, the identity of the employer, the approximate date of the injury and information which asserts the injury is work related. Rule 124.1(c)(1) provides that the Commission shall furnish written notification to the carrier when a source other than the carrier reports an injury that may cause the employee eight days or more of disability or has resulted in an impairment. In the instant case the first written notice, the EES-11, was not in evidence and it is unknown what injury was listed on that form.

Rule 124.3(a) provides in part that upon receipt of written notice of injury the carrier shall conduct an investigation relating to the compensability of the injury. In the instant case, the EES-11, the first written notice, started the time period for the carrier to investigate the compensability of the injury. The TWCC-41 was filed with the Commission on December 19, 2003, listing the low back and left leg as the initial compensable injury. This same TWCC-41 triggered the Commission to send notice of injury to the carrier.

We hold that the injury that becomes compensable by virtue of waiver is not necessarily limited by the information listed on the first written notice of injury. Rather the nature of the injury will be defined by that information that could have been reasonably discovered in the carrier's investigation prior to the expiration of the waiver period. In this case, it is apparent that the TWCC-41 could have been reasonably discovered in that period. Accordingly, the hearing officer properly determined, in accordance with the TWCC-41, that the low back and the left leg became compensable due to the carrier's waiver of its right to contest compensability.

Next the carrier asserts that the claimant did not sustain an injury on _____, therefore the carrier's failure to contest compensability cannot create an injury as a matter of law. In the instant case, although the hearing officer determined the claimant did not sustain a low back and left leg injury in the course and scope of employment, he determined the claimant established that he sustained an injury within the definition of Section 401.011(26) to his low back and left leg. We have interpreted Continental Casualty Company v. Williamson, 971 S.W.2d 108 (Tex. App.-Tyler 1998, no pet.) to mean that a carrier's failure to timely dispute does not create an injury when there is no injury. However, if the claimant has established a condition that meets the definition of injury under Section 401.011(26), it does not matter that the cause of the injury may be outside the course and scope of employment because causation is no longer in dispute when the carrier waives the right to dispute compensability. See Texas Workers' Compensation Commission Appeal No. 992584, decided January 3, 2000, and Texas Workers' Compensation Commission Appeal No. 981640, decided September 2, 1998. Additionally, the carrier for the first time on appeal argues that the claimant's low back injury is a preexisting condition. An assertion that injuries are preexisting is exactly the type of defense that should be raised in a TWCC-21. The carrier failed to do this.

Due to our affirmance of the hearing officer's waiver determination, we likewise affirm his determination that the claimant sustained a compensable injury because the injury became compensable as a matter of law due to the carrier's waiver of its right to dispute compensability. Although the claimant appeals the determination that he did not injure his low back and left leg while in the course and scope of employment on _____, due to carrier waiver, the claimant ultimately prevailed on the compensability issue.

NOTICE AND DISABILITY

Given our affirmance of the carrier waiver and compensable injury determinations, and in view of the evidence that the claimant notified his employer of the work-related injury, we likewise affirm the notice determination. With regard to the disability issue, this was a question of fact for the hearing officer to resolve. The hearing officer did not err in making the complained-of notice and disability determinations. The carrier's challenge to these determinations is premised upon the success of its arguments with regard to waiver and compensability, above.

The decision and order of the hearing officer are affirmed.

The true corporate name of the insurance carrier is **ST. PAUL FIRE & MARINE INSURANCE COMPANY** and the name and address of its registered agent for service of process is

**CORPORATION SERVICE COMPANY
701 BRAZOS STREET, SUITE 1050
AUSTIN, TEXAS 78701.**

Veronica L. Ruberto
Appeals Judge

CONCUR:

Chris Cowan
Appeals Judge

Thomas A. Knapp
Appeals Judge