

APPEAL NO. 091047
FILED AUGUST 20, 2009

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 June 8, 2009. In regard to the only issue before him the hearing officer determined that the respondent/cross-appellant's (claimant) compensable injury of _____, extends to lumbar instability at L4-5.

The appellant/cross-respondent (carrier) appeals on a sufficiency of the evidence basis. The claimant in a Request for Review and Response appeals a finding of fact that a 5 millimeter (mm) retrolisthesis was neither caused nor aggravated by the claimant's work-related injury, contending that finding exceeded the scope of the issue before the hearing officer. The carrier responds to the claimant's appeal, contending compensability of the retrolisthesis was "a critical component of the issue certified for resolution."

DECISION

Affirmed in part and reversed and rendered in part.

EXTENT OF INJURY

The hearing officer's determination that the claimant's compensable injury of _____, extends to lumbar instability at L4-5 is supported by sufficient evidence and is affirmed.

RETROLISTHESIS

In the Background Information, the hearing officer commented that: the claimant fell from a ladder on _____; the claimant underwent three surgeries; and "it was not until flexion/extension x-rays on March 8, 2005, showed a 5 [mm] retrolisthesis at L4-5 that an issue of whether this type of instability was part of the compensable injury was raised." The hearing officer made the following finding of fact:

7. The 5 mm retrolisthesis was neither caused nor aggravated by the [c]laimant's work related injury of _____, or reasonable and necessary medical treatment for this injury.

The unresolved issue at the benefit review conference (BRC) was "[d]oes the compensable injury of _____ extend to include the lumbar instability at L4-5?" The claimant's position at the BRC and CCH was that the "[c]laimant's first two surgeries caused the instability and the need for spinal fusion at L4-5 . . . performed on May 2, 2005." The carrier's position was that the lumbar instability was not the result of the surgeries but was due to the normal aging process. Although medical reports which

mentioned retrolisthesis were referenced at the CCH, there was no discussion how retrolisthesis either differed or was similar to instability. Section 410.151(b) and 28 TEX. ADMIN. CODE § 142.7 (Rule 142.7) essentially provide that issues not considered at a BRC may only be added by consent of the parties or upon a showing of good cause. While consent may be inferred if the parties actually litigated an issue not otherwise identified, the record in this case does not establish that the parties litigated whether the compensable injury of _____, extends to 5 mm retrolisthesis. We have in a number of cases considered a hearing officer's findings on a matter not at issue to be surplusage when that matter was not before the hearing officer. Appeals Panel Decision 071838, decided December 3, 2007.

We hold that the hearing officer's Finding of Fact No. 7 that the 5 mm retrolisthesis was neither caused nor aggravated by the claimant's work-related injury of _____, or reasonable and necessary medical treatment for this injury exceeded the scope of the extent-of-injury issue before him. We reverse the hearing officer's decision by striking Finding of Fact No. 7 which held that the 5 mm retrolisthesis was neither caused nor aggravated by the claimant's work-related injury of _____, or reasonable and necessary medical treatment for this injury as surplusage.

SUMMARY

We affirm the hearing officer's determination that the claimant's compensable injury of _____, extends to lumbar instability at L4-5. We reverse the hearing officer's Finding of Fact No. 7 that the 5 mm retrolisthesis was neither caused nor aggravated by the claimant's work-related injury of _____, or reasonable and necessary medical treatment for this injury by striking Finding of Fact No. 7 as surplusage.

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

**CORPORATION SERVICE COMPANY
701 BRAZOS STREET, SUITE 1050
AUSTIN, TEXAS 78701.**

Thomas A. Knapp
Appeals Judge

CONCUR:

Veronica L. Ruberto
Appeals Judge

Margaret L. Turner
Appeals Judge