CAUSE NO. 05-10799A

MID-CENTURY INSURANCE COMPANY	§	**IN THE DISTRICT COURT OF**
	§	
Plaintiff	§	
v.	§	**DALLAS COUNTY, TEXAS**
	§	
ROBERT L. FREDERICK,	§	
	§	
Defendant	§	**14TH JUDICIAL DISTRICT**

DEFENDANT'S MOTION FOR NEW TRIAL
AND, ALTERNATIVELY, MOTION FOR RECONSIDERATION
OF FINAL SUMMARY JUDGMENT

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW Defendant Robert L. Frederick ("Claimant"), and files this Motion for New Trial and, Alternatively, Motion for Reconsideration of Final Summary Judgment, and would respectfully show the Court as follows.

I. Introduction

This Court's summary judgment of September 13, 2006, which reverses a decision of the Department of Workers' Compensation Appeals Panel ("Appeals Panel"), is contrary to the intent and purpose of the Texas Workers' Compensation Act ("TWCA") as well as the Division of Workers' Compensation,[1] as reflected in innumerable DWC Appeals Panel decisions. This motion for reconsideration is filed to show the inaccuracy and misleading nature of Mid-Century's arguments. By virtue of those arguments, Mid-Century achieved a result that contravened Texas law and policy.

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[1]The Texas Department of Insurance's Division of Workers' Compensation ("DWC") administers the Texas Workers' Compensation Act. The DWC assumed the responsibilities of the former Texas Workers' Compensation Commission effective September 1, 2005. For ease of reference, all references in this brief to the governmental body administering the Texas Workers' Compensation Act will be to the DWC. The Appeals Panel decision at issue in this case is attached as Exhibit A.

II.

Legal Standard

A trial court has broad discretion to grant a new trial. *Champion Int'l Corp. v. Twelfth Court of Appeals*, 762 S.W.2d 898, 899 (Tex. 1988). Specifically, a court may grant a new trial "for good cause, on motion or on the court's own motion." TEX. R. CIV. P. 320. The grounds that may justify a new trial include, but are not limited to, (a) factual and legal insufficiency of the evidence to support a judgment, (b) the fact that a jury finding is immaterial or contrary to the overwhelming weight of the evidence, and (c) the interests of justice. *See Champion Int'l Corp.*, 762 S.W.2d at 899; *Cecil v. Smith*, 804 S.W.2d 509, 510 (Tex. 1991). A motion for new trial is an appropriate means of challenging a summary judgment to "point out reasons why the judgment was wrongly entered with the possibility that the expense and delay of an appeal might be obviated." *Thomley v. Southwood-Driftwood Apts., Ltd.*, 961 S.W.2d 6, 8 (Tex. App.—Amarillo 1996, no pet. h.).

III.

The Court Should Reconsider its Acceptance of Mid-Century's "No Waiver" Arguments

This Court's September 13, 2006, summary judgment order reversed a decision of the Workers' Compensation Appeals Panel based on the Court's finding that Plaintiff Mid-Century Insurance Company ("Mid-Century") had not waived its right to contest compensability of Claimant's injury. Any consideration of waiver under the Worker's Compensation laws must begin with the statute that provides for it. The applicable waiver provision, Texas Labor Code Section 409.021, states in relevant part:

> 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. The initiation of payments by an insurance carrier does not affect the right of the insurance carrier to

> continue to investigate or deny the compensability of an injury during the 60-day period.

TEX. LAB. CODE § 409.021(c).

Here, it is undisputed that Mid-Century did not contest Frederick's claimed injuries within 60 days of the date that Mid-Century received written notice of Frederick's work-related injury.[2] Therefore, presumptively, Mid-Century waived its right to contest compensability of that injury, as the DWC Appeals Panel held. However, Mid-Century's motion for summary judgment invoked several misleading, confusingly presented arguments and red herrings which are contrary to the statute and turn long-standing DWC policy on its head. Those arguments are dissected and negated below.

A. Mid-Century's "Ordinary Disease of Life" Theory

Mid-Century's motion is permeated by expressions of righteous indignation at the notion that the Workers' Compensation laws could ever cover "ordinary diseases of life." However, whether Claimant's condition is an "ordinary disease of life" is *irrelevant* to a waiver determination. Mid-Century's fanciful and false arguments about this being contrary to the statute[3] or commissioners' intent or legislature's intent[4] were improperly designed to influence this Court into thinking that the DWC Appeals Panel did something incorrect or unlawful. It is therefore important to make clear

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[2] *See* Plaintiff's Responses to Requests for Admissions, attached as Exhibit A to Defendant's Motion for Summary Judgment, at 1, 5 and 6.

[3] *See, e.g.*, Plaintiff's Motion at 2 (asserting that the Appeals Panel's view that "an insurance carrier can waive an extent of injury dispute so that an ordinary disease of life . . . is deemed to be a work-related injury is entirely inconsistent with the express language of the Texas Workers' Compensation Act and the intent of the DWC Commissioners.").

