

APPEAL NO. 051253
FILED JULY 21, 2005

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 commenced on March 1, 2005, and concluded on April 26, 2005.

The hearing officer determined that respondent's 1 (claimant) _____, compensable injury extends to and includes herniated discs in the lumbar spine with radiculopathy and herniated discs in the cervical spine with radiculopathy (lumbar and cervical neurologia and radiculitis) at L2-3 through L5-S1 and C4-5 and C5-6 and C6-7.

The appellant (carrier) appealed, contending that the hearing officer abused her discretion by refusing to add an issue and that the hearing officer's determinations on radiculopathy at C4-5, and "herniations or radiculopathy at the levels L2-3 or L3-4" was not sufficiently supported by the evidence. The respondent 2 (subclaimant) responded, urging affirmance. The file does not contain a response from the claimant.

DECISION

Affirmed in part and reversed and rendered in part.

The parties stipulated that the claimant sustained a compensable cervical and lumbar sprain/strain superimposed on degenerative disc disease injury on _____. A designated doctor certified maximum medical improvement (MMI) on March 28, 1997, and in a report dated April 3, 1997, assessed a 34% impairment rating (IR) based on impairments from Table 49, Section (II)(C) Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association and loss of range of motion for both cervical and lumbar components. The subclaimant contends that the first quarter of supplemental income benefits (SIBs) would have begun in April 1999. The hearing officer recites that the claimant has continued with medical treatment and examinations from 1994 through 2004. The carrier in a Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) dated October 30, 2002, contended that "documentation fails to establish the current conditions as casually related to or even aggravated or accerlerated [sic] by injuries sustained in the incident of _____." In a Notice of Disputed Issue(s) and Refusal to Pay Benefits (PLN 11) dated November 29, 2004, the carrier repeats the assertions contained in the October 30, 2002, TWCC-21, further naming conditions it believes are not related to the compensable injury and contends that per a peer review report "the effects of the compensable injury have resolved."

The subclaimant requested a benefit review conference (BRC) which was held January 5, 2005. The claimant's position, at both the BRC and CCH, was that he continues to suffer effects of the compensable injury and needs medical treatment. The subclaimant's position at both proceedings is that it is owed "\$25,300.00 for twenty-six

dates of service pre-authorized by the [carrier].” The carrier’s position was that it accepted cervical and lumbar sprains/strains superimposed on the cervical and lumbar degenerative disc disease and that those “injuries have resolved according to the carrier’s peer review doctors.” The benefit review officer (BRO) recommended that the compensable injury extended to include the claimed conditions citing Texas Workers’ Compensation Commission Appeal No. 040150-s, decided March 8, 2004, and the diagnostic codes the designated doctor used in arriving at his assessment. The BRO commented that the Medical Review Division of the Texas Workers’ Compensation Commission “should address the issue regarding the payment of the amount being sought by the sub-claimant.”

The carrier filed a Motion to Rephrase the Issue (which was granted) and a response to the BRO report dated February 2, 2005, to rephrase the issue. Subsequently, the carrier filed a Motion to Add Issues dated February 10, 2005, requesting the following issue to be added:

Did the compensable injury aggravate Claimant’s pre-existing degenerative disease of the cervical and lumbar spine? If so, what was the nature of that aggravation and has the aggravation resolved?

The carrier renewed its motion to add the cited issue at the CCH. The hearing officer refused to add the issue stating that she believed she could address the carrier’s concern in her decision.

Section 401.011(24) defines IR as “the percentage of permanent impairment of the whole body resulting from the compensable injury.” The designated doctor’s report of April 3, 1997, discusses the various levels of the spine he rated including a central herniation at C4-5. An October 11, 2000, report from one of the carrier’s RME doctor’s supports the finding that the claimant had radiculopathy at C4-5. Other diagnostic testing on April 3, 1997, established support for the determination of herniation and radiculopathy at L3-4. See Carrier’s Exhibit J page 6. Section 408.021(a) provides that an employee is entitled to all health care reasonably required by the nature of the compensable injury as and when needed.

At the carrier’s request the original issue on whether the compensable injury includes herniated discs and radiculopathy of the lumbar and cervical spine was rephrased to add “and, if so, to what levels?” Subsequently the carrier wanted to add an additional issue of “[d]id the compensable injury aggravate Claimant’s pre-existing degenerative disease of the cervical and lumbar spine?” We note that the parties stipulation that the claimant sustained a compensable cervical and lumbar sprain/strain superimposed on degenerative disc disease injury answers the proposed additional issue in the affirmative. The carrier also wanted to add “[i]f so, what was the nature of that aggravation and has the aggravation resolved?” The carrier cites Texas Workers’ Compensation Commission Appeal No. 041286, decided July 21, 2004, as authority to add an issue pursuant to Tex. W.C. Comm’n, 28 TEX. ADMIN. CODE § 142.7(a) (Rule 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 no later than 15 days prior to the hearing and must establish good cause. In the instant case, the BRC was held on January 5, 2005, and the BRC report was signed on January 6, 2005. The carrier's response to the BRC report was filed on February 2, 2005. There is no evidence when the carrier received the BRC report, but the response was more than 20 days after the BRC report was signed. The request to add an issue under Rule 142.7(e) was filed on February 10, 2005, a date more than 15 days prior to the March 1, 2005, CCH, however the hearing officer, at least by implication, appeared to believe there was no good cause. We cannot agree that the proposed added issue of what was the nature of the aggravation and whether the aggravation had resolved was not an "additional" issue. The facts in this case are clearly distinguishable from the facts cited in Appeal No. 041286, cited by the carrier. We cannot conclude that the hearing officer abused her discretion in refusing to add the requested issue(s). Morrow v. H.E.B., Inc., 714 S.W.2d 297 (Tex. 1986).

The carrier also contends that there is no evidence of radiculopathy at C4-5 citing certain medical reports that do not mention radiculopathy at that level. As previously noted an October 11, 2000, report from one of the carrier's RME doctors showing impression on the ventral cord and mild encroachment on the C4 nerve root would support that finding. The carrier argues there is no evidence of herniations or radiculopathy at L2-3 and L3-4. As noted diagnostic studies (Carrier's Exhibit J) on April 3, 1997, which indicate a "left posterior tear/fissure at the L3-4 level, marked partly concordant, left buttock pain was reported" is sufficient to support the finding of herniation and radiculopathy. However our review of the record fails to disclose testing or diagnosis of herniation and radiculopathy at L2-3 and only shows desiccation of the disc at L2-3. Even the subclaimant agrees "that the L2-L3 level is not supported by the diagnostic testing."

Accordingly, we affirm the hearing officer's determination that the _____, compensable injury extends to and includes herniated discs in the lumbar spine with radiculopathy and herniated discs in the cervical spine with radiculopathy (lumbar and cervical neuralgia and radiculitis) at L3-4 through L5-S1 and C4-5 and C5-6 and C6-7. We reverse the hearing officer's determination that the compensable injury extends to include herniation and radiculopathy at L2-3 as not supported by the evidence and render a new decision that the herniated discs in the lumbar spine with radiculopathy does not extend to include the L2-3 level.

The true corporate name of the insurance carrier is **TRANSPORTATION INSURANCE COMPANY** 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.**

Thomas A. Knapp
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Margaret L. Turner
Appeals Judge