

APPEAL NO. 080039
FILED MARCH 13, 2008

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 May 10, 2007, and continued on October 25, 2007, with the record closing on December 4, 2007. The issues before the hearing officer were:

- (1) Does the _____, compensable injury extend to include an inguinal hernia and an L4-5 herniated disc?
- (2) Does the appellant (claimant) have disability as a result of the _____, injury and if so for what periods?
- (3) Has the claimant reached maximum medical improvement (MMI) and if so on what date? and
- (4) If the claimant has reached MMI, what is the impairment rating (IR)?

The hearing officer determined that: (1) the claimant's compensable injury of _____, includes an inguinal hernia, but does not include an L4-5 herniated disc; (2) the claimant had disability beginning on April 1, 2006, and continuing through August 4, 2006, and at no other time through October 25, 2007; (3) the claimant reached MMI on October 15, 2007; and (4) the claimant's IR is 5%. The claimant appealed that portion of the hearing officer's extent-of-injury determination that the compensable injury does not include an L4-5 herniated disc, and the ending date of disability. The respondent (carrier) responded, urging affirmance.

The hearing officer's determinations that the claimant's compensable injury of _____, includes an inguinal hernia, that the claimant had disability beginning on April 1, 2006, and continuing through August 4, 2006, and that the claimant reached MMI on October 15, 2007, with a 5% IR were not appealed and have become final pursuant to Section 410.169.

DECISION

Reversed and rendered.

EXTENT OF INJURY

The parties stipulated that the claimant sustained a compensable injury on _____. In evidence is a medical report dated January 16, 2006, that states that on _____, the claimant was lifting heavy doors and "felt a sharp pain on his left [side] of his back," that "[p]ain radiates down his left leg," and that the "[x]-rays revealed marked arthritic changes with some scoliosis and cannot rule out a mild compression

fracture at L4.” In evidence is a Functional Capacity Evaluation (FCE) dated May 4, 2006, that states that the claimant’s chief complaint was “low back pain left side,” that the claimant did not complete the FCE “due to pain,” and that the claimant “may not safely [sic] perform his normal work duties without risk of reinjury.” An MRI of the lumbar spine dated May 31, 2006, concludes that there are “anterior complexes and posterior complex bulges that are very severe at L4-L5 and L5-S1, with complete collapse of the interspace,” and “[a]t L4-L5, there is bilateral facet arthrosis, a large complex bulge that narrows the left neural foraminal canal and causes stenosis of the lateral recesses and has hyperintensity focus that represents tears in the annular fibers.” Dr. ES, an orthopedic surgeon and referral doctor, examined the claimant on June 15, 2006, and reported that he had reviewed the report and films of the May 31, 2006, MRI. Dr. ES reported that the claimant has a large disc herniation on the left side at L4-5 with nerve root compression. In evidence is another FCE dated October 5, 2006, that states that “[o]n palpation, there is hypertonicity of the lumbar muscles L4-S1 with pin point tenderness over the left lumbar facet joints L4-L5 and bilateral S1 joints.”

The designated doctor, Dr. E, examined the claimant on June 18, 2007, to determine the extent of the claimant’s compensable injury. In a narrative report dated June 18, 2007, Dr. E determined that “[t]he extent of the [claimant’s] compensable injury is the lumbar complaints and complaints of hernia (not authorized), right side, recurrent, surgery.” In that report, the “Current Complaints” section states:

The [claimant] states that he has numbness and stabbing sensation in his left outer leg. He states that standing, walking, riding in the car, and stair climbing makes the pain worse. On a scale of 0-10, with 10 being the worse pain, he rates his pain as 6.

Dr. E diagnosed the claimant with “lumbar disc bulge/stenosis” and “left lower extremity radiculopathy/sacroillitis.” In response to a letter of clarification, Dr. E states in a report dated September 13, 2007, that a question that was asked of him was “[d]id the _____, compensable injury cause or aggravate the L4-5 herniation, or is it a degenerative condition?” In response to that question Dr. E stated that “[i]n my opinion, the L4-5 herniation was caused by the aggravation of the L2-3 degenerative condition.” No further letters of clarification were sent to Dr. E to clarify why he referenced an aggravation of the L2-3 degenerative condition when responding to the question regarding the L4-5 disc herniation. The hearing officer states in the Background Information section of the decision that “[Dr. E] was of the medical opinion that claimant’s _____ injury included an inguinal hernia and, fairly read, did not include the L4-5 disc herniation” and that “[Dr. E’s] determination that the compensable injury extends to the inguinal hernia and not to the L4-5 disc herniation is not against the preponderance of the other medical evidence.” The hearing officer concluded that the compensable injury of _____, does not include an L4-5 disc herniation.

28 TEX. ADMIN. CODE § 126.7(c)(3) (Rule 126.7(c)(3)) provides that a designated doctor examination shall be used to resolve questions about the extent of the compensable injury. Rule 126.7(d) provides that the report of the designated doctor

is given presumptive weight regarding the issues in question and/or dispute, unless the preponderance of the evidence is to the contrary. Rule 126.7 became effective on January 1, 2007, and provides in subsection (w) that a request for a designated doctor under its provisions may be made on or after January 1, 2007.

The hearing officer misread Dr. E's narrative report dated October 15, 2007, to indicate that the compensable injury does not include a herniation at L4-5. However, it is clear that Dr. E opined that the claimant's compensable injury includes the L4-5 disc herniation because he specifically states that "[t]he extent of the [claimant's] compensable injury is the lumbar complaints." The medical evidence indicates that the claimant's compensable injury includes a herniation at L4-5. The hearing officer's determination that the compensable injury does not include a herniation at L4-5 is against the great weight and preponderance of the evidence. Accordingly, we reverse the hearing officer's determination that the claimant's compensable injury of _____, does not include an L4-5 herniated disc and we render a new decision that the claimant's compensable injury of _____, includes an L4-5 herniated disc.

DISABILITY

Section 401.011(16) defines "disability" as "the inability because of a compensable injury to obtain and retain employment at wages equivalent to the pre-injury wage." The hearing officer determined that the ending date of disability was August 4, 2006. In the Background Information section of the decision the hearing officer states that "[t]he additional claimed periods of disability are related to the non compensable L4-5 disc herniation and its sequelae." Given that we have reversed the extent-of-injury determination regarding the herniation at L4-5, and rendered a new decision that the compensable injury includes the herniation at L4-5, we also reverse the hearing officer's ending date of disability based on the hearing officer's statement that the additional claimed period of disability is due to the L4-5 herniation. Additionally, the medical evidence establishes that the claimant had disability due to his low back injury. Accordingly, we reverse the hearing officer's ending date of disability and we render a new decision that the claimant had disability from April 1, 2006, through the date of the CCH on October 25, 2007.

SUMMARY

We reverse the hearing officer's determination that the claimant's compensable injury of _____, does not include an L4-5 herniated disc and we render a new decision that the claimant's compensable injury of _____, includes an L4-5 herniated disc. We reverse the hearing officer's ending date of disability and we render a new decision that the claimant had disability from April 1, 2006, through the date of the CCH on October 25, 2007.

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

**ROBIN M. MOUNTAIN
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IRVING, TEXAS 75063.**

Veronica L. Ruberto
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Margaret L. Turner
Appeals Judge