

## APPEAL NO. 002085

This appeal is brought 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 August 9, 2000, with (Hearing Officer 1) presiding as hearing officer. The appellant (claimant) and the respondent (carrier) stipulated that the claimant sustained a compensable injury on \_\_\_\_\_. Hearing Officer 1 determined that the claimant did not continue to suffer the effects of the compensable injury involving his lumbar spine after September 7, 1999, and that the claimant did not have disability from September 15, 1999, through April 18, 2000. The claimant appealed, referred to a prior CCH decision concerning this claim, commented on evidence, urged that the determinations of Hearing Officer 1 are against the overwhelming weight of the evidence, and requested that the Appeals Panel reverse the decision of Hearing Officer 1 and render a decision in his favor on both issues. The carrier responded, commented on the evidence, urged that the determinations of Hearing Officer 1 are not so contrary to the overwhelming weight of the evidence as to be clearly wrong or unjust, and requested that the decision of Hearing Officer 1 be affirmed.

### DECISION

We reverse and render a decision for the claimant on both issues.

The claimant testified that he worked as a dock worker; that he loaded and unloaded freight; that he had a low back injury in 1994; that after the low back injury, he did not have surgery, but attended a work hardening program; that he injured his neck on \_\_\_\_\_; that he had a cervical fusion and was assigned a 19% impairment rating for the neck injury; and that he returned to work. He said that on \_\_\_\_\_, he and a coworker were lifting a heavy box; that he felt a twinge and had pain in his back; that at that time, he did not report the injury because he had just returned to work; that he continued to work, but he got worse; and that after he could not bend down and could not pick up an eight-pound box, he reported the injury and told his supervisor that he had back pain and his lower extremities hurt. The claimant stated that on September 7, 1999, he went to Dr. L, who had been treating him; that he told Dr. L that he was hurting real bad and that he felt like he had worked a double shift; that Dr. L recorded that he had worked 16 hours; that the employer's records showed that he had not worked a double shift; and that Dr. L corrected his records. He testified that the last day he worked was September 14, 1999; that he has not been able to work since that day because of his injury; that he has received help from the union; and that he will have to repay the money to the union.

Dr. L testified that on September 7, 1999, he misunderstood the claimant; that he makes treatment notes and progress notes; that as a result of his billing, it was noticed that the claimant did not work on September 7, 1999; that he was asked by the clinic he works for to change the records; and that he talked with the claimant, and changed the claimant's records to indicate that the claimant told him that he felt like he had worked a double shift.

Dr. G testified that he first saw the claimant on November 3, 1999, and treated him until March 7, 2000; that he reviewed reports of MRIs from 1994 and April 1999, but did not review the films on which the reports are based; that the 1999 report shows a 5 mm right posterior disc herniation at L4-5 and that the 1994 report does not indicate a herniation; that the 1999 report states that the herniated disc was “causing extrinsic compression along the right anterior aspect of the thecal sac,” but does not state whether or not the thecal sac impinges on a nerve; and that he would need to see the films to determine if there is nerve root impingement. Dr. G said that a herniated disc means that there is a tear in the wall of the disc and that disc material sticks out through the wall of the disc. He explained that swelling is involved, that swelling of a disc can retract, that there can be reaggravations, that symptoms can come and go, and that a person can think that he is getting better and still have a herniated disc. Dr. G testified that he was not aware of an incident in \_\_\_\_\_, but that he was aware of a miscommunication with a doctor.

A Decision and Order of (Hearing Officer 2), issued after a CCH held on August 26, 1999, contains “felt a sudden pain in his back, through to his groin area” and “[c]laimant was diagnosed with a lumbar strain (along with sciatica and low back pain)” in the statement of the evidence. It also contains the following findings of fact and conclusions of law that follow those concerning jurisdiction and venue:

#### **FINDINGS OF FACT**

2. Claimant suffered damage or harm to the physical structure of his body in the course and scope of his employment on \_\_\_\_\_.
3. As a result of the injury of \_\_\_\_\_, beginning March 22, 1999, and continuing through July 13, 1999, with the exception of two weeks, Claimant was unable to obtain and retain employment at wages equivalent to his pre-injury wage.

