

APPEAL NO. 062601-s  
FILED FEBRUARY 21, 2007

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 November 28, 2006. The hearing officer determined that the appellant's (claimant) compensable injury of \_\_\_\_\_, does not extend to and include tenosynovitis, carpal tunnel syndrome (CTS) and a ganglion cyst of the left wrist and that the respondent (carrier) did not waive the right to contest compensability of the claimed diagnoses of tenosynovitis, CTS and ganglion cyst of the left wrist by not timely contesting the injury in accordance with Sections 409.021 and 409.022.

The claimant appeals, contending that her employment did cause the claimed conditions and that the carrier could have reasonably discovered the claimed diagnoses/conditions within 60 days after receipt of written notice of the injury. The carrier responds urging affirmance and asserting that the claimant had failed to prove the claimed conditions were causally related to the compensable injury. The carrier also contends there was no waiver because the relevant medical records were received by the carrier "after the 60 day investigatory period's expiration."

DECISION

Affirmed in part and reversed and a new decision rendered in part.

The claimant was employed as a cashier at a large discount retailer warehouse and testified that she sustained a repetitive trauma type injury to her left upper extremity on \_\_\_\_\_. The parties stipulated that on \_\_\_\_\_, the claimant sustained a compensable injury and that the carrier received written notice of the claimed injury on January 24, 2006.

The claimant went to a hospital emergency room on January 18, 2006, where x-rays (report not in evidence) of her wrist were taken. The claimant subsequently sought treatment from Dr. B. In a report of an evaluation performed on January 25, 2006, Dr. B noted "repetitive-type lifting" at work, complaints of pain in the claimant's left wrist, and some residual tenderness over the radial ulnar joint. Although there was negative testing, Dr. B diagnosed synovitis and tenosynovitis. A headliner on the report states: "Mail Receive Date: 2006-02-13." (The significance of that notation will be discussed later.) The claimant then sought treatment from Dr. S on February 10, 2006. Dr. S listed a diagnosis of "tenosynovitis, left wrist" and noted full range of motion of the wrist with no swelling. X-rays of the left wrist were negative but Dr. S continued a diagnosis of tenosynovitis and neuropathy with noted complaints of pain and tingling in the left thumb and popping in the wrist. Dr. S continued the claimant in physical therapy and referred the claimant out for "an EMG/NCV of her left upper extremity, as well as, an MRI of her wrist" in a report dated March 6, 2006.

The MRI was performed on March 8, 2006, and the MRI report dictated March 9, 2006, showed no evidence of tenosynovitis but did note a small ventral ganglion cyst and noted the “carpal tunnel was without mass effect or edema.” A physical therapy note dated March 13, 2006, referred to the MRI indicating a synovial cyst and claimant’s referral for electrodiagnostic testing on March 21, 2006. The electrodiagnostic testing of the left upper extremity was performed on March 21, 2006. The report, dictated and transcribed March 22, 2006, discussed the claimant’s work and noted an abnormal electrodiagnostic study of the left upper extremity revealing evidence of CTS. The report concluded that the claimant had sustained a wrist sprain/strain and median neuropathy was noted as being “an incidental finding.” A report dated March 22, 2006, from Dr. S, listed diagnoses of tenosynovitis of the left wrist, a ganglion cyst of the left wrist and neuropathy. The report discussed the minimal carpal tunnel abnormality and recommended “possible surgical removal of her ganglion cyst and surgical correction of the mild [CTS].” The carrier disputed the diagnoses of left wrist tenosynovitis, of left ganglion cyst, neuropathy, radial nerve and CTS as not related to the “industrial injury” in a Notice of Disputed Issues and Refusal to Pay Benefits (DWC Form PLN-11) dated and filed April 26, 2006. The carrier in that form “asserts the compensable injury is for left wrist sprain/strain.”

## **WAIVER**

Section 409.021(a), effective for a claim for benefits based on a compensable injury that occurred on or after September 1, 2003, provides 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 begin the payment of benefits as required or notify the Texas Department of Insurance, Division of Workers’ Compensation and the claimant in writing of its refusal to pay benefits. Section 409.021(a-1) further provides that if an insurance carrier fails to comply with the 15th day requirement, the carrier does not waive its right to contest compensability but rather commits an administrative violation. Section 409.021(c) defines the waiver period. It provides that if an insurance carrier does not contest 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 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 an injury, 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 hearing officer, in her Background Information section, notes there was conflicting evidence and medical reports which failed to causally relate the claimed conditions to the compensable injury. The hearing officer noted that the MRI (performed on March 8, 2006, but possibly not transcribed until March 10, 2006) report was on the 46th day of the 60-day waiver period and the EMG/NCV was performed on the 56th day of the 60-day waiver period and therefore “the information could not have been discovered within the 60 day [waiver] period.”

We agree the 60-day waiver period was January 24 through March 25, 2006. The hearing officer and the carrier rely on a report dated April 5, 2006, from Dr. S, which indicated that the carrier was awaiting the results of the MRI and that the carrier had requested the MRI results from Dr. S on March 31, 2006, and they had been sent to the adjuster the same day by fax. (We note that March 31, 2006, is after the waiver period and there is no evidence that the MRI report was requested by the carrier within the waiver period.)