[4] *See, e.g.*, Plaintiff's Motion at 7-8 ("Apparently, the Appeals Panel was not concerned that it had 'deemed' compensable a medical condition that the doctors and the hearing officer said was not caused by the work incident, thus making workers' compensation insurance cover an ordinary disease of life that the legislature never envisioned would be converted by an unsupported legal device created by the agency – waiver – into a work injury.").

at the outset that the policy of the DWC – as expressed through its administrative decisions for years, as well as in Texas case law – is that an "ordinary disease of life" is covered if the carrier waives its right to dispute compensability by failing to object within sixty days after receiving notice of a claim.

This policy was upheld in *Zurich American Ins. Co. v. Gill,* 173 S.W.3d 878 (Tex. App.---Fort Worth 2005, pet. denied). In *Gill*, the claimant had lifelong allergy problems. *Id.* at 879-80. She was diagnosed with allergic rhinitis and maxillary sinusitis after she found ceiling tiles containing stachybotrys mold in her office. *Id.* at 880. The carrier did not contest compensability of her injury within 60 days of its receipt of notice. The appeals panel held that the carrier waived the compensability issue by failing to timely contest compensability, despite the contested case hearing officer's finding that her conditions were ordinary diseases of life and not an occupational disease. The carrier filed suit in district court, which affirmed the waiver finding, and then appealed. On appeal, the carrier argued that waiver did not prevent it from disputing the *occurrence* of any injury, as opposed to its compensability, citing *Continental Casualty Co. v. Williamson*, 971 S.W.2d 108 (Tex. App.---Tyler 1998, no pet.).[5]

The court of appeals rejected the carrier's argument based on numerous decisions of the DWC Appeals Panel: "[T]he Workers' Compensation Commission Appeals Panel has repeatedly and consistently held that *Williamson* applies to situations where there is a determination that the claimant did not have an injury, as opposed to cases where there is an injury or disease which was determined by the hearing officer not to be causally related to the claimant's employment." *Gill*, 173 S.W.3d at 885. Thus, "because the hearing officer found that [the claimant] Gill had an injury,

[5]The court in *Williamson* had held that a carrier's failure to contest compensability cannot create an injury *where no injury exists*. Mid-Century's reliance on this case is obviously misplaced for the reasons discussed in *Gill* and elsewhere in this motion.

Williamson does not apply to this case. Consequently, Zurich's sole issue is whether Gill had an 'injury.'" *Id.* at 885.

The court of appeals in *Gill* found that although the claimant's "ordinary disease of life" was not an occupational disease, it was still an "injury" under the applicable definition of injury in Section 401.011(26) of the Labor Code.[6] The relevant question was whether the claimant's condition "qualif[ied] as damage or harm to the physical structure of the body and a disease or infection naturally resulting from the damage or harm." *Id.* at 885-86. The court found that "[b]ecause Gill's chronic allergic rhinitis and maxillary sinusitis resulted in the malfunctioning of the physical structure of the body," the AP's finding of an injury was not contrary to the overwhelming weight of the evidence. *Id.* at 886. The court then concluded:

> Consequently, we hold that . . . although Gill's condition was an ordinary disease of life, not incident to a compensable injury or occupational disease, her condition was an 'injury' for purposes of section 401.011(26) of the Texas Labor Code. Thus, because Zurich cannot contest the compensability of the injury, it owes medical benefits to Gill.

Id. at 886. Cases following *Gill* include *Alexander v. Lockheed Martin Corp.*, 188 S.W.3d 348 (Tex. App.---Fort Worth 2006, pet. filed) (carrier waived right to object to compensability on grounds that the claimant's injury was not work-related, reversing trial court's summary judgment for carrier); *State Office of Risk Mgmt. v. Peeples*, No. 07-04-0408-CV, 2006 WL 2056684 (Tex. App.–Amarillo July 25, 2006, no pet. h.) (carrier waived right to object to compensability on grounds that the claimant's injury was not work-related). There are no contrary cases.

The DWC has long applied the same policy. For instance, in Appeal No. 032731 (Dec. 8, 2003) (Exh. B), the claimant was diagnosed with lead poisoning, as to which the carrier contested

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[6]Section 401.011(26) states: "'Injury' means damage or harm to the physical structure of the body and a disease or infection naturally resulting from the damage or harm. The term includes an occupational disease." TEX. LAB. CODE § 401.011(26).

compensability after the 60-day notice period had expired. The hearing officer agreed with the carrier that the lead poisoning was not a compensable occupation disease injury in the course and scope of the claimant's employment. Although the hearing officer found that the carrier had waived the right to contest compensability, he nevertheless applied *Williamson* to preclude compensability. The appeals panel reversed, stating: "We have interpreted *Williamson* to meant that a carrier's failure to timely dispute does not create an injury only when there is no injury. However, if the claimant has established a condition that meets the definition of injury under Section 401.011(26), it does not matter that the cause of the injury may be outside the course and scope of employment because causation is no longer in dispute when the carrier waivers the right to dispute compensability." *Id.* at 2 (citing Appeals Nos. 992584 and 981640). The appeals panel concluded that since lead poisoning was an injury under Section 401.011(26), the injury was compensable due to the carrier's waiver of the right to dispute compensability. *Id.*

Similarly, in Appeal No. 991720 (undated) (Exh. C), the panel found that the carrier had waived the right to contest compensability of the claimant's hepatitis, which was therefore compensable despite the hearing officer's finding that there was insufficient evidence that the claimant's hepatitis was caused by his work. *Id.* at 2.

