

APPEAL NO. 992760
FILED JANUARY 24, 2000

Following a contested case hearing (CCH) held in (City), Texas, on November 17, 1999, pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act), the hearing officer resolved the disputed issues by determining that the respondent's (claimant) compensable head contusion injury sustained on _____, was not a producing cause of his current conditions involving a possible stroke and an aggravation of his preexisting skull lesion; that claimant's compensable head contusion injury sustained on _____, produced his current conditions of a muscle spasm at the paraspinal muscle along the thoracic and lumbar spine and his myofascitis of the cervical dorsal area; and that claimant had disability beginning on October 6, 1998, and continuing through December 18, 1998, and beginning on January 8, 1999, and continuing through June 7, 1999. The appellant (carrier) asserts in its request for review that the hearing officer exceeded her "jurisdiction" in finding injury to the lumbar spine because the disputed issue was limited to the cervical and thoracic spinal regions. The carrier seeks relief from the inclusion of the lumbar spine in Finding of Fact No. 5 and Conclusion of Law No. 4. The file does not contain a response from claimant.

DECISION

Affirmed as reformed.

The parties stipulated that claimant sustained a compensable injury of a head contusion on _____.

The report of the benefit review conference (BRC) held on September 30, 1999, framed the extent-of-injury issue as follows: "Is the claimant's compensable injury sustained on _____, a head contusion, a producing cause of the claimant's current condition involving the cervical and thoracic areas, a possible stroke, and an aggravation to the claimant's preexisting skull lesion?" The BRC report states claimant's position as being that while Dr. A concentrated his efforts on the skull lesion, claimant was complaining of back problems in his mid-back area; that Dr. A eventually examined claimant's back and discovered a bulge in the muscles of the thoracic area which he related to the _____, incident; that claimant does have preexisting back problems in the lumbar area only, having been involved in a motor vehicle accident (MVA) a year earlier; and that claimant is not claiming that he injured his lumbar area.

The carrier's position is stated, in part, as having "accepted a bump/contusion to the head" but denying that claimant's current problems are related to that injury and noting that the medical reports concerned the lumbar area which is preexisting. There

was no evidence that either party filed a response to this BRC report. See Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 142.7(b)(2) and (c) (Rule 142.7(b)(2) and (c)).

Claimant testified that on _____, he was operating a front-end loader carrying loads of large caliche rock over rough terrain on a ranch to construct a road for a drilling rig; that he was told to drive faster than he otherwise would have because of a deadline; that he had to sit on the edge of the seat, which had only an inoperative lap belt, and brace himself with his right elbow; and that on three occasions when the loader either hit bumps or ran over large pieces of caliche, he was thrown about in the steel-frame cab, striking his head on the right side and on the left side and also striking his back against an arm rest. He said he had to stop working after these blows and the next day went to his doctor, Dr. A; that Dr. A concentrated on his head injury, thinking he might have cancer, and paid no attention to his continued complaints of neck and mid-back pain; that on November 20, 1998, he showed Dr. A a big bulge in his mid-back on the right, above the belt; and that Dr. A apologized and began treating his back. He also said that he had a previous work-related injury in 1987 involving his right knee and a herniated disc in his low back and that in August 1996 he was involved in an MVA near his house and injured another disc in his low back.

Claimant further stated that Dr. A took him off work on _____, and released him to return to work on December 18, 1998; that he was again taken off work on January 8, 1999, and was released to return to work on June 7, 1999.

In his closing argument, claimant, noting the absence of medical evidence, stated that he was no longer claiming that the _____, injury extended to a stroke and to the aggravation of a skull lesion; that he was claiming that the compensable injury extended to his cervical problems and thoracic problems; that he injured his back when he came back down on the arm rest; that the medical reports do not contain a diagnosis of the thoracic spine as such but do mention the lumbar spine; that the hearing officer should consider the mention of the L1-2 level in the medical records as a reference to the thoracic spine because claimant did not know the difference, as he so testified; and that it is his fault for not phrasing the issue correctly at the BRC.

The carrier stated in its closing argument that a lumbar spine injury "is not being argued today"; that the carrier did not come to the hearing prepared to defend against a claim of lumbar spine injury; and that claimant, who has had five BRCs and who now recognizes the absence of medical evidence concerning a thoracic spine injury, is "attempting to sneak the thoracic in as lumbar." The carrier objected to some of claimant's rebuttal argument referencing the lumbar spine, stating that the lumbar spine was not at issue at the CCH.

The hearing officer's Finding of Fact No. 5 states that "[b]ased upon reasonable medical probability, Claimant's muscle spasm at the paraspinal muscle along the thoracic and lumbar spine in addition to Claimant's myofascitis of the cervical dorsal area were a result of Claimant's _____, compensable injury." Conclusion of

Law No. 4 and the "Decision" portion of the Decision and Order similarly include the reference to the lumbar spine.

The carrier correctly asserts that the disputed issue from the BRC did not include the lumbar spine. A disputed issue concerning the lumbar spine was not added at the hearing (see Rule 142.7) nor, given the carrier's statements during argument and objection to claimant's argument, can an issue concerning the lumbar spine be said to have been tried by consent of the parties. Accordingly, we reform Finding of Fact No. 5, Conclusion of Law No. 4, and the Decision to strike the reference to the lumbar spine. We do not, by this action, determine whether claimant's injury of _____, extends to the lumbar spine.

The decision and order of the hearing officer are affirmed as reformed.

Philip F. O'Neill
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Dorian E. Ramirez
Appeals Judge