APPEAL NO. 042048-s
FILED OCTOBER 11, 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 July 26, 2004. The hearing officer determined that the appellant's (claimant) _____, compensable injury includes an injury to the right knee; that the _____, compensable injury does not include a torn right knee anterior cruciate ligament (ACL); that the respondent (carrier) waived the right to contest compensability of a right knee injury by not timely contesting the injury in accordance with Section 409.021; and that the carrier has not waived the right to contest compensability of a torn right knee ACL by not contesting the injury in accordance with Section 409.021.

The claimant appealed, asserting that since the carrier waived the right to contest the compensability of the right knee injury, it also waived the right to contest the compensability of the torn right knee ACL. The carrier responded, urging affirmance.

DECISION

Affirmed.

The parties stipulated that the claimant sustained a compensable injury on _____, and that the carrier did not contest compensability of the injury in accordance with Section 409.021. The claimant testified that the injury occurred when he tripped and fell forward while wearing stilts, landing on his hands and knees. On May 22, 2000, the claimant went to a clinic and the only injury to the right knee mentioned or diagnosed was a contusion. The treatment records between May 22 and July 28, 2000, make very little mention of the right knee, and there was no mention of any injurious condition to the right knee other than the contusion. The claimant ceased treating for his injuries on July 28, 2000, and the medical report from that date indicates that the claimant had been working regular duty. That same report reflects that the claimant was still having bilateral wrist pain, but makes no mention of the right knee.

The next medical record in evidence that mentions the right knee is dated April 19, 2002. This report indicates pain and stiffness in the right knee, and an MRI was recommended. A report dated December 23, 2002, indicates that the claimant may have a medial meniscal tear, and on December 31, 2002, internal derangement of the right knee was diagnosed. Finally, on March 8, 2004, a right knee MRI was performed and it showed a possible sprain or partial tear of the ACL. Clinical correlation was recommended. Based upon the evidence presented at the hearing, the hearing officer concluded that the mechanism of the injury supported a determination that the claimant sustained a compensable injury to his right knee in the form of a contusion. The hearing officer further determined that the claimant not only failed to prove that he had a torn ACL in his right knee, he also failed to prove that if he does have a torn ACL that it

was related to the fall at work. We find these determinations to be sufficiently supported by the evidence to be affirmed.

It is undisputed that the carrier waived its right to contest the compensability of the injuries to the claimant's bilateral wrists and knees. The question in this appeal is what injuries to the claimant's right knee are compensable as a result of that waiver. The hearing officer in effect determined that the carrier waiver was only to a right knee contusion and that whether the compensable injury includes a torn ACL presented a question of extent of injury. Before deciding the extent of a compensable injury based upon the carrier's waiver, the original injury must be defined. The hearing officer in this case defined the original injury as being a right knee contusion and this is supported by all of the medical records up until April 19, 2002.

Prior to the March 13, 2000, change to Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 124.3 (Rule 124.3), a carrier had 60 days to dispute the compensability of an injury or it waived the right to do so.[1] Based upon Appeals Panel decisions prior to March 13, 2000, every time the carrier was notified of a new diagnosis, condition, or claimed body part, the carrier had an additional 60 days from the date it received the notice to dispute the diagnosis, condition, or body part or it again waived. *See* Texas Workers' Compensation Commission Appeal No. 980822, decided June 3, 1998; Texas Workers' Compensation Commission Appeal No. 962415, decided January 10, 1997. In other words, prior to the adoption of Rule 124.3, the carrier would waive the extent of an injury if it failed to dispute the additionally claimed diagnosis, condition, or body part within 60 days of receiving notice.

