

APPEAL NO. 060701-s
FILED MAY 23, 2006

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 March 7, 2006. The hearing officer resolved the disputed issues by deciding that the compensable injury sustained on ____, does not extend to and include lumbar spine MRI findings dated September 19, 2005 (1. Disc desiccation at L5-S1. 2. Right paramedian disc protrusion at L5-S1 with effacement of the right lateral recess and impingement on the descending right S1 and exiting L5 nerve roots), lumbar radiculopathy, and lumbar spondylosis; that the respondent (carrier) has not waived the right to contest compensability of the claimed injury by timely contesting the injury in accordance with Section 409.021; and that the appellant (claimant) does not have disability from November 9, 2005, through the date of the CCH as a result of an injury sustained on _____. The claimant appealed, disputing the extent of injury, waiver, and disability determinations. The carrier responded, urging affirmance.

DECISION

Affirmed in part and reversed and rendered in part and reversed and remanded in part.

The parties stipulated that the claimant sustained a compensable injury on ____, and that on August 30, 2005, the carrier received written notice of the claimed injury. The claimant testified she felt pain in her back while moving a 50-pound bag of popcorn kernels from the table to the floor so she could open it. The claimant sought medical treatment and a MRI dated September 19, 2005, was in evidence which gave the following impressions: 1. Disc desiccation at L5-S1 and 2. Right paramedian disc protrusion at L5-S1 with effacement of the right lateral recess and impingement on the descending right S1 and exiting L5 nerve roots. The claimant initially began treating with a chiropractor and was referred to an orthopedic spine surgeon. A medical report from the surgeon dated October 10, 2005, referenced the mechanism of injury and referred to the MRI of the lumbar spine and gave a diagnosis as disc displacement, spondylosis w/o myelopathy, and sprain lumbar region. The claimant had an EMG on February 24, 2006, which noted evidence of S1 radiculopathy on the right. In a Notice of Disputed Issue(s) and Refusal to Pay Benefits (PLN-11) dated September 15, 2005, the carrier disputed "all medical treatment, indemnity benefits, etc. for [claimant's] cervical and thoracic areas." In the PLN-11, the carrier stated it "is accepting a strain/sprain of [claimant's] lumbar area."

WAIVER

Section 409.021 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 Texas Department of Insurance, Division of Workers' Compensation (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. 28 TEX. ADMIN. CODE § 124.3(e) (Rule 124.3(e)) provides that Section 409.021 does not apply to disputes of extent of injury. In Appeals Panel Decision (APD) 041738-s, decided September 8, 2004, the Appeals Panel 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.

The evidence reflects that the carrier disputed the cervical and thoracic areas within the 60-day waiver period and specifically accepted a strain/sprain of the lumbar area. The question remains whether or not the carrier waived its right to contest any other conditions of the lumbar spine. The PLN-11 dated September 15, 2005, disputed compensability as follows:

Carrier respectfully denies all medical treatment, indemnity benefits, etc. for [claimant's] cervical and thoracic areas. Carrier is accepting a strain/sprain of [claimant's] lumbar area. Carrier contends the compensable injury of ___ does not include and extend to the thoracic and cervical areas.

The hearing officer found that the evidence established that the carrier informed the claimant, within 60 days from August 30, 2005 (carrier's receipt of written notice of the claimed injury) that they were accepting a lumbar sprain/strain as the compensable injury. The hearing officer then concluded that the carrier has not waived the right to contest compensability of the claimed injury by timely contesting the injury in accordance with Section 409.021. The evidence establishes that the carrier timely disputed any claimed thoracic and cervical injuries. The carrier did state it was accepting a lumbar strain/sprain injury but did not expressly limit its acceptance of a compensable injury to the specified condition. Prior Appeals Panel decisions have recognized that disputes containing limitation language are sufficient to dispute any injury other than the one specifically accepted. In APD 000119, decided March 6, 2000, the dispute contained the following language: "Carrier disputes that the compensable injury extends to both shoulders or any other body part. The compensable ___ injury is limited to the lumbar area only." In that case the hearing officer's determination that the carrier waived its right to contest compensability of the cervical injury was reversed and a new decision rendered that the carrier did not waive its right to contest the compensability of the cervical injury.

