

APPEAL NO. 010574

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 14, 2001. The agreed upon issues were:

1. Did the claimant [appellant] sustain a compensable injury on _____?
2. Was the carrier's [respondent] contest of compensability based on newly discovered evidence that could not reasonably have been discovered at an earlier date, thus allowing the carrier to reopen the issue of compensability?
3. If it is determined that the claimant sustained a compensable injury, does the claimed injury include a diagnoses of herniated disk at L5-S1?
4. Did the claimant have disability resulting from the injury sustained on _____, and if so for what periods?

The hearing officer determined that the claimant had sustained a compensable lumbar strain injury on _____; that there was "no newly discovered medical evidence" which would allow the carrier to reopen the compensability issue, however, the carrier's Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) does dispute the extent of injury; that the compensable lumbar strain injury does not extend to include the herniation (the hearing officer uses language of "aggravated" and "naturally flowing"); and that the claimant had disability from _____, until October 22, 1999, and that the claimant's inability to obtain and retain employment at the preinjury wage after that date was due to the claimant's degenerative disc disease ("herniation at L5-S1"). The hearing officer's decision that the claimant had sustained a compensable injury on _____, and that the carrier did not have newly discovered evidence have not been appealed.

The claimant appeals the issues that the compensable injury does not include a herniated disc at L5-S1, that the carrier's TWCC-21 contests the extent of injury, and that the claimant's disability ended on October 22, 1999. The carrier responds, urging affirmance.

DECISION

Affirmed in part and reversed and remanded in part.

The claimant was employed as a packer/loader/driver for the employer moving company. The claimant testified that on _____, as she was reaching up to move some empty boxes, she felt a pop in her back and sustained a low back injury. The

claimant went to the (clinic) where she was diagnosed with a lumbar strain and degenerative disc disease, and was taken off work for a week, and was then released to light duty.

Exactly what happened next is unclear. The carrier apparently accepted liability for a lumbar strain. The claimant testified that she continued to see a number of doctors with back complaints. A Dr. M took the claimant off work on September 27, 1999. An MRI was performed on October 22, 1999, which indicated a "5-6 mm . . . paracentral disc herniation which . . . appears to impinge the right S1 root within the canal." There was mild to moderate foraminal stenosis. The claimant saw Dr. J on November 19, 1999, and Dr. J, after reviewing the MRI, suggested spinal surgery.

The claimant was examined by Dr. GF, the carrier's required medical examination doctor on March 20, 2000. Dr. GF referenced some of the medical reports, stated that he reviewed the MRI and commented that the claimant "indeed . . . has a central HNP at L5-S1 with some degenerative changes at L4-5." Dr. GF goes on to conclude:

In my opinion, the claimant has imaging indicia of an HNP at L5-S1 which probably was present prior to the onset of symptoms and was probably part of heredity, genetics, and life activities as opposed to any event. There is simply no medical literature that would indicate that an *invisible industrial injury* would focally produce this lesion. In my opinion, the claimant has multiple levels of degenerative disk disease which is part of daily living as opposed to occupational events. The Texas Supreme Court in *Kennedy vs. Protective Insurance Company, #98-0562*, has identified that degenerative disk disease is an ordinary disease of life and thus not compensable. [Emphasis in the original.]

(The carrier uses this report to assert that this was newly discovered evidence on which to contest compensability—rejected by the hearing officer.) The carrier filed a TWCC-21 on April 6, 2000, which references Dr. GF's report and asserts that the "claimant's current condition is not related to an injury at work but is a result of an ordinary disease of life" The claimant was subsequently seen by Dr. RF, the designated doctor, who in a report dated July 10, 2000, had an impression of "Back pain" and gave an opinion "that no injury took place at work on _____," that the claimant has "significant degenerative disease at L5-S1" as shown on "xrays done _____ [sic], 11 days after the alleged injury" and that the degenerative disease is an ordinary disease of life. (The claimant was 39 years old at that time.)

The hearing officer found that the carrier's TWCC-21, "[f]airly construed . . . contests the extent of Claimant's _____ injury." The hearing officer cites, and quotes at length, *Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 124.3 (Rule 124.3)*.

The claimant appeals, objecting to the hearing officer's finding as to the degree of the claimant's lumbar injury, citing various Appeals Panel decisions and arguing that the

hearing officer "has been allowed to re-open the issue of compensability based upon degree of injury." We disagree. The issues included both a compensable injury and the extent of injury. The hearing officer had to define the compensable injury in order to resolve whether that injury included the herniated disc at L5-S1. We affirm the hearing officer's decision on that issue.

The hearing officer resolved the issue of the carrier's contest of the herniation by citing Rule 124.3(c), which provides, in pertinent part, that Section 409.021 and the implementing provisions of this statute in Rule 124.3(a) "do not apply to disputes of extent of injury." Rule 124.3(c) further provides that if a carrier receives a medical bill and wishes to dispute liability for treatment, it shall file a notice of dispute not later than the earlier of the date the medical bill is denied or the due date for paying or denying the medical bill. Notwithstanding, the preamble to the rule provides that failure to timely dispute the extent of injury pursuant to Rule 124.3(c) is a compliance issue and does not create liability for the claimed injuries. Therefore, the hearing officer properly applied Rule 124.3 in determining that the carrier did not waive its right to dispute compensability with regard to the herniated disc. See Texas Workers' Compensation Commission Appeal No. 010201, decided March 8, 2001.

It is on the issue of disability that we have some concerns. Clearly the claimant has not returned to work, and the light-duty releases will not allow her to return to her preinjury job with the employer. The hearing officer determined that disability ended on October 22, 1999, which was the date the claimant had the MRI. The MRI shows a herniated disc, and even if due to a degenerative condition, does not perforce mean disability has ended. We remand the case to the hearing officer on this issue for some rationale why the claimant had disability (as defined in Section 401.011(16)) on October 21, 1999, but not on October 22, 1999. It would appear that the claimant is still under a light-duty release due to the lumbar strain. We affirm the hearing officer's decision on the extent-of-injury issue and the carrier's contest of the extent of injury. We remand for either findings or rationale how the ending date of disability was determined.

Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Texas Workers' Compensation Commission's Division of Hearings,

pursuant to Section 410.202. See Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

Thomas A. Knapp
Appeals Judge

CONCUR:

Gary L. Kilgore
Appeals Judge

Philip F. O'Neill
Appeals Judge