It could not be otherwise. If a carrier could contest the compensability of an injury after 60 days by claiming that it is not a work-related injury but an ordinary disease of life, there would be no consequences to waiver. Section 409.021's requirement that these matters must be raised within 60 days would have no meaning. Not only is it *not* contrary to Section 409.021 for Mid-Century to pay benefits related to an "ordinary disease of life" in a waiver situation, but it is *mandated* by Section 409.021 when waiver occurs. Any other result would write Section 409.021 out of existence. *See, e.g.,* Appeal No. 001258 (no date) (Exh. D) ("The carrier, in its appeal, would have

us expand Williamson to apply to those case where there is an injury, but the claimant fails to prove the injury was work related. This we decline to do because we do not believe it to be the correct interpretation of Williamson and because to so hold would effectively eliminate from the 1989 Act the requirement to timely dispute.").

In light of the foregoing uncontradicted authorities, which Mid-Century never mentions or attempts to distinguish, it is difficult to fathom how Mid-Century could justify arguing that *Williamson* stands for the proposition that "failure to timely contest compensability of ordinary diseases of life cannot as a matter of law result in those ordinary diseases of life becoming injuries within the meaning of the Act because ordinary diseases of life are excluded by definition of what constitutes an injury." Motion at 16. It is even more difficult to explain how, notwithstanding the careful parsing of the term "injury" in *Gill*, Mid-Century could represent to this Court that "ordinary diseases of life" are excluded from that term. As *Gill* makes clear, and as reflected in dozens of Appeals Panel decisions addressing the issue, a claimant may have an "injury" regardless of whether it was work-related or whether it was an "ordinary disease of life."

Here, Mid-Century failed to allege or establish before this Court that Frederick's degenerative disc disease and disc bulge at L5-S1 do not constitute an injury under the definition in *Gill* and the TWA. In fact, Mid-Century never even raised this argument before the hearing officer or the Appeals Panel, so the issue is waived. *Krueger v. Atacosa County*, 155 S.W.3d 614, 619 (Tex. App.–San Antonio 2004, no writ) ("[A] party may not raise an issue in the trial court which was not raised before the TWCC Appeals Panel."). Therefore, *Williamson* does not apply.

Thus, Mid-Century's assertion that "as a matter of law, a workers' compensation insurance carrier cannot be liable to pay for medical treatment for an ordinary disease of life"[7] is transparently

[7]Plaintiff's Motion at 2.

incorrect and contrary to the law. The Appeals Panel properly concluded, under Texas law and established DWC policy, that Mid-Century had waived the right to contest the compensability of Claimant's injury on the ground that it was an "ordinary disease of life."

B. Mid-Century's "Extent of Injury" Theory

Mid-Century argued in its motion for summary judgment that this case is all about the extent of the Claimant's injury, and that "extent of injury" challenges cannot be waived. *See* Plaintiff's Motion at 2 ("As a matter of law, a workers' compensation insurance carrier cannot waive its right to dispute the extent of an injury."); *id.* at 8 ("The concept of waiver simply does not apply to a dispute over the extent of an injured worker's compensable injury."); *id.* at 8 (citing Rule 124.3 of the Texas Administrative Code, which provides that "Texas Labor Code, §409.021 and subsection (a) of this section do not apply to disputes of extent of injury"). Mid-Century then stated that "the Appeals Panel effectively held that Plaintiff Mid-Century waived its right to dispute the *extent* of Defendant Frederick's injury." Motion at 8.

Mid-Century's "extent of injury" argument is a blatant straw man. Mid-Century failed to apprise this Court of the steady stream of DWC Appeals Panel decisions that have refused to permit carriers to recast waiver issues into "extent of injury" issues on facts similar to this case. The DWC Appeals Panel properly held, under long-established DWC precepts and case law, that this was *not* an "extent of injury" case, using the accepted analysis set out below.

Under DWC standards, the first question to be addressed in determining an "extent of injury"[8] question is: What is the compensable injury? Appeal No. 042048-S (Oct. 11, 2004) (Exh. F), at 2 ("Before deciding the extent of a compensable injury based upon the carrier's waiver, the

[8]There is no statutory definition of "extent of injury." Appeal No. 021907, Sept. 16, 2002, at 6 (Exh. E).

original injury must be defined."). If the compensable injury includes the injuries that the carrier is now trying to dispute on "extent of injury" grounds, then the carrier will not be permitted to invoke "extent of injury" to avoid waiver. A determination of what the "compensable injury" consists of is *not* determined by the words in the original notice of injury, but by what the carrier could have learned by investigating the claimant's claim during the 60-day post-notice period:

> [T]he injury that becomes compensable by virtue of waiver is not necessarily limited by the information listed on the first written notice of injury. ***Rather the nature of the injury will be defined by that information that could have been reasonably discovered in the carrier's investigation prior to the expiration of the waiver period***. In this case, it is apparent that the TWCC-41 could have been reasonably discovered in that period. Accordingly, the hearing officer properly determined, in accordance with the TWCC-41, that the low back and the left leg became compensable due to the carrier's waiver of its right to contes compensability.

