APPEAL NO. 012365
FILED NOVEMBER 26, 2001

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). Following a contested case hearing (CCH) held on August 28, 2001, the hearing officer resolved the disputed issues by concluding that "[t]he claimed injury of _____, does extend to a herniated disc [sic] at the L4-L5 and L5-S1 levels" and that the respondent (claimant) "did suffer disability as a result of her compensable _____, injury from June 28, 2000, through the date of the [CCH]." However, in Finding of Fact No. 3 the hearing officer finds that "[o]n October 12, 2000, the Claimant signed a benefit review conference [BRC] agreement in which she agreed that on October 12, 2000, her injury had not resulted in a herniation." The appellant (carrier) appeals the hearing officer's extent-of-injury and disability determinations, asserting that the hearing officer erred in refusing to give effect to the BRC agreement. The claimant's response asserts that the validity of the BRC agreement was not a disputed issue and that the hearing officer has not erred in her interpretation of "a poorly constructed agreement which was interpreted differently by the parties to the agreement."

DECISION

Reversed and remanded.

No testimonial evidence was adduced at the hearing and the parties submitted their respective cases on documentary evidence and arguments. According to her Employee's Notice of Injury or Occupational Disease and Claim for Compensation (TWCC-41) of June 29, 2000, the claimant, an assembly line production worker, injured her "low back" while standing on a cart, leaning over to work on a unit, and twisting her back to pick up screws. She described the nature of the injury as "sprain/strain." The carrier's Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) disputed the compensability of the claimed injury, asserting that the claimant had an ordinary disease of life. The Initial Medical Report (TWCC-61) of Dr. C dated June 28, 2000, reflects the diagnosis codes for "lumbar IVD displacement w/o myelopathy"; lumbosacral neuritis or radiculitis, unspecified; and lumbar sprain /strain. Dr. JB's July 17, 2000, report to Dr. C of his July 13, 2000, lumbar spine MRI testing states the impression as follows: "Focal relative canal stenosis at L5-S1 and L4-5 with neural impingement as mentioned above. The disk material at L5-S1 may be extruded."

On October 12, 2000, the claimant and her representative signed a Benefit Dispute Agreement (TWCC-24) which stated the following:

Issue Code	Disputed Issue(s)	Resolution(s)
C06/C07	Did Claimant sustain a compensable Injury in the course and scope of her employment on _____.	The parties agree that Claimant sustained a compensable lumbar sprain/strain and disc bulge/extrusion at the L4-L5, L5-S1 levels. The parties also agree that the above referenced compensable injury does not extend to or include a lumbar disc herniation, lumbar stenosis, arthritis, or other degenerative conditions.

Both parties made clear at the hearing that neither were attempting to void or withdraw from the BRC agreement.

The November 3, 2000, report of Dr. MB states that the July 13, 2000, MRI shows a focal canal stenosis at L4-5 and L5-S1 with a fairly large herniated disc at L4-5 and a large extruded disc at L5-S1. He further stated that the claimant has "a very severe problem" and should undergo surgery. In evidence is a Recommendation for Spinal Surgery (TWCC-63) signed by Dr. MB on November 3, 2000, which reflects the diagnosis code for "lumbar IVD displacement w/o myelopathy." On January 23, 2001, Dr. A, a second opinion doctor, agreed that the recommended procedure is needed. Dr. A wrote on January 24, 2001, that the claimant's diagnosis is "two ruptured and herniated discs at L4-5 and L5-S1 level and that has proposed surgery." The Texas Workers' Compensation Commission's (Commission) letter of February 6, 2001, advised the parties that a second opinion doctor concurred with Dr. MB's recommendation for spinal surgery and that the carrier will be responsible for that surgery unless the carrier appeals. The claimant averred that the carrier did not appeal the Commission's spinal surgery decision, as such. This is understandable given that there were two opinions recommending surgery. However, the carrier did file a TWCC-21 dated February 22, 2001, disputing disability from the lumbar disc herniation based on the BRC agreement and stating that no income or medical benefits are due for the claimant's noncompensable conditions as established by the BRC Agreement. The carrier also filed a Request for a [BRC] (TWCC-45) dated February 23, 2000, stating that the parties agreed in a BRC agreement that the compensable injury does not include a lumbar disc herniation and that the claimant's provider, though notified, plans on going ahead with the surgery scheduled for February 26, 2001. Dr. A on April 18, 2001, iterated that the proposed spinal surgery at both lumbar spine levels is due to disc herniations. The other second opinion doctor, Dr. T, who had earlier nonconcurred in the proposed surgery because he felt a discogram should be obtained, reported on June 5,

2001, that the proposed surgery at both the L4-5 and L5-S1 levels is "due to a lumbar disc herniation." On August 15, 2001, Dr. B answered certain questions of both parties concerning different types of herniations, contained and uncontained herniations, and extrusions and also agreed with the opinions of Dr. A and Dr. T that the proposed spinal surgery was due to disc herniations.

In the claimant's response to the BRC report, she requested that the disability issue be added. She also stated the following: "The Claimant's position is that her compensable injury necessitates spinal surgery due to compensable extrusions in the L4-5 and L5-S1 dics. It is the claimant's position that the medical term 'extrusion' is inclusive of the medical term 'herniation' and by accepting an extrusion, the carrier accepted the lesser included term 'herniation.'

Section 410.029 provides for the resolution of a dispute, in whole or in part, at a BRC and further provides that if there is a resolution by agreement the benefit review officer (BRO) shall reduce the agreement to a writing to be signed by the BRO and the parties or their representatives. Section 410.166 provides that "[a] written stipulation or agreement of the parties that is filed in the record or an oral stipulation or agreement of the parties that is preserved in the record is final and binding."

As noted above, the hearing office found that the claimant signed a BRC agreement in which she agreed that her injury did not result in a herniation. In her Statement of the Evidence, the hearing officer states the following:

> Semantics aside, the Claimant acknowledged when she signed the agreement that she did not have a herniation at that time but was in no way giving up a future claim. It would be fundamentally unfair to allow the Carrier to avoid liability by including a clause intended to deny the Claimant of a claim she at some future date may have a right to assert. Therefore, it is this Hearing Officer's finding the Claimant's compensable injury extends to and includes the herniated disc [sic] at L4-5 and L5-S1 levels.

The hearing officer has erred as a matter of law in failing to give effect to the BRC agreement in which the parties plainly agreed that the claimant's compensable injury of _____, does not include herniated discs. We again note that the claimant did not seek relief from the agreement that the "compensable injury does not extend to or include a lumbar disc herniation." Accordingly, we reverse Finding of Fact No. 2 which states that "[t]he herniated disc [sic] at L4-5 and L5-S1 are a direct and natural result of the compensable injury of _____," and Conclusion of Law No. 3 which states that "[t]he claimed injury of _____, does extend to a herniated disc [sic] at the L4-5 and L5-S1 levels." We remand for the hearing officer to determine whether the compensable injury resulted in disability and if so, for what period(s).

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. Saturdays and Sundays and holidays listed in Section 662.003 of the Texas Government Code are not included in the computation of the time.

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

JEFF AUTREY
ROAN AND AUTREY
710 FIRST STATE BANK
400 WEST 15TH STREET
AUSTIN, TEXAS 78701-1647.

Philip F. O'Neill
Appeals Judge

CONCUR:

Robert E. Lang
Appeals Panel
Manager/Judge

Michael B. McShane
Appeals Judge