

APPEAL NO. 041286
FILED JULY 21, 2004

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 5, 2004. The hearing officer determined that the compensable injury of _____, extends to include the lumbar spine at L3-4 and L4-5. The appellant (carrier) concedes that the compensable injury extended to include L3-4 and L4-5. The carrier appeals, however, asserting that the hearing officer failed to address the true issue in this case, *i.e.*, whether the compensable injury extends to and includes the respondent's (claimant) "current condition" at L3-4 and L4-5. The claimant did not file a response.

DECISION

Reversed and remanded.

The parties stipulated that the claimant sustained a compensable injury on _____. The carrier conceded, at the hearing and on appeal, that the compensable injury included a right lateral disc herniation at L3-4 and an annular tear with left lateral disc protrusion at L4-5. On May 20, 2002, the claimant underwent spinal surgery to treat these conditions, including a bilateral laminectomy and discectomy at L3-4 and a left-sided laminectomy at L4-5. The claimant continued to receive medical treatment to her lumbar spine, following her surgery. The medicals records are conflicting with regard to ongoing pathology at L3-4 and L4-5, and its relation to the compensable injury. On February 27, 2003, the claimant was certified at maximum medical improvement by her treating doctor, Dr. W. The claimant, later, changed treating doctors to Dr. D. Dr. D diagnosed recurrent herniated discs at L3-4 and L4-5 and recommended fusion surgery with instrumentation at these levels.

A benefit review conference (BRC) was held on January 20, 2004. According to the BRC report, the claimant argued, "The injury, according to Dr. D, includes L-3, L-4, and L4-5 and I need surgery. I need surgery and treatment the carrier is denying." The carrier argued, "The claimant has had surgery to correct herniation [sic] at the L-3, L4 level. The carrier denies any further extent of injury to include herniations in the region of the back." The following issue was certified in the BRC report: Does the compensable _____, injury extend to and include L-3, L-4 and L4-5 of the lumbar back?

The record reflects that the carrier received the BRC report on January 30, 2004. The carrier filed a response to the BRC report on February 17, 2004, in which it argued that "the issue as it is currently worded fails to differentiate between the accepted and disputed conditions at L3-4 and L4-5." The carrier requested that the issue be amended as follows: Does the compensable _____, injury extend to and include the degenerative disc disease, spondylosis, and/or recurrent herniations at L3-4 and L4-5?

The carrier reurged its request at the CCH. The hearing officer denied the carrier's request, stating only that he would address the issue as certified. Our review of the record reveals that the parties argued and presented evidence with regard to the issue put forth by the carrier. Nonetheless, the hearing officer noted that "there is no dispute that the claimant's _____, compensable injury included the L3, L4, and L4-5 levels of the lumbar spine," and entered a decision accordingly.

The hearing officer erred by failing to address the issue put forth by the carrier. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 142.7(a) (Rule 142.7(a)) provides that a dispute not expressly included in the statement of disputes will not be considered by the hearing officer. The statement of disputes for a hearing held after a BRC includes the BRC report, the parties' responses to the BRC report (Rule 142.7(b)(2)), and additional disputes by either unanimous consent (Rule 142.7(d)) or by permission of the hearing officer (Rule 142.7(e)). A party's response to a BRC report, under Rule 142.7(c)(3), must be filed not later than 20 days after receipt of the BRC report. A request to add an issue under Rule 142.7(e) must be filed not later than 15 days prior to hearing and must establish good cause. In Texas Workers' Compensation Commission Appeal No. 972656, decided February 4, 1998, the Appeals Panel stated that the purpose of Rule 142.7(e) is to provide for addition of disputes not identified as unresolved in the BRC report, and that no good cause need be shown for issues which were not "additional." The record, in this case, shows that the carrier's request to amend the issue was timely filed under both Rule 142.7(c) and (e). We believe that the BRC report fairly identifies the issue put forth by the carrier and that such issue does not constitute an "additional" issue. Additionally, we note that the issue was actually litigated by the parties and was before the hearing officer. See Texas Workers' Compensation Commission Appeal No. 94269, decided April 20, 1994, (a hearing officer may decide an issue actually litigated at the CCH, even if it is not among the certified issues in dispute). In the absence of a reasoned justification for denying the carrier's request, we conclude that the hearing officer abused his discretion by failing to address the issue put forth by the carrier. Morrow v. H.E.B., Inc., 714 S.W.2d 297 (Tex. 1986).

For the reasons stated above, we reverse and remand the hearing officer's decision for consideration of the following issue: Whether the compensable injury of _____, extends to and includes the current condition of the claimant's lumbar spine, particularly degenerative disc disease, spondylosis, and/or herniations at L3-4 and L4-5? On remand, the hearing officer should determine whether the claimant has such conditions and, if so, whether they are related to the compensable injury.

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 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 Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

The true corporate name of the insurance carrier is **AMERICAN CASUALTY COMPANY OF READING, PENNSYLVANIA** and the name and address of its registered agent for service of process is

**CT CORPORATION SYSTEM
350 NORTH ST. PAUL STREET
DALLAS, TEXAS 75201.**

Edward Vilano
Appeals Judge

CONCUR:

Elaine M. Chaney
Appeals Judge

Thomas A. Knapp
Appeals Judge