

APPEAL NO. 090350  
FILED MAY 18, 2009

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 February 11, 2009. The issues before the hearing officer were:

- (1) Does the compensable injury of \_\_\_\_\_, extend to the diagnoses of: (1) bulging disc between L5-S1; (2) degenerative disc disease between L5-S1, with desiccation of the disc between L2-3 as well as L5-S1; (3) partial tear of the anterior cruciate ligament (ACL) of the left knee; and (4) the cervical spine, including bulging disc(s) in the cervical spine?
- (2) Has respondent 1 (self-insured) waived the right to dispute the diagnoses of: (1) bulging disc between L5-S1; (2) degenerative disc disease between L5-S1, with desiccation of the disc between L2-3 as well as L5-S1; and (3) partial tear of the ACL of the left knee in accordance with Section 409.021?

With regard to the extent-of-injury issue, the hearing officer determined that the compensable injury of \_\_\_\_\_, extends to the diagnosis of a partial tear of the ACL of the left knee. The hearing officer determined that the compensable injury of \_\_\_\_\_, does not extend to the diagnoses of: (1) a bulging disc between L5-S1; (2) degenerative disc disease between L5-S1, with desiccation of the disc between L2-3 as well as L5-S1; and (3) the cervical spine, including bulging disc(s) in the cervical spine.

With regard to the carrier waiver issue, the hearing officer determined that the self-insured waived the right to dispute the diagnosis of a partial tear of the ACL of the left knee by not timely disputing the claimed condition in accordance with Section 409.021. The hearing officer determined that the self-insured did not waive the right to dispute the diagnoses of: (1) a bulging disc between L5-S1; and (2) degenerative disc disease between L5-S1, with desiccation of the disc between L2-3 as well as L5-S1 by timely disputing the claimed conditions in accordance with Section 409.021.

The appellant (claimant) appealed the hearing officer's extent of injury and carrier waiver determinations that were adverse to the claimant. The self-insured responded, urging affirmance. The appeal file does not contain a response from respondent 2 (subclaimant). The hearing officer's extent of injury and carrier waiver determinations with regard to a partial tear of the ACL of the left knee were not appealed and have become final pursuant to Section 410.169.

## DECISION

Affirmed in part and reversed and rendered in part.

### 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 Texas Department of Insurance, Division of Workers' Compensation 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 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 claimant testified that he sustained a left knee and back injury at work on \_\_\_\_\_. The parties stipulated that: (1) the claimant sustained a compensable injury on \_\_\_\_\_; and (2) the self-insured received first written notice of an injury on August 7, 2006. The expiration of the 60-day waiver period is therefore October 6, 2006.

In evidence is an x-ray of the lumbar spine dated August 10, 2006, which gives an impression of "[m]inimal subluxation of L2 on L3 and L3 on L4 presumably on a degenerative basis with degenerative facet changes at these levels. This can be further evaluated with MRI if clinically needed." An MRI of the lumbar spine dated August 16, 2006, states that at level L2-3 "[t]here is disc [desiccation] and a mild posterior disc bulge. There is no significant narrowing of the lateral recess or neural [foramina]" and at level L5-S1 "[t]here is disc space narrowing and disc [desiccation]. There is a small central disc protrusion without narrowing of the lateral recesses or neural foramina." A medical report dated August 31, 2006, from Dr. B, the treating doctor, shows diagnoses of: (1) bulging disc between L5-S1; (2) degenerative disc disease between L5-S1 with desiccation of the disc between L2-3 as well as L5-S1; and (3) lumbosacral muscular strain.

The self-insured filed a Notice of Disputed Issue(s) and Refusal to Pay Benefits (PLN-11) on September 19, 2006, which states:

We are disputing entitlement of benefits for Anterior Subluxation of L3 on L2 and L4 on L3, Small Anterior Osteophytes and Degenerative Facet Changes of the Lumbar Spine because:

The diagnoses referenced above are considered to be ordinary diseases of life to which the general public is exposed, with work placing you at no greater risk than the general public. Claimant suffers from pre-existing medical conditions with normal progression, which was not aggravated nor exacerbated by the incident of \_\_\_\_\_. Does not flow from, extend to, or relate to the incident of \_\_\_\_\_.

In evidence is another PLN-11 dated January 16, 2007, after the expiration of the 60-day waiver period, that states that the self-insured is disputing the diagnoses of “bulging disc between L5-S1 and degenerative disc disease between L5-S1 with desiccation of the disc between L2-3 as well as L5-S1” because the injury of \_\_\_\_\_, is limited to a left knee and lumbar strain only.

In the Background Information section of the hearing officer’s decision, the hearing officer states that “[t]he PLN-11 filed on September 19, 2006 contained sufficient language to notify the claimant that the self-insured was disputing the alleged disc pathology of the lumbar spine.” Therefore, the hearing officer determined that the self-insured did not waive the right to contest compensability of the diagnoses of a bulging disc between L5-S1 and degenerative disc disease between L5-S1, with desiccation of the disc between L2-3 as well as L5-S1 by timely disputing the claimed conditions in accordance with Section 409.021.

