APPEAL NO. 091423
FILED DECEMBER 2, 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 July 23, 2009, with the record closing on August 24, 2009. The issue from the benefit review conference (BRC) was "[d]id the [respondent/cross-appellant (claimant)] have disability from 11-19-08 to the present resulting from an injury sustained on _____?" Over the objection of the claimant the hearing officer stated:

> At the request of the [appellant/cross-respondent (self-insured)], and upon a finding of good cause, the following issue was added:
>
> Does the compensable injury sustained on _____, extend to and include an injury to the lumbar spine in the form of a sprain/strain and/or a lumbar protrusion at L4-5?

The hearing officer determined that the claimant had disability from November 19, 2008, through the date of the CCH; that the compensable injury sustained on _____, does include an injury to the lumbar spine in the form of a sprain/strain but that the compensable injury of _____, does not include a lumbar protrusion at L4-5.

The self-insured appealed the disability issue and the determination that the compensable injury includes an injury to the lumbar spine in the form of a sprain/strain, contending that the hearing officer "misstates, mischaracterizes and/or misinterprets the designated doctor's final opinion on extent of injury . . . ."

The claimant appealed the determination that the compensable injury does not include a lumbar protrusion at L4-5 asserting that the extent-of-injury issue had been added over the claimant's objection and that the "record lacks any evidence to support the finding of good cause." The self-insured responded to the claimant's appeal, contending that a low back injury had been discussed at the BRC and urging affirmance of the hearing officer's determination on the lumbar protrusion issue. The appeal file does not contain a response from the claimant to the self-insured's appeal.

DECISION

Reversed and remanded.

The parties stipulated that the claimant sustained a compensable injury on _____. The claimant, a welder, testified he was welding a border fence on a "manlift" (a cherry picker type vehicle) when a section of tubing came loose and struck the claimant in the left forearm as he tried to protect himself. The claimant testified that the impact knocked him back into the controls of the manlift. The self-insured initially denied compensability but subsequently on June 16, 2009, accepted a compensable

injury to the claimant's "left elbow in the form of minimal lateral epicondylitis partial tear of the common extensor tendon at the attachment."

GOOD CAUSE TO ADD AN ISSUE

The claimant objected to adding the extent-of-injury issue. The self-insured urged that a low back injury had been discussed at the BRC. The hearing officer, at the CCH, commented that it would be necessary to determine the extent of injury in order to resolve the disability issue. The hearing officer did not err in adding the extent-of-injury issue. *See* Appeals Panel Decision (APD) 050005, decided February 16, 2005.

EXTENT OF INJURY

At the CCH, the hearing officer was confronted with conflicting medical reports regarding lumbar protrusions at L4-5 and a lumbar sprain/strain, including contradicting opinions from the designated doctor. The hearing officer, at the conclusion of the CCH, announced that she was "holding the record open" and was inclined to write (Dr. W), the designated doctor, a letter of clarification (LOC). The hearing officer announced that she would be "writing letters to you-all and enclosing whatever documents I send, and the letter that I send to [Dr. W]." The hearing officer stated there would be "an opportunity for a final argument," presumably after receiving Dr. W's response.

No LOC was sent to Dr. W. Instead a letter dated August 20, 2009, from the hearing officer, was sent to the parties. The letter stated:

> As you both are aware, the [CCH] was held on July 23, 2009, and the record remained open to allow me an opportunity to send a [LOC] to [Dr. W], the [Texas Department of Insurance, Division of Workers' Compensation (Division)] appointed designated doctor. On August 18, 2009, I personally spoke with [Dr. W] and I have determined that a [LOC] is no longer necessary. As a result of that conversation and discussing only the mechanism of injury as he understood how the [c]laimant was injured. I also agree with him regarding the mechanism of injury, he opined that the injury included a lumbar sprain/strain and does not include the MRI findings taken in May of 2008. This opinion is consistent with his reports and therefore, I do not feel another letter is necessary.
>
> I will be closing the record on August 24, 2009 to allow the parties to submit any additional objections or briefs regarding this case. This letter will also be part of the record and will be marked as a hearing officer exhibit.

The hearing officer erred by failing to allow the parties an opportunity to see or hear exactly what additional information was given to the designated doctor and exactly how, or if, the designated doctor reconciled his conflicting opinions.

We reverse the hearing officer's determinations that the compensable injury includes an injury to the lumbar spine in the form of a sprain/strain; that the compensable injury does not include a lumbar protrusion at L4-5; and that the claimant had disability from November 19, 2008, through the date of the CCH, and remand these issues to the hearing officer.

Upon remand the hearing officer is to document what inquiry she made of Dr. W, allow the parties to comment, and then send Dr. W a corrected LOC, agreeable with the parties. Dr. W's written response is to be made available to the parties for comment and then the hearing officer is to render a decision on the issues of extent of the injury and disability.

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* APD 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).

_____
Thomas A. Knapp
Appeals Judge

CONCUR:

_____
Veronica L. Ruberto
Appeals Judge

_____
Margaret L. Turner
Appeals Judge