

APPEAL NO. 100718
FILED AUGUST 9, 2010

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 October 19, 2009, with the record closing on April 27, 2010. The issues before the hearing officer were:

- (1) Does the compensable injury of _____, extend to: laceration to the forehead; disco-osteophytic bulges at C4-5, C5-6 with mild central canal and bilateral neural foraminal stenosis; disco-osteophytic bulges at C3-4, and C6-7; aggravation of the disco-osteophytic bulges at C3-4 and C6-7; lumbar disc protrusions at L4-5 and L5-S1; aggravation of the lumbar disc protrusions at L4-5 and L5-S1; right shoulder supraspinatus tendon tear; right shoulder impingement; right shoulder tendinitis; left shoulder rotator cuff tear; left shoulder supraspinatus tendon tear; left shoulder impingement; right wrist sprain; and soft tissue chest wall injuries?
- (2) What is the date of maximum medical improvement (MMI)?
(Resolved by stipulation)
- (3) What is the respondent's (claimant) impairment rating (IR)?

The hearing officer determined that the compensable injury of _____, extends to: (1) a laceration to the forehead; (2) aggravation of the disco-osteophytic bulges at C3-4 and C6-7; (3) aggravation of the lumbar disc protrusions at L4-5 and L5-S1; (4) right shoulder supraspinatus tendon tear; (5) right shoulder impingement; (6) right shoulder tendinitis; (7) left shoulder supraspinatus tendon tear; (8) left shoulder impingement; (9) right wrist sprain; and (10) soft tissue chest wall injuries.

The hearing officer determined that the compensable injury of _____, does not extend to: (1) disco-osteophytic bulges at C4-5, C5-6 with mild central canal and bilateral neural foraminal stenosis; (2) disco-osteophytic bulges at C3-4, and C6-7; (3) lumbar disc protrusions at L4-5 and L5-S1; and (4) left shoulder rotator cuff tear.

With regard to the MMI issue, the hearing officer determined, as stipulated by the parties, that the date of MMI is May 1, 2008. With regard to the IR issue, the hearing officer determined that the claimant's IR is 25%, per the designated doctor.

The appellant (carrier) appealed the hearing officer's determinations on the issues of extent of injury and IR. The carrier states that "[t]he preponderance of the medical evidence is contrary to the designated doctor's opinion on the [IR] and extent of injury issues." Further, the carrier states in its appeal that "[b]ased on the totality of the medical evidence," and inconsistencies in the designated doctor's reports, the

designated doctor's opinion "on extent and the IR cannot be supported, and are invalid." The claimant responded, urging affirmance. The hearing officer's determination that the claimant's MMI date is May 1, 2008, as stipulated by the parties, has not been appealed and has become final pursuant to Section 410.169.

DECISION

Affirmed in part and reversed and rendered in part.

The parties stipulated that: (1) the claimant sustained a compensable injury on _____; (2) the Texas Department of Insurance, Division of Workers' Compensation appointed (Dr. B) as the designated doctor in this case; and (3) the date of MMI is May 1, 2008. It is undisputed that Dr. B was appointed to determine MMI, IR and extent of injury, at various times, throughout this claim.

EXTENT OF INJURY

FOREHEAD, RIGHT WRIST, RIGHT SHOULDER, LEFT SHOULDER AND CHEST WALL

That portion of the hearing officer's determination that the compensable injury of _____, extends to: (1) a laceration to the forehead; (2) right wrist sprain; (3) right shoulder supraspinatus tendon tear; (4) right shoulder impingement; (5) right shoulder tendinitis; (6) left shoulder supraspinatus tendon tear; (7) left shoulder impingement; and (8) soft tissue chest wall injuries, is supported by sufficient evidence and is affirmed.

That portion of the hearing officer's determination that the compensable injury of _____, does not extend to left shoulder rotator cuff tear is supported by sufficient evidence and is affirmed.

CERVICAL SPINE

Section 401.011(26) defines "injury" as damage or harm to the physical structure of the body and a disease or infection naturally resulting from the damage or harm and that the term includes an occupational disease. See Peterson v. Continental Casualty Company, 997 S.W.2d 893 (Tex. App.-Houston [1st Dist.] 1999, no pet.), in which the court held that the aggravation of a pre-existing condition is a compensable injury for purposes of the 1989 Act. See *also*, Appeals Panel Decision 062010, decided December 4, 2006, that to prove an aggravation of a pre-existing condition there must be some enhancement, acceleration, or worsening of the underlying condition from the injury and not just a mere recurrence of symptoms inherent in the etiology of the pre-existing condition.

At issue was whether the compensable injury of _____, extends to: (1) disco-osteophytic bulges at C3-4, and C6-7; and (2) aggravation of the disco-

osteophytic bulges at C3-4 and C6-7. The hearing officer found that the claimed condition of aggravation of the disco-osteophytic bulges at C3-4 and C6-7 were “caused, accelerated, enhanced or worsened by the compensable injury of _____.” However, the hearing officer inconsistently found that disco-osteophytic bulges at C3-4 and C6-7 were not “caused, accelerated, enhanced or worsened by the compensable injury of _____.” The hearing officer determined that the compensable injury extends to an “aggravation” of the disco-osteophytic bulges at C3-4 and C6-7, but does not extend to disco-osteophytic bulges at C3-4 and C6-7. An aggravation of a pre-existing condition is an injury in its own right. INA of Texas v. Howeth, 755 S.W.2d 534 (Tex. App.-Houston [1st Dist.] 1988, no writ).