#### **CONCLUSIONS OF LAW**

3. Claimant sustained a compensable injury on \_\_\_\_\_.
4. As a result of the compensable injury of \_\_\_\_\_, Claimant had disability beginning March 22, 1999 and continuing through July 13, 1999, with the exception of two weeks.

The decision of Hearing Officer 2 contains “[t]emporary income benefits should be paid for all periods of disability through the date of maximum medical improvement [MMI].”

At the request of the carrier, the claimant was seen by Dr. J. In a letter dated October 27, 1999, Dr. J stated that he was asked to rule out an inguinal hernia. He reported that the claimant complained of bilateral inner thigh pain; that the pain extends into his scrotum; that the pain occurred acutely on \_\_\_\_\_, at work; that the claimant

now complained of constant pain which he does not associate with any tingling or numbness; that the claimant associates the pain with daily bladder dysfunction; and that the claimant's past medical history is positive for lower back pain. Dr. J reported that the claimant's abdomen had no palpable hernia and was non-tender without masses; that thorough exam of the groin did not reveal masses; that the claimant's pain and bladder dysfunction was probably not related to a hernia; and that he advised the claimant to follow up with a urologist for bladder dysfunction and to refer to a neurosurgeon regarding the history of back pain and changes on previous studies of the spine.

At the CCH, the attorney representing the carrier objected to a question concerning the claimant's being referred to a urologist and a neurologist, stating that urological problems are clearly not part of the compensable injury. The attorney representing the claimant responded, stating that the decision of Hearing Officer 2 mentions the groin area and that groin area includes more than a hernia. The carrier stated that extent of injury was not an issue, and Hearing Officer 1 agreed. Hearing Officer 1 asked the attorney representing the carrier if she wanted to go back to a benefit review conference (BRC) or proceed without the issue of extent of injury. She said that she wanted to go forward on the issues before Hearing Officer 1 and would object to any arguments regarding other potential body parts being a producing cause of disability. The record of the CCH contains the following:

HEARING OFFICER: Anything else, [(Mr. O), the attorney representing the claimant.]?

MR. O: Not in regard to that.

HEARING OFFICER: I'm not inclined to send you back to a BRC, but if you want to make a record on that, you may if that's what you want.

MR. O: Well, for the record, I'd like to point out that he has never received the medical treatment that was ruled to be compensable in regard to the groin area and that was what we argued at the first CCH in which the hearing officer had deemed both the low back and the groin area to be compensable injuries which he has never received any treatment for.

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[Discussion about locating a copy of the CCH of Hearing Officer 2.]

HEARING OFFICER: It doesn't have a finding of injury extended to the groin area. It just finds it merely a compensable injury with the note in the discussion about where he felt pain. Let's move on with your questioning of the witness.

MR. O: I pass the witness.

In closing argument, the attorney representing the carrier stated:

Be that as it may, I would like to flip to the 9-20-99 patient treatment record, and I think that's also interesting in this case. The record indicates that the groin started hurting again and for that reason the claimant left work on 9-13-99. Assuming it is true that the groin was what caused the claimant to stop working on 9-13-99 and that's what's indicated in the report, we would submit that that would be for something that is not compensable. We know that he definitely suffered a back injury. We think it was relatively minor, and I will go into that in a moment. At this point there's been no confirmation that there is any damage or harm to the claimant's groin. He did undergo an examination by [Dr. J] who found no hernia and, in fact, referred claimant to his physician for examination for bladder dysfunction and other non-work related issues. So we would submit that if claimant did begin losing time, which he did as of 9-14- or 9-15-99, then any lost time would not be for our compensable injury.

In rebuttal, Mr. O stated:

I also would like to refer to [Dr. J's] report, which also was chosen by the insurance company, in which there was a misstatement made in regard to him being followed up by his family doctor. It is recommended that he be referred to a urologist and to a neurosurgeon for his back pain. These are the kinds of things that were never done and that exacerbate [claimant's] problems when he is not given the medical treatment that he deserves. He has to wait until there is a decision made because the insurance company finds everything they can to raise a red flag to keep this man from getting the medical treatment he needs. As a result, when you're sitting without medical treatment or have to – have to resort to some type of outside financial aid, it shouldn't be held against him.

