APPEAL NO. 012144
FILED OCTOBER 24, 2001

This appeal arises 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, 2001. The issue at the CCH was:

1. Does the compensable injury sustained by the [respondent] claimant include the condition of spondylolisthesis and degenerative disc disease of the lumbar spine?

The hearing officer concluded that he "lacks jurisdiction in a [CCH] to issue a declaratory judgment, or to review the [Texas Workers' Compensation] [C]ommission spinal surgery determination" and the decision is that "[t]he matter is dismissed for want of jurisdiction."

The appellant (carrier) appeals, reciting some of the factual history, and arguing that as early as June 1999 "it [carrier] was not agreeing to pay benefits . . . associated with the claimant's underlying degenerative disc disease and spondylolisthesis." The carrier argues that there is "no mechanism in which to adjudicate extent of injury in the spinal surgery second opinion process" other than through the Hearings Division. The carrier states that it did not ask for a declaratory judgment but only seeks a hearing on its extent-of-injury issue. The file does not contain a response from the claimant.

DECISION

Reversed and remanded.

The background facts are not greatly disputed. As the carrier points out, the claimant had a history of 30 years of back problems. Nonetheless, the claimant sustained a compensable low back injury when he fell a short distance off a ladder on _____. The claimant treated with Dr. H and returned to work. The claimant had two other incidents in latter 1998 which do not appear to impact this case. The claimant continued to see Dr. H, and in February 1999, Dr. H referred the claimant to Dr. G, who noted that the claimant had spondylolisthesis "with early degenerative change at L5-S1, possibly L4-L5." Dr. G ordered an MRI, which was performed on February 8, 1999, and which showed that in addition to the Grade I spondylolisthesis, the claimant had a "broad based 3 mm herniation at L2-3." In evidence are progress notes from Dr. G indicating that the claimant was receiving continued treatment including lumbar epidural steroid injections for low back complaints. The claimant was examined by Dr. N, the carrier's required medical examination doctor, on June 10, 1999. Dr. N appeared to principally examine the claimant for maximum medical improvement and an impairment rating (IR) (Dr. N assessed a zero percent IR); however, in his June 17, 1999, report Dr. N noted that the claimant "will ultimately require stabilization of the lumbosacral junction but, in my opinion, not due to the compensable injury of _____."

The claimant continued to treat with Dr. G, and, in a note dated February 28, 2000, Dr. G noted that the claimant "is not keen on surgery" and that "a series of three lumbar ESIs" would be arranged. In an office note of May 5, 2000, Dr. G comments that lumbar surgery was discussed with the claimant and that the claimant "wishes to proceed with the surgery." Dr. G filed a Recommendation for Spinal Surgery (TWCC-63) listing the type of surgery to be performed on May 12, 2000. The carrier selected Dr. M as its second opinion doctor on May 23, 2000, and Dr. M examined the claimant on June 6, 2000. Dr. M, in a report of that date and form, concurred in the proposed surgery with an impression of spondylolisthesis L5, spondylolisis of L5, and degenerative disc disease L5-S1. Dr. M did not comment on causation. The carrier filed a Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) dated June 13, 2000, disputing the proposed spinal surgery on the grounds that the claimant's condition was preexisting "and not the result of the lumbar strain which was the diagnosis given for this work-related injury" and that the claimant is suffering from an ordinary disease of life. Nonetheless, the Commission, by letter dated June 20, 2000, notified the parties and Dr. G that the second opinion doctor had agreed with the proposed surgery and the carrier would be liable for reasonable and necessary costs of spinal surgery. The carrier filed a Request for Benefit Review Conference [BRC] (TWCC-45) dated June 21, 2000, received by the Commission on June 23, 2000, disputing the proposed spinal surgery on essentially the same grounds as listed on the TWCC-21. The claimant had the proposed spinal surgery on July 20, 2000, and the carrier filed another TWCC-45 dated July 27, 2000, received by the Commission on July 31, 2000, disputing the "extent and duration of w/c injury."