When Rule 124.3 was changed effective March 13, 2000, it provided that the waiver provision of Section 409.021 does not apply to issues of extent of injury. The preamble for the change to Rule 124.3 states:

> Previously the rules were virtually silent on the issue of how to dispute extent of injury. This has led to numerous problems within the system. In the absence of guidance on this issue, the [A]ppeals [P]anel has attempted to provide some structure to this issue. One [A]ppeals [P]anel approach has suggested that when a doctor attempts to treat additional body parts/systems, … [Section] 409.021 (regarding Initiation of Benefits; Insurance Carrier's Refusal; Administrative Violation) is invoked and the carrier has 60 days to file a dispute for extent of injury or waive the right to dispute this issue and become liable for this body part/system. This rule does not adopt that interpretation.
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> [Section] 409.021, is intended to apply to the compensability of the injury itself or the carrier's liability for the claim as a whole, not individual aspects of the claim. When a carrier disputes the extent of an injury, it is not

[1] We note that this was prior to the Texas Supreme Court's holding in Continental Casualty Company v. Downs, 81 S.W.3d 803 (Tex. 2002), which held that the carrier only had seven days to pay or dispute a claim before it waived the right to contest compensability.

> denying the compensability of the claim as a whole, it is disputing an aspect of the claim. This is similar to when a carrier accepts a claim but disputes the existence of disability. A dispute of disability is a dispute of the amount of benefits that a person is entitled to. In much the same way, a dispute involving extent of injury is a dispute over the amount or type of benefits, specifically, medical benefits, to which the employee is entitled (i.e. what body areas/systems, injuries, conditions, or symptoms for which the employee is entitled to treatment); it is not a denial of the employee's entitlement to benefits in general.

As stated earlier, prior to deciding whether a case presents an issue of waiver or extent of injury, one must first define what the original injury was. In the instant case, the claimant sustained injuries to his bilateral wrists and knees on _____, and the carrier did not contest the compensability of the claim. Up until April 19, 2002, almost 2 years later, all of the treatment focused on the claimant's wrists and left knee. There is very little mention of the right knee prior to that date. The only diagnosis for the right knee prior to 2002 was a contusion.

Texas Workers' Compensation Commission Appeal No. 041738-s, decided September 8, 2004, established that when a carrier does not timely dispute the compensability of a claim, the compensable injury is defined by the information that could have been reasonably discovered by the carrier's investigation prior to the expiration of the waiver period. In the instant case, the carrier would have had no way to discover that there may be something more severely wrong with the claimant's right knee than a contusion until almost 2 years after the waiver period ended. As such, the hearing officer did not err in determining in effect that the compensable injury to the right knee was defined as a contusion, and that the new diagnosis became a question of extent of injury and waiver does not apply.

While we recognize that Appeal No. 041738-s dealt with body parts and not a later diagnosis to an accepted (waived into) body part, we find the rational and result to be the same.

The hearing officer's decision and order are affirmed.

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

HOWARD ORLA DUGGER
1702 NORTH COLLINS BOULEVARD, SUITE 200
RICHARDSON, TEXAS 75080.

_____
Daniel R. Barry
Appeals Judge

CONCUR:

_____
Thomas A. Knapp
Appeals Judge

CONCURRING OPINION:

I concur that the decision of the hearing officer can be affirmed. I would simply affirm it on the grounds that the hearing officer determined that there was no torn right anterior cruciate ligament. The hearing officer did not make a specific finding of fact stating this but clearly believes this to be the case when he states in his discussion of the evidence as follows:

> The Claimant pointed to the right knee MRI done in March 8, 2004, but [Dr. M] report does not really say Claimant had a torn right anterior cruciate ligament. Dr. M states that the ligament "appears slightly thin and inhomgeneous, though intact fibers do appear present", which findings "suggest sprain or partial tear". Claimant failed to prove by the greater weight of the credible evidence that he has or had a torn right anterior cruciate ligament, much less that the fall at work was a producing cause of that condition.

The hearing officer is the finder of fact and the hearing officer judges the credibility of the hearing officer. Since the hearing officer did not believe that the credible evidence established a torn right anterior cruciate ligament, the decision of the hearing officer may be affirmed based upon this belief not being contrary to the great

weight and preponderance of the evidence. I believe that the decision of the hearing officer may be affirmed upon this basis.