Most of the carrier's closing argument addresses disability. The claimant's argument mentions disability, but spends more time on the carrier's not paying for medical treatment.

Disability is defined as “the inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage.” Section 401.011(16). Even though the only issue before a hearing officer is whether a claimant had disability, the circumstances of the case may require that the hearing officer determine whether something that the claimant contends is part of the compensable injury is included in the compensable injury even though extent of injury is not a stated issue before the hearing officer. In an unpublished decision, Texas Workers' Compensation Commission Appeal No. 983053, decided February 8, 1999, the Appeals Panel stated that the only issue at the CCH was whether the claimant had disability after a certain date and that the burden was on the claimant to prove that a complained-of condition was part of the compensable injury and caused the inability to obtain and retain employment beyond the date claimed. In the

case before us, it would have been better had the hearing officer determined whether the compensable injury included an injury to the groin; but under the circumstances of the case, including the burden on the claimant, we do not find it to be reversible error for him not to have done so.

A Benefit Dispute Agreement (TWCC-24) dated March 28, 2000, contains two disputed issues and resolution to each of those issues. The first issue is “[h]as the claimant had disability from 9-14-99 through the present.” The resolution is “[t]he carrier agrees to pay temporary income benefits [TIBs] from 3-25-99 and continuing until the next scheduled BRC pending the resolution of the periods of disability.” The second issue is “[w]hat is the claimant’s ability to work.” The resolution is “[t]he claimant will attend an RME of the carrier’s choice of doctors, [Dr. D], and an FCE [functional capacity evaluation] with [clinic].” A BRC was held on June 8, 2000. The issues reported as unresolved at that BRC are “[d]id the claimant have disability from 9/15/99 through 4/18/00?” and “[d]oes the claimant continue to suffer the effects of the compensable injury sustained on \_\_\_\_\_ after 9/7/99?” The BRC report dated June 13, 2000, does not indicate that an interlocutory order was issued.

Section 408.101(a) provides “[a]n employee is entitled to [TIBs] if the employee has disability and has not attained [MMI].” In the agreement, the resolution to the issue concerning disability could have been written more clearly. However, the carrier agreed to pay TIBs until the next BRC that was held on June 7, 2000. Considering the definition of disability and the requirements for entitlement to TIBs, it is not clear why one of the issues reported as unresolved is “[d]id the claimant have disability from 9/15/99 through 4/18/00?” The BRC report indicates that the claimant’s position was that he “had disability from 9/15/99 through 4/18/00” and that the carrier’s position was that the claimant “was reinjured on \_\_\_\_\_.” Those positions do not assist in interpreting the agreement signed on March 28, 2000. Based on the agreement, we reverse the determination of Hearing Officer 1 that the claimant did not have disability from September 15, 1999, through April 18, 2000, and render a decision that he did have disability from September 15, 1999, through April 18, 2000.

We next address the determination of Hearing Officer 1 that the claimant did not continue to suffer the effects of the compensable injury involving his lumbar spine after September 7, 1999. As noted earlier in this decision, the Decision and Order of Hearing Officer 2 contains a finding of fact that states “suffered damage or harm to the physical structure of his body” and a conclusion of law that states “sustained a compensable injury.” For the claimant to have had disability, his inability to obtain and retain wages must have been “because of a compensable injury.” In light of Hearing Officer 1’s not considering a groin injury to be part of the compensable injury and our rendering a decision that the claimant had disability from September 15, 1999, through April 18, 2000, we reverse the determination that the claimant’s lumbar problems after September 7, 1999, are not a result of the compensable injury of \_\_\_\_\_.

Section 408.021(a) provides that an employee who sustains a compensable injury is entitled to all health care reasonably required by the nature of the injury as and when needed. Section 413.031 addresses medical dispute resolution.

We reverse the findings of fact and the conclusions of law on the two issues before Hearing Officer 1. We also reverse the decision of Hearing Officer 1. We render a decision that the claimant had disability from September 15, 1999, through April 18, 2000, and that he continued to suffer the effects of the compensable injury after September 7, 1999.

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Tommy W. Lueders  
Appeals Judge

CONCUR:

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Elaine M. Chaney  
Appeals Judge

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Kenneth A. Huchton  
Appeals Judge