In a questionnaire, the carrier asked Dr. N to respond to certain questions. Dr. N, in a response of June 20, 2000, was of the opinion that while the claimant needed surgery it was not due to the compensable injury "but as a consequence of the pre-existing spondylolisthesis." Dr. G, in a letter dated September 11, 2000, disagreed with Dr. N and stated that in his opinion "the work related injury was the source of [claimant's] symptoms at the L5-S1 level and the accident is directly related to his need for surgery." Similarly, Dr. H, in a report dated April 11, 2001, stated:

> I believe [claimant] did have a pre-existing condition of Spondylolisthesis, but this had been asymptomatic at the time of his compensable injury. The injury precipitated the pain, which I believe was concentrated at the L5-S1 level of the Spondylolisthesis. If he had not had the injury of _____, he would likely not have experienced the degree of pain he did. Therefore, it is my opinion that the work related injury was the source of his symptoms at the L5-S1 level and the ladder accident was directly related to his need for surgery.

We reverse the hearing officer's decision that he did not have jurisdiction to hear this case. The issue was framed as an extent-of-injury issue, and the carrier, through its TWCC-21 and TWCC-45s, was clearly attempting to get that issue heard. While there were limited options open to the hearing officer, saying he had no jurisdiction was not one of them. While the issues of spinal surgery and compensability may proceed separately

(*see* Texas Workers' Compensation Commission Appeal No. 950517, decided May 17, 1995, and Texas Workers' Compensation Commission Appeal No. 002531, decided December 11, 2000), the threshold determination of whether the recommended surgery in this case will address the compensable injury must be made by the hearing officer. While the spinal surgery process assesses the medical need for surgery, the dispute resolution process must first determine whether the condition is compensable.

In Texas Workers' Compensation Commission Appeal No. 970978, decided July 7, 1997, a case where the issue was liability for the cost of spinal surgery, the carrier, at the CCH, alluded to "companion issues" of extent of the injury and to "an underlying issue of extent of the injury." The Appeals Panel remanded that case, stating:

> Determination that there has been a spinal injury and it is compensable is necessarily adjudicated as part of an order for payment of spinal surgery, because medical benefits are only due under the 1989 Act for reasonable and necessary treatment of compensable injuries. *See* Section 408.021. In this case, there were statements made by counsel for the carrier indicating that an issue on extent of injury had been raised prior to, or around the same time as, this proceeding for a second opinion.
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> We accordingly reverse and remand so that the hearing officer may ascertain the progress of the dispute over the extent of the injury, put into evidence BRC reports from any such dispute and, if possible, combine any pending dispute with the determination on spinal surgery.

That case was returned on a decision on remand in Texas Workers' Compensation Commission Appeal No. 971847, decided October 27, 1997, where the hearing officer, on remand issued a contingent order, leaving ultimate liability for the payment of the surgery in limbo; however, neither party appealed the contingent order and the Appeals Panel affirmed the hearing officer's decision.

In this case, the Commission acted prematurely in authorizing the surgery in its letter of June 20, 2000. As stated in Appeal No. 971847:

> The cart, in this instance, appeared to be before the horse. [A] carrier is liable for medical benefits, including spinal surgery, only for a reasonable and necessary treatment of a "compensable injury," and an order for spinal surgery would appear to have little effect beyond an advisory opinion on the second procedure process if the compensability of the . . . injury was being disputed[.]

Although the carrier, in this case, should have disputed the extent of injury earlier (the carrier argues it did so "as early as June 1999") no dispute is in evidence prior to the June

13, 2000, TWCC-21 although the carrier had knowledge through Dr. H's report of the extent, or alleged extent, of the claimant's injury considerably earlier.

We would note that an aggravation of a preexisting condition can be an injury in its own right (INA of Texas v. Howeth, 755 S.W.2d 534, 537 (Tex. App.-Houston [1st Dist.] 1988, no writ), and that a carrier that wishes to assert that a preexisting condition is the sole cause of an incapacity has the burden of proving this. Texas Employers Insurance Association v. Page, 553 S.W.2d 98 (Tex. 1977). An incident may indeed cause injury where there is a preexisting infirmity where no injury might result in a sound employee, and a predisposing bodily infirmity will not preclude compensation. Sowell v. Travelers Insurance Company, 374 S.W. 2d 412 (Tex. 1963).

We remand the case for the hearing officer to determine the extent of the injury and address the stated issue.

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 Commission's Division of Hearings, pursuant to Section 410.202 (amended June 17, 2001). *See* Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

The true corporate name of the insurance carrier is **THE INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA** and the name and address of its registered agent for service of process is

CORPORATION SERVICE COMPANY
800 BRAZOS, SUITE 750
COMMODORE 1
AUSTIN, TEXAS 78701.

Thomas A. Knapp
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Gary L. Kilgore
Appeals Judge