The carrier's position is that they did not know, and a reasonable investigation would not have discovered, the claimed conditions during the waiver period. At the CCH, the carrier asserted that it had not received the EMG/NCV testing until April 3, 2006, and Dr. S's March 22, 2006, report until April 4, 2006, as evidenced by a fax headliner which states "Mail Receive Date: 2006-04-03" and "Mail Receive Date: 2006-04-04" respectively. The claimant contends that Dr. B's January 25, 2006, report diagnosing synovitis and tenosynovitis has the exact same type of headliner date indicating the carrier's adjuster received Dr. B's January 25, 2006, report on February 13, 2006.

The carrier contends that the evidence indicates that the relevant medical records were received after the waiver period. The Appeals Panel has stated that the receipt date of a report does not control when it could have been reasonably discovered. In APD 060233, decided April 4, 2006, we held that "[t]he fact that the carrier actually received the diagnostic testing . . . outside the waiver period does not mean that the carrier could not have discovered the results of the diagnostic testing through a reasonable investigation prior to the expiration of the waiver period." In this case although there were conflicting medical reports, fairly clearly the claimant was diagnosed with synovitis and tenosynovitis as early as January 25, 2006 (with some evidence this was received by the carrier on February 13, 2006), the ganglion cyst was diagnosed in an MRI performed on March 8, 2006, which also notes "carpal tunnel is without mass or edema," and mild CTS was found in the electrodiagnostic testing performed on March 21, 2006. Dr. S, in his report of March 22, 2006 (the 57th day of the waiver period) recommended surgery for the ganglion cyst and the CTS.

The hearing officer's finding that the evidence established the carrier could not have reasonably discovered "the claimed diagnosis/conditions" within 60 days after receipt of written notice (on January 24, 2006) of the claimed injury is in part against the great weight and preponderance of the evidence. The carrier clearly could have had, and perhaps did have, the diagnosis of tenosynovitis in February 2006, and it could have discovered the testing results of the ganglion cyst in March 2006, prior to the end of the waiver period. The evidence from Dr. S's April 5, 2006, report, referred to by the hearing officer, suggests that the carrier did not even request the MRI report until after the waiver period. As previously stated the nature of the injury that becomes compensable by virtue of waiver 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 fact that there was conflicting medical evidence regarding causation does not relieve the carrier from timely disputing the claimed conditions.

Carpal tunnel is first mentioned in the report of the MRI performed on March 8, 2006, where it was noted that the carpal tunnel was without mass effect or edema. An electrodiagnostic study was performed on March 21, 2006, and transcribed March 22, 2006, which showed “a mild left demyelinating median neuropathy at the wrist ([CTS]), with no evidence of acute denervation or axonal loss at this time.” Dr. S, in his report dated March 22, 2006 (the 57th day of the 60-day waiver period) commented on the EMG “which identified a minimal carpal tunnel abnormality as well as decreased conductivity in the radial nerve on the left.” We hold that the hearing officer’s determination that the carrier could not have reasonably discovered the claimed diagnosis/condition of CTS within 60 days after receipt of written notice of the claimed injury is sufficiently supported by the evidence.

We affirm the hearing officer’s decision that the carrier did not waive the right to contest compensability of the claimed diagnosis of CTS by not timely contesting the injury. We reverse the hearing officer’s determination that the carrier did not waive the right to contest compensability of the claimed diagnoses of tenosynovitis and ganglion cyst of the left wrist and render a new decision that the carrier has waived its right to contest compensability of the claimed diagnoses of tenosynovitis and ganglion cyst of the left wrist by not timely contesting the diagnosed conditions in accordance with Section 409.021.

### **EXTENT OF INJURY**

Because the carrier waived its right to contest compensability of the diagnoses of tenosynovitis and a ganglion cyst of the left wrist, those conditions become compensable as a matter of law. The hearing officer’s determination that the compensable injury on \_\_\_\_\_, does not extend to and include tenosynovitis and a ganglion cyst of the left wrist is reversed and a new decision is rendered that the compensable injury of \_\_\_\_\_, does extend to include tenosynovitis, and a ganglion cyst of the left wrist. We affirm the hearing officer’s decision that the claimant’s compensable injury of \_\_\_\_\_, does not extend to include CTS.

### **SUMMARY**

We affirm the determinations that the compensable injury of \_\_\_\_\_, does not extend to include CTS and that the carrier did not waive the right to contest compensability of the claimed diagnosis of CTS. We reverse the hearing officer’s determinations that the carrier did not waive the right to contest compensability of the tenosynovitis and ganglion cyst of the left wrist by not timely contesting the claimed injury. We render a new decision that the compensable injury of \_\_\_\_\_, does extend to and include tenosynovitis and a ganglion cyst of the left wrist because the carrier waived the right to contest compensability of the claimed diagnoses of tenosynovitis and a ganglion cyst of the left wrist by not timely contesting the injury in accordance with Section 409.021.

The true corporate name of the insurance carrier is **AMERICAN HOME ASSURANCE COMPANY** and the name and address of its registered agent for service of process is

**CORPORATION SERVICE COMPANY  
800 BRAZOS SUITE 750 COMMODORE 1  
AUSTIN, TEXAS 78701.**

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Thomas A. Knapp  
Appeals Judge

CONCUR:

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Cynthia A. Brown  
Appeals Judge

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Margaret L. Turner  
Appeals Judge