In APD 052689, decided January 27, 2006, the hearing officer's decision that the self-insured did not waive its right to dispute compensability as to an alleged injury to claimant's cervical spine was reversed and a new decision rendered that the self-

insured did waive its right to dispute compensability as to an alleged injury to the claimant's cervical spine. In that case the self-insured did not include the cervical spine in the conditions it specifically disputed nor did it dispute any and all conditions except the "chest pain" it identified as the compensable injury. Medical records existed within the waiver period, which revealed that the claimant had been diagnosed with having sustained a compensable injury to her cervical spine in that case.

Rule 124.2(j) provides that except as otherwise provided, carriers shall not provide notices to the [Division] that explain that the compensability is not denied but the carrier disputes the existence of disability. The PLN-11 filed by the carrier does not deny any part of an injury to the lumbar spine but rather accepts a lumbar sprain/strain and as previously noted did not contain any words of limitation for the condition it accepted.

The evidence reflects that the carrier through a reasonable investigation could have discovered that the MRI findings and lumbar spondylosis were claimed to be part of the compensable injury within the waiver period and it failed to deny these conditions either specifically or by limiting the lumbar condition it accepted. The EMG which revealed a positive lumbar radiculopathy finding however was not in existence on a date within the waiver period nor did any other medical record in evidence reference radiculopathy within the waiver period. We affirm the hearing officer's determination that the carrier has not waived the right to contest compensability of the claimed injury by timely contesting the injury in accordance with Section 409.021 as to lumbar radiculopathy. We reverse the hearing officer's determination that the carrier has not waived the right to contest compensability of the claimed injury by timely contesting the injury in accordance with Section 409.021 and render a determination that the carrier has waived the right to contest the compensability of the claimed injury by not timely contesting the lumbar spine MRI findings dated September 19, 2005, and lumbar spondylosis.

EXTENT OF INJURY

The hearing officer found that the evidence was insufficient and failed to causally relate the MRI findings of the lumbar spine, lumbar radiculopathy, and lumbar spondylosis to the compensable injury sustained on _____. Since we determined that the carrier waived its right to contest the compensability of the MRI findings of the lumbar spine and lumbar spondylosis these conditions have become compensable as a matter of law. We affirm the determination that the compensable injury sustained on _____, does not extend to and include lumbar radiculopathy. We reverse the determination that the compensable injury sustained on _____, does not extend to and include lumbar MRI findings dated September 19, 2005, and lumbar spondylosis and render a new determination that the compensable injury sustained on _____, does extend to and include lumbar MRI findings dated September 19, 2005, and lumbar spondylosis.

DISABILITY

The hearing officer was persuaded that due to the claimed injury the claimant was not unable to obtain or retain employment at wages equivalent to the claimant's preinjury wage beginning on November 9, 2005, through the date of the CCH. Since the MRI findings and lumbar spondylosis have become part of the compensable injury as a matter of law we remand the issue of disability to reexamine the evidence and make a determination regarding disability. No additional evidence should be considered.

We affirm the hearing officer's determination that the carrier did not waive its right to contest the compensability of lumbar radiculopathy. We affirm the hearing officer's determination that the compensable injury sustained on ____, does not extend to lumbar radiculopathy. We reverse the hearing officer's determination that the carrier has not waived the right to contest the compensability of the claimed injury by timely contesting the injury in accordance with Section 409.021 and render a new determination that the carrier has waived the right to contest the compensability of the lumbar spine MRI findings dated September 19, 2005 and lumbar spondylosis. We reverse the hearing officer's determination that the claimant does not have disability from November 9, 2005, through the date of the CCH as a result of an injury sustained on ____, and remand back to the hearing officer for action consistent with this decision.

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 of Hearings 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.

The true corporate name of the insurance carrier is **CUMIS INSURANCE SOCIETY, INCORPORATED** and the name and address of its registered agent for service of process is

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DALLAS, TEXAS 75244-5918.

Margaret L. Turner
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Robert W. Potts
Appeals Judge