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 the 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. In that case, 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 the instant case, the evidence establishes that the self-insured could have reasonably discovered by the self-insured’s investigation prior to the expiration of the waiver period the diagnoses of a bulging disc between L5-S1 and degenerative disc disease between L5-S1, with desiccation of the disc between L2-3 as well as L5-S1 based on an MRI dated August 16, 2006, and a medical report dated August 31, 2006, from Dr. B. The hearing officer erred in determining the PLN-11 filed on September 19, 2006, contained sufficient language to dispute the diagnoses of a bulging disc between L5-S1 and degenerative disc disease between L5-S1, with desiccation of the disc between L2-3 as well as L5-S1, because the PLN-11 specifically limited its dispute to the diagnoses listed in the x-ray dated August 10, 2006. The evidence establishes that the self-insured did not file a dispute contesting compensability of the conditions listed in the carrier waiver issue prior to the expiration of the 60-day carrier waiver period, rather the self-insured filed a PLN-11 after the expiration of the 60-day waiver period, disputing the conditions listed in the carrier waiver issue.

Accordingly, we reverse the hearing officer's determination that the self-insured did not waive the right to dispute the diagnoses of: (1) a bulging disc between L5-S1; and (2) degenerative disc disease between L5-S1, with desiccation of the disc between L2-3 as well as L5-S1 by timely disputing the claimed conditions in accordance with Section 409.021, and we render a new decision that the self-insured waived the right to dispute the diagnoses of: (1) a bulging disc between L5-S1; and (2) degenerative disc disease between L5-S1, with desiccation of the disc between L2-3 as well as L5-S1 by not timely disputing the claimed conditions in accordance with Section 409.021.

### **EXTENT OF INJURY**

That portion of the hearing officer's determination that the compensable injury of \_\_\_\_\_, does not extend to the cervical spine, including bulging disc(s) in the cervical spine is supported by sufficient evidence and is affirmed.

Given that we have reversed a portion of the carrier waiver issue with regard to the lumbar spine and we rendered a new decision that the self-insured waived the right to dispute the diagnoses of: (1) a bulging disc between L5-S1; and (2) degenerative disc disease between L5-S1, with desiccation of the disc between L2-3 as well as L5-S1 by not timely disputing the claimed conditions in accordance with Section 409.021, those conditions became compensable by virtue of carrier waiver. Accordingly, we reverse that portion of the hearing officer's decision that the compensable injury of \_\_\_\_\_, does not extend to the diagnoses of: (1) a bulging disc between L5-S1; and (2) degenerative disc disease between L5-S1, with desiccation of the disc between L2-3 as well as L5-S1 and we render a new decision that the compensable injury of \_\_\_\_\_, extends to the diagnoses of: (1) a bulging disc between L5-S1; and (2) degenerative disc disease between L5-S1, with desiccation of the disc between L2-3 as well as L5-S1, by virtue of carrier waiver.

### **SUMMARY**

We affirm that portion of the hearing officer's extent-of-injury determination that the compensable injury of \_\_\_\_\_, does not extend to the cervical spine, including bulging disc(s) in the cervical spine.

We reverse that portion of the hearing officer's carrier waiver determination that the self-insured did not waive the right to dispute the diagnoses of: (1) a bulging disc between L5-S1; and (2) degenerative disc disease between L5-S1, with desiccation of the disc between L2-3 as well as L5-S1 by timely disputing the claimed conditions in accordance with Section 409.021, and we render a new decision that the self-insured waived the right to dispute the diagnoses of: (1) a bulging disc between L5-S1; and (2) degenerative disc disease between L5-S1, with desiccation of the disc between L2-3 as well as L5-S1 by not timely disputing the claimed conditions in accordance with Section 409.021.

We reverse that portion of the hearing officer's decision that the compensable injury of \_\_\_\_\_, does not extend to the diagnoses of: (1) a bulging disc between L5-S1; and (2) degenerative disc disease between L5-S1, with desiccation of the disc between L2-3 as well as L5-S1 and we render a new decision that the compensable injury of \_\_\_\_\_, extends to the diagnoses of: (1) a bulging disc between L5-S1; and (2) degenerative disc disease between L5-S1, with desiccation of the disc between L2-3 as well as L5-S1, by virtue of carrier waiver.

The true corporate name of the insurance carrier is **(a self-insured governmental entity)** and the name and address of its registered agent for service of process is

**SUPERINTENDENT  
(ADDRESS)  
(CITY), TEXAS (ZIP CODE).**

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Veronica L. Ruberto  
Appeals Judge

CONCUR:

\_\_\_\_\_  
Cynthia A. Brown  
Appeals Judge

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Margaret L. Turner  
Appeals Judge