APPEAL NO. 110309
FILED MAY 11, 2011

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 January 3, 2011, with the record closing on January 31, 2011.

The hearing officer determined that: (1) the appellant (claimant) did not have disability resulting from a compensable injury sustained on _____, from August 1, 2010, through the date of the CCH; and (2) the compensable injury of _____, does not extend to spondylolisthesis at L4-5 or to a disc protrusion at L5-S1.

The claimant appealed the hearing officer's disability and extent-of-injury (EOI) determinations. The claimant also alleged the hearing officer failed to consider evidence timely submitted by the claimant in response to the designated doctor's report received by the hearing officer on January 7, 2011, and prior to the closing of the record by the hearing officer on January 31, 2011. The respondent (self-insured) responded, urging affirmance and objecting to any new evidence offered for the first time on appeal.

DECISION

Reversed and remanded.

The parties stipulated that the claimant sustained a compensable injury on _____, and the claimant testified that he twisted and injured his low back at work when he lifted and pulled heavy frozen products as a food stocker. It is undisputed that the Texas Department of Insurance, Division of Workers' Compensation (Division) appointed (Dr. D) as the designated doctor to determine the extent of the compensable injury of _____, in addition to the claimant's date of maximum medical improvement and impairment rating.

Dr. D initially examined the claimant on July 20, 2010, and in a report dated July 27, 2010, diagnosed the claimant with lumbar sprain/strain and lumbar spondylolisthesis stating:

> Based on [the claimant's] diagnosis, of lumbar sprain/strain, 6-8 weeks of treatment, according to the [Official Disability Guides (ODG)] is recommended. [His] continued symptoms as described by his treating doctors are related to instability of L4-5 due to a pre-existing lumbar spondylolesthes . . . . He does continue to have low back pain and suffering from L4-5 instability, however, it is not related to his [_____] work related injury, it is due to a pre-existing condition.

Dr. D re-examined the claimant on December 28, 2010, and in his December 31, 2010, report, Dr. D noted that the claimant's June 2, 2010, lumbar MRI findings included a disc protrusion at L5-S1, and also stated:

> After reviewing the records provided by the treating doctors and my physical evaluation and patient consultation, I have determined that [the claimant's] compensable injury was a lumbar sprain strain and however, this individual does demonstrate pre-existing degenerative findings, it is my professional judgment and opinion that it was aggravated . . . by the work injury. His lumbar MRI September 2010 shows inflammation of the lumbar facets, however, the spondylosis was preexisting [*sic*] and not compensable.

PROCEDURAL MATTER

At the conclusion of the January 3, 2011, CCH, the record was left open for the hearing officer to receive Dr. D's December 31, 2010, report as well as any evidence responsive to that designated doctor's report offered by either the claimant or the self-insured. In a letter dated January 10, 2011, the hearing officer stated:

> I received a copy of the designated doctor's report from [Dr. D] dated December 31, 2010. The document was provided by the [self-insured] and it is my understanding that a copy was [sent by facsimile (faxed)] to [c]laimant's counsel on January 7, 2011. The report will be entered into evidence as Carrier's Exhibit G. Please review [Dr. D's] report and respond with any additional evidence that you would like the [h]earing [o]fficer to consider. The parties have until January 24, 2011, to submit additional documentary evidence on this case. Any new evidence that is submitted to the [h]earing [o]fficer must be exchanged with the other party. Proof of service is required. Closing arguments on this case are due by January 31, 2011. Please provide a copy of your closing argument to the opposing party.

In the hearing officer's decision and order, she stated:

> Upon agreement of the parties, the [CCH] record was held open to allow the [self-insured] to submit the designated doctor's report from an examination that took place on December 28, 2010. The report was received by the [h]earing [o]fficer on January 7, 2011, and entered into evidence as Carrier's Exhibit G. A letter was sent to the parties on January 10, 2011, advising that they had until January 24, 2011, to submit additional documentary evidence in response to the designated doctor's report. Written closing arguments were due by January 31, 2011. No additional evidence was received from either party. The parties submitted closing arguments on January 31, 2011, and the [CCH] record closed on that same date.

The claimant attached to his request for review a copy of a letter dated January 24, 2011, from his attorney to the hearing officer. Attached to that letter was a letter from (Dr. E), the claimant's treating doctor, dated January 21, 2011, and which is a response to Dr. D's December 31, 2010, report on EOI. In his letter, the claimant's attorney requested that the hearing officer consider the additional documentary evidence from Dr. E. The letter contained a certificate of service reflecting service of these documents to the self-insured's attorney on January 24, 2011. Additionally, attached to the claimant's appeal is a fax transmission cover sheet dated January 24, 2011, reflecting that the claimant's attorney's letter and additional documentary evidence was faxed to the hearing officer and to the self-insured's attorney on January 24, 2011, at 4:25 p.m. Also attached to the appeal is a fax transmission verification report reflecting the documents were received by the Division's (city) field office on January 24, 2011, at 4:44 p.m.

The documents attached to the claimant's appeal reflect that on January 24, 2011, the claimant timely submitted additional documentary evidence responsive to the December 21, 2010, report of Dr. D, the designated doctor, in the manner required by the hearing officer in order to consider the evidence and prior to the closing of the record on January 31, 2011. Inexplicably, the hearing officer did not consider the additional documentary evidence submitted by the claimant on January 24, 2011, stating that it was never received. As previously noted, a fax confirmation evidences receipt by the Division's (city) field office prior to the stated deadline. Accordingly, we reverse the hearing officer's determination that the compensable injury of _____, does not extend to spondylolisthesis and a disc protrusion at L5-S1 and remand the EOI issue to the hearing officer for consideration of all the evidence and for further proceedings consistent with this decision.

In the Background Information section of her decision, the hearing officer stated that the claimant "also did not meet his burden of proof to establish that he had disability from August 1, 2010, to the present as a result of the compensable lumbar sprain/strain." Because we have reversed the hearing officer's EOI determination and because the hearing officer is basing her disability determination on a diagnosis of lumbar sprain/strain, we likewise reverse the hearing officer's determination that the claimant did not have disability resulting from a compensable injury sustained on _____, from August 1, 2010, through the date of the CCH and we remand the disability issue to the hearing officer for consideration of all the evidence and for further proceedings consistent with this decision.

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 Division, pursuant to Section 410.202 which was amended June 17, 2001, to exclude Saturdays and Sundays and holidays listed in Section 662.003 of the Texas Government Code in the computation of the 15-day appeal and response periods. *See* Appeals Panel Decision 060721, decided June 12, 2006.

The true corporate name of the insurance carrier is **(a certified self-insured)** and the name and address of its registered agent for service of process is

(ADDRESS)
(CITY), TEXAS (ZIP CODE).

_____
Cynthia A. Brown
Appeals Judge

CONCUR:

_____
Carisa Space-Beam
Appeals Judge

_____
Margaret L. Turner
Appeals Judge