Appeal No. 041738-S, Sept. 8, 2004, at 3 (Exh. G) (emphasis added). The DWC Appeals Panel specifically *rejected* the notion that a carrier could raise an "extent of injury" argument about matters that it failed to identify during the 60-day notice period:

> [T]o forestall the Texas Supreme Court decision in Continental Casualty Company v. Downs, No. 00-1309 (June 6, 2002) from inspiring a rash of 'extent' issues . . . we will respond to the carrier's contention that the hearing officer erred in converting the reported 'extent of injury' issue regarding the spine into a straight compensability issue. We find no error on the hearing officer's part . . . . We agree that the 1989 Act does not contemplate multiple notices of injury and responses thereto. It is the first written notice of an injury . . . which begins the 7- and 60-day deadlines set out in Section 409.021 . . . . ***It is the carrier's active investigation upon receipt of the TWCC-1 that should supply the diagnoses and scope of the reported injury.***

Appeal No. 021907, Sept. 16, 2002, at 4-5 (Exh. E) (emphasis added).

Here, in spite of the clear standards set out repeatedly by the DWC as set out above, Mid-Century misrepresented in its motion that the scope of the injury is established by "the *initial report* notifying Plaintiff Mid-Century that Defendant Frederick sustained an injury on August 5, 2002 in the form of a low back injury." Motion at 10. Claimant did not even attach a copy of the initial

report of injury, so even if this were the correct standard, Claimant's proof fails.[9] But it is not the correct standard for establishing the scope of the original injury.

Under the correct standard – what Mid-Century could reasonably have discovered within 60 days of Claimant's injury – the Appeals Panel's decision was clearly correct. The Appeals Panel 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." Exh. A, at 2. The Appeals Panel found that the Claimant's original injury included degenerative disc disease and disc bulge at L5-S1, based on its finding that Mid-Century could readily have discovered that claimant's claim of back injury included degenerative disc disease and disc bulge at L5-S1:

> "[T]he record is replete with evidence, which indicates that a disc bulge and degenerative conditions reflected in the medical records could have been discovered by the carrier within the 60-day period from the carrier's first written notice of the claimed injury."
>
> "The following medical records dated within the 60-day waiver period were in evidence: (1) a magnetic resonance imaging (MRI) dated August 8, 2002, which listed as a finding a mild diffuse bulge at L5-S1 and noted degenerative changes; (2) a nerve conduction study dated September 11, 2002, which gave as the interpretation that the claimant had at least a right L5-S1 radiculopathy; (3) an EMG dated September 20, 2002, which stated the results were suggestive of left S1 radiculopathy; and (4) a medical report from (Dr. S), dated October 3, 2002, states the claimant's MRI is indicative of a lumbar disc bulge and listed lumbar radiculopathy as an impression with a suggested treatment plan of a series of three epidural steroid injections.

[9]Factual assertions unsupported by evidence cannot serve as the basis for a motion for summary judgment. *See, e.g., Trunkhill Capital, Inc. v. Jansma*, 905 S.W.2d 464, 469 (Tex. App.–Waco 1995, writ denied).

Exh. A, at 2.[10] Thus, the Appeals Panel properly concluded that "the carrier may not now prevail on an issue regarding extent of injury that concerns *the claimed injury itself*." *Id.* at 3.

To show that the Appeals Panel was wrong as a matter of law in its determination of the scope of Claimant's compensable injury, Mid-Century needed to establish as a matter of law[11] that it could *not* have discovered from the medical records, during the 60 days after Claimant's notice of injury, that Claimant's claim of back injury included degenerative disc disease and disc bulge at L5-S1. Mid-Century half-heartedly attempts this, asserting that "the injury to Defendant's lumbar spine that resulted from the alleged fall was characterized by medical providers throughout the course of the claim as a lumbar sprain/strain." Motion at 10. But this assertion is both untrue and unsupported. Mid-Century's "support" is Exhibit H – a thin, cherry-picked layer of 11 pages culled from Claimant's medical record. Moreover, only ***one*** of these eleven pages is even dated during the relevant 60-day period allotted to Mid-Century for investigation under Section 409.021. It is ludicrous to suggest that a solitary page dated nine days after the Claimant's injury, rather than Claimant's complete medical record for 60 days after notice was given, establishes as a matter of law that Claimant's injury "was characterized by medical providers throughout the course of the claim as a lumbar sprain/strain."

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[10]The records listed by the Appeals Panel are in the summary judgment record, included as part of Exhibit B to Defendant's Motion for Summary Judgment. The listed records may be found in Defendant's Exhibit B-3 beginning at 000010, 000049, 000060, and 000068, respectively.

[11]As summary judgment movant, Mid-Century had the burden of proving its contentions conclusively as a matter of law. TEX. R. CIV. P. 166a. As appellant in this proceeding, Mid-Century also bore the burden of proving its contentions by a preponderance of the evidence. TEX. LABOR CODE § 410.303. But Mid-Century also bore the burden of proof on waiver before the DWC Hearing Officer and the Appeals Panel. Rule 124.3 puts that burden squarely on Mid-Century. *See* Rule 124.3(c), stating: "If the carrier wants to deny compensability of or liability for the injury after the 60th day after it received written notice of the injury: (1) the carrier must establish that it is basing its denial on evidence that could not have reasonably been discovered earlier." In light of this, Mid-Century's complaint that by conditioning waiver on whether the conditions in issue "could have been discovered by the carrier" the Appeals Panel "shifted the burden to the insurance carrier to prove that it did *not* receive notice" is inexplicable. Motion at 11.