However, the majority has decided to go much further than this and use this case as vehicle for making broad pronouncements about carrier waiver and extent of injury with which I simply disagree. I think the majority's analysis creates a number of problems. I attempted to explain this in my dissenting opinion in Texas Workers' Compensation Commission Appeals Panel No. 971824, decided October 27, 1997, when I stated as follows:

> I also have difficulty with dividing body parts into components or diagnoses. As I have stated before, traditionally, extent of injury questions under the Texas workers' compensation law dealt with whether or not an injury extended to a certain body part. Thus, the question was framed in terms of whether the injury was confined to the lumbar spine or whether it extended to and affected the cervical spine. *See* 2 STATE BAR OF TEXAS, PATTERN JURY CHARGES, PJC 25.11 (1989). Such questions were not framed in the form of whether or not a particular diagnosis was part of the compensable injury. Diagnoses may evolve over time. It is not unusual that what was originally thought to be a strain or sprain is later diagnosed as a herniated disc problem. It is almost axiomatic that any spinal injury will initially be diagnosed as a strain or sprain and that, when failure of symptoms to resolve over time results in further testing, some of these will be diagnosed as disc problems.
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> Attempting to divide body parts into separate diagnoses is a road rife with pitfalls. First of all, it almost hopelessly confuses the doctrine of aggravation, which complicates questions of compensability and makes them far more medically technical. It also blurs and threatens to extinguish the burden to prove sole cause even when the defense is based upon an intervening injury. It can set preliminary diagnoses in stone, precluding the treatment or compensation of the whole injury, which sometimes can only be fully understood over the course of time. As Judge Rhodes noted recently in a concurring opinion in Texas Workers' Compensation Commission Appeal No. 971725, decided October 17, 1997.
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> The adjudication of the confines of an injury provides carriers with a vehicle to limit their liability for the payment of medical and income benefits. It also gives carriers a weapon to use against employees' claims of reasonable health care, disability and impairment after such an adjudication.
>
> This can make the promise of lifetime open medical benefits a hollow and false promise. It also means the question of injury may be perpetually relitigated under the aegis of extent of injury. We have already seen this

> attempted in cases dealing with the carrier's failure to contest compensability under Section 409.021(c). Carriers have argued that their failure to dispute only went to the original diagnosis and not to the body part. Texas Workers' Compensation Commission Appeal No. 961850, decided November 1, 1996.

Since I wrote these words nearly seven years ago, the problems to which Judge Rhodes and I alluded to above have become far worse. We see cases in which time after time the carrier argues that its waiver only goes to a very minor problem with the injured body part and that the serious injury that has been uncovered by later diagnostic testing was not waived. When the argument is successful it tends to render waive meaningless in that the carrier has essentially waived very little, or in some cases, nothing. This undermines the purpose of the waiver provision, which was intended to encourage the prompt adjustment of claims by providing a penalty for the carrier that fails to provide a basis for denying benefits while failing to pay benefits. Even when the argument is unsuccessful it delays medical treatment because it means that with each additional diagnosis of the same injury, the extent of injury can be brought back through the income dispute resolution system, slowing the delivery of medical treatment and the claimant's ability to recover from the injury so as return to work. I would even suggest that the frustration attendant to this constant litigation of medical treatment under the aegis of extent of injury is at least a contributing factor to the abandonment of the workers' compensation system by a number of medical providers.

I certainly do not believe that this endless relitigation of compensability was the intent of Rule 124.3. I would argue that in fact to avoid these problems is why the language cited by the majority from the preamble to the rules speaks of extent of injury in terms of body part, and not in terms of diagnosis.

I think the majority's opinion today, and particularly its designation as a significant case, will only aggravate the problems outlined above. I would simply affirm the hearing officer on the grounds that his finding that the claimant did not suffer a torn right ACL was sufficiently supported by the evidence.

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Gary L. Kilgore
Appeals Judge