The hearing officer’s determination that the compensable injury of _____, extends to an aggravation of the disco-osteophytic bulges at C3-4, and C6-7 is supported by sufficient evidence and is affirmed. However, the hearing officer erred as a matter of law in his determination that the compensable injury of _____, does not extend to include the disco-osteophytic bulges at C3-4 and C6-7. The hearing officer’s determinations are internally inconsistent because a determination that the compensable injury extends to an aggravation of a pre-existing condition (disco-osteophytic bulges at C3-4 and C6-7) is a determination that the compensable injury extends to the underlying pre-existing condition (disco-osteophytic bulges at C3-4 and C6-7) as a matter of law.

Given that we have affirmed that the compensable injury of _____, extends to an aggravation of disco-osteophytic bulges at C3-4 and C6-7, and that an aggravation of a pre-existing condition, is an injury in its own right, we reverse the hearing officer’s determination that the compensable injury of _____, does not extend to the disco-osteophytic bulges at C3-4 and C6-7. We render a new decision that the compensable injury of _____, extends to disco-osteophytic bulges at C3-4 and C6-7.

Also at issue was whether the compensable injury of _____, extends to disco-osteophytic bulges at C4-5, C5-6 with mild central canal and bilateral neural foraminal stenosis. The hearing officer’s determination that the compensable injury of _____, does not extend to the disco-osteophytic bulges at C4-5, C5-6 with mild central canal and bilateral neural foraminal stenosis, is supported by sufficient evidence and is affirmed.

LUMBAR SPINE

At issue was whether the compensable injury of _____, extends to: (1) lumbar disc protrusions at L4-5 and L5-S1; and (2) aggravation of the lumbar disc protrusion at L4-5 and L5-S1. The hearing officer found that the claimed condition of “aggravation” of the lumbar disc protrusions at L4-5 and L5-S1 was “caused, accelerated, enhanced or worsened by the compensable injury of _____.” However, the hearing officer inconsistently found that lumbar disc protrusions at L4-5

and L5-S1 were not “caused, accelerated, enhanced or worsened by the compensable injury of _____.” The hearing officer determined that the compensable injury extends to an “aggravation” of the lumbar disc protrusions at L4-5 and L5-S1, but does not extend to the lumbar disc protrusions at L4-5 and L5-S1. (See INA, *supra*.)

The hearing officer’s determination that the compensable injury of _____, extends to aggravation of the lumbar disc protrusions at L4-5 and L5-S1 is supported by sufficient evidence and is affirmed. However, the hearing officer erred as a matter of law in his determination that the compensable injury of _____, does not extend to the lumbar disc protrusions at L4-5 and L5-S1. The hearing officer’s determinations are internally inconsistent because a determination that the compensable injury extends to an aggravation of a pre-existing condition (lumbar disc protrusions at L4-5 and L5-S1) is a determination that the compensable injury extends to the underlying pre-existing condition (lumbar disc protrusions at L4-5 and L5-S1) as a matter of law.

Given that we have affirmed that the compensable injury of _____, extends to an aggravation of the lumbar disc protrusions at L4-5 and L5-S1, and that an aggravation of a pre-existing condition, is an injury in its own right, we reverse the hearing officer’s determination that the compensable injury of _____, does not extend to the lumbar disc protrusions at L4-5 and L5-S1. We render a new decision that the compensable injury of _____, extends to the lumbar disc protrusions at L4-5 and L5-S1.

IR

The hearing officer’s determination that the claimant’s IR is 25% is supported by sufficient evidence and is affirmed.

SUMMARY

We affirm the hearing officer’s determination that the claimant’s IR is 25%.

We affirm the hearing officer’s determination that the compensable injury of _____, extends to: (1) a laceration to the forehead; (2) aggravation of the disco-osteophytic bulges at C3-4 and C6-7; (3) aggravation of the lumbar disc protrusions at L4-5 and L5-S1; (4) right shoulder supraspinatus tendon tear; (5) right shoulder impingement; (6) right shoulder tendinitis; (7) left shoulder supraspinatus tendon tear; (8) left shoulder impingement; (9) right wrist sprain; and (10) soft tissue chest wall injuries.

We affirm the hearing officer’s determination that the compensable injury of _____, does not extend to: (1) disco-osteophytic bulges at C4-5, C5-6 with mild central canal and bilateral neural foraminal stenosis; and (2) left shoulder rotator cuff tear.

We reverse the hearing officer's determination that the compensable injury of _____, does not extend to: (1) disco-osteophytic bulges at C3-4, and C6-7; and (2) lumbar disc protrusions at L4-5 and L5-S1, and we render a new decision that the compensable injury of _____, does extend to: (1) disco-osteophytic bulges at C3-4, and C6-7; and (2) lumbar disc protrusions at L4-5 and L5-S1.

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

**CORPORATION SERVICE COMPANY D/B/A
CSC – LAWYERS INCORPORATING SERVICE COMPANY
701 BRAZOS STREET, SUITE 1050
AUSTIN, TEXAS 78701.**

Veronica L. Ruberto
Appeals Judge

CONCUR:

Cynthia A. Brown
Appeals Judge

Thomas A. Knapp
Appeals Judge