Certainly, Mid-Century's solitary page is inadequate to conclusively establish that during the 60-day notice period Mid-Century had no notice of and could not have discovered Claimant's degenerative disc disease and disc bulge at L5-S1. This is like pointing to a three-centimeter patch of grass to establish the absence of trees in the Sam Houston Forest. The paralyzing inadequacy of Mid-Century's evidence is even more starkly illumined by the Appeals Panel's explicit identification of documents that *did* provide such notice, and which are opportunely not included within Mid-Century's Exhibit H or mentioned in Mid-Century's Motion.

DWC Decisions consistent with the Appeals Panel's conclusion are legion. One good example is Appeal No. 021569, Aug. 12, 2002 (Exh. H). In that case, the carrier sought to dispute compensability of the claimant's carpal tunnel syndrome (CTS) injury after the 60-day notice period as an "extent of injury" issue, claiming that the first medical record showed only a wrist strain. The appeals panel rejected this argument because other records indicated probable CTS. In so doing, the appeals panel slapped the hands of the carrier who, like Mid-Century here, was trying to circumvent the 60-day waiver period by recharacterizing the original injury into an "extent issue":

> Although [Rule 124.3(c)] states that 409.021 does not apply to an 'extent of injury' dispute, the rule cannot be interpreted in a way that would simply allow a dilatory carrier to recast the primary claimed injury issue as an 'extent issue' and thereby read the mandates of Section 409.021 out of existence entirely. . . . **[C]haracterization and acceptance of an injury as a strain will not serve to convert the primary injury into an 'individual aspect' for purposes of circumventing the requirements of Section 409.021**. . . . We observe that this provision of subsection (c) is the first sentence in the portion of the rule having to do with conditions that don't appear related to the compensable injury . . . in short, situations where the original injury has grown to include additional conditions that were not apparent within the first 60 days. That is not the case here.

Exh. H, at 2. In the present case, Mid-Century tried the very same gambit, and it is improper for the same reasons.[12]

Mid-Century has not shown any basis for this Court to reach a conclusion contrary to the established DWC position. An administrative agency's interpretation of its own rules "is entitled to great weight and deference; it controls unless plainly erroneous or inconsistent with the agency's enabling statute." *Ackerson v. Clarendon Nat. Ins. Co.*, 168 S.W.3d 273, 275 (Tex. App.---Austin 2005, pet. denied). Further, "we must liberally construe the Workers' Compensation Act in favor of the injured worker; thus, a strained or narrow construction is improper." *Id.* Thus, unless this Court finds that the DWC Appeals Panel's decision was plainly erroneous or inconsistent with Section 409.021 or any other part of the Act, it must give deference to the DWC's interpretation of its own rule. *See State v. New*, 159 S.W.3d 232, 236 (Tex. App.---Fort Worth 2005, no writ).

Mid-Century has not shown that the Appeals Panel's decision was "plainly erroneous" or inconsistent with Section 409.021. Mid-Century's "policy" arguments are absurd because, as noted

[12]In another red herring, Mid-Century asserts that the Appeals Panel "erroneously reached the conclusion that any and all medical conditions existing within the lumbar spine and that were present on or around the date of the injury, must be disputed or else the right to dispute those conditions is waived." Motion at 10-11. This is a mischaracterization. Nothing in the Appeals Panel decision suggests that a condition totally unrelated to the Claimant's back injury (*e.g.*, throat cancer) would be compensable if Mid-Century did not dispute it within 60 days. A carrier need only dispute conditions or diagnoses which have been suggested, either by the claimant or a doctor or by the carrier in an exercise of logic, to be related to the claimed injury. *See, e.g.*, Appeal No. 060233, at 2 (April 4, 2006) (Exh. I) (citing rule that waiver depends on what the carrier could have discovered during the 60-day notice period, and noting that because "the back was consistently noted in the medical records and reports as the body part that was injured in the work-related incident," the carrier could have reasonably learned about an MRI showing spondylosis in the upper thoracic spine "consisting of mild disc desiccation at T3 through T5; minimal bulging annulus at T4-5; and osteophytes from T10 through T12." The cervical MRI of the same date showed "a small central herniated nucleus pulposus (HNP) at C3-4; a small midline HNP at C5-6; and mild bulging at C4-5 and C6-7."); Appeal No. 040426 (April 20, 2004) (Exh. J) (finding waiver where the evidence "clearly shows that the primary claimed injury included the claimant's cervical region;" thus, the carrier was obligated to dispute compensability of a cervical injury under Section 409.021). The Appeals Panel found such a connection in this case, stating: "We note that the October 3, 2002, report from Dr. S specifically mentions the claimant related his back pain to an on the job injury which occurred on August 5, 2002. Further, the MRI dated August 8, 2002, gave a history of fall, injury, and back pain." Exh. A, at 2.

