

APPEAL NO. 091292
FILED OCTOBER 29, 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 July 24, 2009. The issues before the hearing officer were:

- (1) Does the compensable injury of _____, extend to the diagnosed conditions of right knee anterior cruciate ligament (ACL) tear, post-traumatic arthritis/osteoarthritis of the right knee, and/or internal disruption of the right knee? (the right knee ACL tear condition was resolved by stipulation)
- (2) Has the appellant (carrier) waived the right to contest compensability of the diagnosed conditions of right knee ACL tear, post-traumatic arthritis/osteoarthritis of the right knee, and/or internal disruption of the right knee by not timely contesting the diagnoses in accordance with Section 409.021?

The parties resolved a portion of the disputed extent-of-injury issue by stipulating that the compensable injury of _____, extends to a right knee ACL tear.

The hearing officer determined that: (1) respondent's 1 (claimant) compensable injury of _____, extends to the diagnosed conditions of right knee ACL tear, post-traumatic arthritis/osteoarthritis of the right knee, and internal disruption of the right knee; and (2) the carrier waived the right to contest compensability of the diagnosed conditions of right knee ACL tear, post-traumatic arthritis/osteoarthritis of the right knee, and/or internal disruption of the right knee by not timely contesting the diagnoses in accordance with Section 409.021.

The carrier appealed the hearing officer's determinations that: (1) the claimant's compensable injury of _____, extends to post-traumatic arthritis/osteoarthritis of the right knee, and internal disruption of the right knee; and (2) the carrier waived the right to contest compensability of the diagnosed conditions of right knee ACL tear, post-traumatic arthritis/osteoarthritis of the right knee, and/or internal disruption of the right knee. The claimant responded to the carrier's appeal, urging affirmance. Respondent 2 (subclaimant) did not respond to the carrier's appeal.

DECISION

Affirmed in part, reversed and rendered in part.

FACTUAL SUMMARY

The claimant testified that he sustained a work-related right knee injury when he stepped off of a fork lift on _____. The parties stipulated that on _____, the claimant sustained a compensable injury to his right knee in the form of a sprain/strain, and that the compensable injury of _____, extends to a right knee ACL tear.

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 (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. 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.

In State Office of Risk Mgmt. v. Lawton,¹ 2009 Tex. LEXIS 629 (Tex. August 28, 2009), the Texas Supreme Court held that the interpretation given in APD 041738-s, *supra*, would eliminate the distinction between compensability and extent of injury. In Lawton, the carrier agreed the claimant had a compensable injury. Similarly, in the instant case, the carrier agreed the claimant had a compensable injury and later disputed the extent of that injury. We find the reasoning set forth in the Lawton decision applicable to the facts in the case at issue. Accordingly, we reverse the hearing officer's decision that the carrier waived the right to contest compensability of the diagnosed conditions of right knee ACL tear, post-traumatic arthritis/osteoarthritis of the right knee, and/or internal disruption of the right knee and we render a new decision that the carrier did not waive its right to contest the claimed conditions in accordance with Section 409.021.

EXTENT OF INJURY

The hearing officer found that "[o]n _____, the claimant did sustain internal disruption of the right knee, specifically: an [ACL] tear." That portion of the hearing officer's determination that the claimant's compensable injury of _____, extends to internal disruption of the right knee is supported by sufficient evidence and is affirmed.

¹ We note that the decision in Lawton, *supra*, is not yet final until opportunities for rehearing have been exhausted.

In the Background Information section of the decision, the hearing officer made it clear that he did not believe the pre-existing arthritis/osteoarthritis condition was part of the compensable injury on the merits. The hearing officer found that “[t]here [was] insufficient evidence to establish that the pre-existing arthritis/osteoarthritis in the claimant’s right knee was aggravated by the compensable injury.” The hearing officer determined the compensable injury extends to post-traumatic arthritis/osteoarthritis of the right knee, by virtue of carrier waiver. Given that we have reversed the hearing officer’s carrier waiver determination, we reverse the hearing officer’s determination that the compensable injury extends to post-traumatic arthritis/osteoarthritis of the right knee and we render a new decision that the compensable injury does not extend to post-traumatic arthritis/osteoarthritis of the right knee.

SUMMARY

We affirm the hearing officer’s determination that the claimant’s compensable injury of _____, extends to internal disruption of the right knee.

We reverse the hearing officer’s determination that the compensable injury of _____, extends to post-traumatic arthritis/osteoarthritis of the right knee and we render a new decision that the compensable injury does not extend to post-traumatic arthritis/osteoarthritis of the right knee.

We reverse the hearing officer’s decision that the carrier waived the right to contest compensability of the diagnosed conditions of right knee ACL tear, post-traumatic arthritis/osteoarthritis of the right knee, and/or internal disruption of the right knee and we render a new decision that the carrier did not waive its right to contest the claimed conditions in accordance with Section 409.021.

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

**RUSSELL OLIVER, PRESIDENT
6210 EAST HIGHWAY 290
AUSTIN, TEXAS 78723.**

Veronica L. Ruberto
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Margaret L. Turner
Appeals Judge