in Appeal No. 001258,[13] it is Mid-Century's attempt to contravene and circumvent the statutory 60-day notice period that undermines the expressed intent of the Legislature and DWC. Further, as discussed above in Appeal No. 032731 (Dec. 8, 2003) (Exh. B) and Appeal No. 991720 (undated) (Exh. C), and confirmed in *Gill*, it is the DWC's policy that a carrier who does not contest an injury within the 60-day notice period must pay benefits for even an injury that is an "ordinary disease of life" or unrelated to work. It is Mid-Century's unsupported efforts to recast an injury as one of "extent of injury" that are injurious to public policy.[14]

For the foregoing reasons, Mid-Century failed to establish either a legal or factual basis for its "extent of injury" argument, and thus provided no grounds for summary judgment on this issue.[15]

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[13]*See* discussion *supra* at __.

[14]*See, e.g.*, Appeal No. 042048-S (Oct. 11, 2004), at 6 (Exh. F), in which the concurring judge noted the disastrous effect on the Workers' Compensation system resulting from carriers' constant "extent of injury" litigation: "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[r] 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 to 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 contribution factor to the abandonment of the workers' compensation system by a number of medical providers."

[15]Mid-Century relies heavily on *TIG Premier Ins. Co. v. Pemberton*, 127 S.W.3d 270 (Tex. App.–Waco 2003, pet. denied), which found no waiver, claiming that the present case is like *Pemberton.* Actually, the facts and findings of *Pemberton* are completely irrelevant to the situation at hand, for at least three reasons. In *Pemberton*, the claimant had an accident on the job in which he hurt his right shoulder and left knee. It was not until three months later – long past the 60-day notice period – that he was diagnosed with deep vein thrombosis in his leg. More than two years later, the carrier disputed the compensability of this condition by disputing its relatedness to the original injury. The claimant contended that because the carrier did not dispute the compensability of the deep vein thrombosis within 60 days of learning of *that condition*, the carrier had waived the right to dispute it. Thus, the principal question in *Pemberton* was whether the 60-day notice period applied only to the initial notice of injury, or whether it began to run again as to each subsequent condition or manifestation of the same injury. The court held that the 60-day notice period applied only to the initial notice of injury. This finding is irrelevant to the present case, because

C. Mid-Century's "Actual, Written Notice" Theory

In another misleading and incorrect representation, Mid-Century asserts that "waiver requires that an insurance carrier have actual, written notice of the injury as well as notice that a medical condition is alleged to have been caused by the injury." Motion at 8; *see also id.* at 11 (claiming that the DWC and legislature have issued a "mandate than an insurance carrier receive actual, written notice before waiver can be applied."); *id.* at 11 (citing DWC Rule 124.3 for proposition that carrier must investigate compensability "upon receipt of written notice of injury."). Based on this, Mid-Century contends that Claimant's original notice of injury was not sufficient to trigger a waiver, and that Claimant should have given Mid-Century a specific written notice of every diagnosis that Claimant received after the injury, specifically including the included degenerative disc disease and disc bulge at L5-S1 in issue.

Mid-Century cites no support for this, and it is incorrect. While it is true that waiver cannot occur until Mid-Century receives written notice of an injury, the only "written notice" required is the original notice of injury or TWCC-1 form that triggers the 60 day period. In fact, the purpose of the 60-day notice period is to *avoid* a scenario where the claimant must file multiple notices of injury for each diagnosis:

Claimant does not contend that the 60-day notice period begins at any time other than the initial notice of injury. It does not appear that any other "waiver" challenge was made to the deep vein thrombosis. Specifically, there was no condition that the carrier should have contested compensability of the deep vein thrombosis during the 60-day notice period following the initial notice of injury. Therefore, *Pemberton* is doubly irrelevant. However, even if the court in *Pemberton* had been confronted with a claim that the carrier waived the right to contest compensability by failing to contest compensability within 60 days of the initial notice of injury, the result reached would be entirely consistent with Claimant's position since, unlike here, there was no suggestion that there was any record or information during the 60-day notice period from which the carrier should have learned that the injury included deep vein thrombosis. Therefore, under DWC policy as set out in this motion, the deep vein thrombosis could not have been considered part of the original compensable injury, and its appearance after the 60-day period would have raised an "extent" issue that could not be waived. Since *Pemberton* does not suggest any rule or outcome that applies when information about a disputed condition is available during the initial 60-day notice period, it is triply irrelevant.

> The 1989 Act does not contemplate multiple notices of injury and responses thereto. It is the first written notice of an injury . . . which begins the 7- and 60-day deadlines set out in Section 409.021. . . . The Appeals Panel has held that the Employer's First Report of Injury or Illness (TWCC-1) is, by definition under Rule 124.1, the first written notice of injury, and where one is filed, no resort to other records which fairly inform the carrier of injury need be made to calculate the deadlines. . . . ***It is the carrier's active investigation upon receipt of the TWCC-1 that should supply the diagnoses and scope of the reported injury***.

Appeal No. 021907, Sept. 16, 2002, at 4-5 (Exh. E) (emphasis added).

Mid-Century's suggestion that waiver could not occur until it received a written notice stating "diagnosis: degenerative disc disease and disc bulge at L5-S1" is false and does not correspond to either Section 409.021 or the extensive appeals panel decisions applying it. Thus, under the express terms of Section 409.021, waiver occurred after Mid-Century received Claimant's notice of injury and failed to contest compensability of any condition or diagnosis that "could have been reasonably discovered by the carrier's investigation prior to the expiration of the waiver period." Appeal No. 041738-S, Sept. 8, 2004, at 3 (Exh. G).

D. Mid-Century's "No Link During 60 Days" Theory

Mid-Century's motion for summary judgment argued that there could be no waiver because, during the sixty days after Claimant's work injury, "not one medical report linked Defendant Frederick's degenerative disc disease or broad-based protrusion at L5-S1 to his 8/5/02 injury." Motion at 12. This contention is legally and factually baseless.

First, Mid-Century cites no case law or appeals panel decision for the proposition that the carrier's duty to contest compensability does not arise, and waiver does not occur, unless there is a medical report "linking" an injury and a condition. To the contrary, Texas case law and Appeals Panel decisions repeatedly recognize that an otherwise non-compensable injury, including ordinary diseases of life and non-work related injuries for which there presumably would be no medical report

establishing a "link," may become compensable through waiver. *See, e.g., Zurich American Ins. Co. v. Gill*, 173 S.W.3d 878 (Tex. App.---Fort Worth 2005, pet. denied); Appeal No. 032731 (Dec. 8, 2003) (Exh. B); Appeal No. 991720 (undated) (Exh. C).

Instead, for purposes of waiver, it is the carrier's job to identify and, if necessary, dispute, possible related conditions. "It is the carrier's active investigation upon receipt of the TWCC-1 that should supply the diagnoses and scope of the reported injury." Appeal No. 021907, Sept. 16, 2002, at 4-5 (Exh. E). If a diagnosis or problem or condition, and associated pain, first appears after a work-related injury, and involves the same body part that was injured, the carrier is sufficiently apprised of a possible connection to contest compensability of it – or risk waiver. The DWC Appeals Panel repeatedly finds sufficient notice to carriers of anything contained in an MRI done as a consequence of an injury. *See, e.g.*, Appeal No. 060273, at 2 (March 31, 2006) (Exh. K) (where reported injury was a back injury, carrier waived right to contest compensability of a central annular tear at L3-4, mild central annular bulge at L2-3, and degenerative disc changes at L5-S1 with mild neural foraminal narrowing shown in an MRI, since "[t]he MRI was information that the carrier could have reasonably discovered by its investigation prior to the expiration of the waiver period.").[16]

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[16]*See* Appeal No. 060233 (April 4, 2006) (Exh. I) (where reported injury was thoracic sprain/strain, carrier waived right to contest compensability of spondylosis in the upper thoracic spine "consisting of mild disc desiccation at T3 through T5; minimal bulging annulus at T4-5; and osteophytes from T10 through T12," when these conditions were shown in MRIs done toward end of 60-day notice period); Appeal No. 060254 (March 29, 2006) (Exh. L) (where reported injury was lumbar/cervical strains/sprains, a left shoulder sprain/strain, and a contusion to the left forearm, self-insured waived right to contest compensability of disc herniation at the C4-5 level that was shown in an MRI within the 60-day notice period); Appeal No. 040426 (April 20, 2004) (Exh. J) (where reported injury involved numbness, pain and tingling in the claimant's arms and pain radiating to her neck, carrier waived right to contest compensability of a herniated disc at C5-6 where this was shown on an MRI within the 60-day notice period); Appeal No. 033143 (Jan. 26, 2004) (Exh. M) (where reported injury was a back injury, carrier waived right to contest compensability of disc bulges where these were shown on an MRI eight days after the injury); Appeal No. 022454, Nov. 18, 2002 (Exh. N) (where reported injury was a lower back injury with lumbar strain, carrier waived right to contest compensability of "L5-S1 spondylolisthesis with right paracentral disc herniation and revealed an L4-5 broad based disc protrusion with mild overall stenosis" where there was an MRI showing these conditions after his injury).

Second, Mid-Century's contention is factually inaccurate. The Appeals Panel cited four specific pieces of medical evidence diagnosing the disputed conditions within 60 days of Claimant's injury, and specifically noted that the records include a suggestion of relatedness: "[T]he October 3, 2002, report from Dr. S specifically mentions the claimant related his back pain to an on the job injury which occurred on August 5, 2002. Further, the MRI dated August 8, 2002, gave a history of fall, injury, and back pain." Exh. A, at 2 (emphasis added).[17] In fact, the records that Mid-Century attached in Exhibit H to its motion include a document authored by Dr. Beaudoing stating that "[t]he MRI performed on 8/8/02 [three days after the Claimant's workplace injury] . . . revealed mild degenerative disc disease at L-4/5 and L-5/S-1"). *See* Plaintiff's Motion, Exh. H at 000246. This diagnosis of the disputed conditions three days after Claimant's workplace fall, in a diagnostic MRI conducted as a result of that fall, was more than sufficient to apprise Mid-Century of a potential claim of relatedness.

Because the Appeals Panel found as a factual matter that there was evidence in the record reflecting the disputed conditions within 60 days of Claimant's injury, that finding must be upheld unless Mid-Century can establish as a matter of law that the Appeals Panel's finding is "so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust." *See Gill*, 173 S.W.3d at 886 ("[W]hen reviewing a hearing officer's determination of a fact issue, the decision should be reversed only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust.").

[17]Mid-Century's own medical timeline, Exh. B to Mid-Century's Exhibit List at the June 21, 2005 contested case hearing, at 1, shows that on August 8, 2002, three days following the fall, the Claimant's treating doctor wrote "Lumbar MRI shows very early degenerative changes L5-S1 disc with diffuse mild disc bulge; degenerative changes of T11-12, T12-L1 discs."

Mid-Century's only effort at making such a showing was to offer a bizarre mischaracterization of a December 13, 2002 statement of Claimant's doctor, Dr. Henderson. Mid-Century cited Dr. Henderson's statement that "*I would like to repeat his lumbar MRI as there was very little chance for pathology to have been represented on the initial MRI done just two days after his injury.*" Plaintiff's Motion at 12 (quoting Exh. I) (emphasis added). The obvious interpretation of these words is that Dr. Henderson felt that the physical consequences of Claimant's injury would likely not have been entirely apparent just two days after the injury. But Mid-Century claimed that these words constituted a representation by Dr. Henderson that "the findings on the MRI, *i.e.*, the broad-based protrusion at L5-S1 and degenerative disc disease, ***were not attributable*** to the work-related injury." Motion at 23 (emphasis added).[18]

The impossibility – and falsity – of Mid-Century's characterization of Dr. Henderson's words is shown by his other statements in the *same document*, in which he strongly ties the Claimant's symptoms and condition to the fall injury.[19] Further, any confusion on the part of Mid-Century should have been cleared up by Dr. Henderson's response on Feb. 24, 2003, to one of Mid-Century's independent medical evaluations, in which Dr. Henderson explains his concern that early MRIs may not reflect all the physical consequences of an injury:

> Dr. McCaskill trivializes the mechanism of injury . . . . ***It is widely recognized among spine surgeons that MRI early post injury can miss changes associated***

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[18]Mid-Century repeated this blatant mischaracterization several more times in its motion, stating that Dr. Henderson "acknowledged the non-relatedness of the disputed conditions" and "Defendant Frederick's own doctor admitted four months post-injury that these incidental findings were *not* related to the compensable work injury." Motion at 12-13.

[19]*See* Plaintiff's Exhibit I, in which Dr. Henderson states: "The patient has a history of having been injured on August 5, 2002, while at work . . . . by that night, he was in significant distress and has not been able to return to work since. He has continued with severe back symptoms with pain that is constant . . . ." Plaintiff's Motion, Exh. I, at 1. Dr. Henderson further discusses the findings of the 8-6-02 MRI and x-ray results taken that day, and concludes: "***Impression: The patient continues with acute and chronic lumbar radicular symptomatology status post a significant fall.***" *Id.* (emphasis added).

> ***with degeneration in an injured disc. In this case, the subtle changes were already present 2 days after injury***. It is clear to me this man has significant spine injury that will be elucidated by discography.

Exh. O (quoted in Mid-Century's Chronology at 13) (emphasis added). Thus, contrary to Mid-Century's attempt to base its motion for summary judgment on an unsupported contrary inference, Dr. Henderson has made clear his belief that the Claimant's back problems as partially shown on the early MRI were related to his injury. Since its "evidence" says the opposite of what Mid-Century claimed, it does not support Mid-Century's "no link" theory.

III. Conclusion

Mid-Century failed to provide legal authority or facts sufficient to support a finding that there was no waiver as a matter of law. Therefore, summary judgment was improper.

WHEREFORE, Defendant Robert L. Frederick respectfully requests that the Court grant his motion for new trial or, alternatively, grant his motion for reconsideration, reverse the September 13, 2006 order granting summary judgment in favor of Mid-Century, and grant Defendant such other and further relief to which he may be justly entitled.

Respectfully submitted,

ROGERS, BOOKER, TREVIÑO & LEWIS

By: _____

Peter N. Rogers
State Bar No. 17184520
901 Waterfall Way, Suite 105
Richardson, Texas 75080
Telephone: (972) 644-1111
Telecopier: (972) 644-7600

ATTORNEYS FOR DEFENDANT

OF COUNSEL:

Byron C. Keeling
State Bar No. 11157980
Ruth B. Downes
State Bar No. 06085330
KEELING & DOWNES, P.C.
JP Morgan Chase Tower
600 Travis, Suite 6750
Houston, Texas 77002
Telephone: (832) 214-9900
Facsimile: (832) 214-9908

CERTIFICATE OF CONFERENCE

I certify that I contacted counsel for Plaintiff regarding the foregoing motion, and that Plaintiff opposes the motion.

_____
Peter N. Rogers

CERTIFICATE OF SERVICE

I certify that on the __ day of October, 2006, a copy of the foregoing was served on the following counsel of record by facsimile, hand delivery or certified mail, return receipt requested, in accordance with the Texas Rules of Civil Procedure:

Jane Lipscomb Stone
Stone Loughlin & Swanson, L.L.P.
P.O. Box 30111
Austin, Texas 78755

_____
Peter N. Rogers