

APPEAL NO. 060322
FILED APRIL 19, 2006

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 5, 2006. The disputed issues at the CCH were: (1) whether the respondent's (claimant) compensable injury of ____, extends to and includes an injury of an L4-5 disc herniation and lumbar radiculopathy; (2) whether the claimant has had disability from an injury sustained on ____, and, if so, for what period(s); (3) whether the first certification of maximum medical improvement (MMI) and impairment rating (IR) assigned by (Dr. R) on July 22, 2003, became final under Section 408.123; (4) the date of MMI; and (5) the IR. The parties withdrew an issue regarding whether the Texas Department of Insurance, Division of Workers' Compensation (Division), has jurisdiction regarding the issue of whether the compensable injury extends to the L4-5 disc herniation and lumbar radiculopathy. The hearing officer resolved the disputed issues by deciding that: (1) the claimant's compensable injury of ____, extends to and includes an injury of an L4-5 disc herniation and lumbar radiculopathy; (2) the claimant had disability from (1 day after date of injury), and continuing through (five days after date of injury), and beginning on June 11, 2003, and continuing through the date of the CCH; (3) the first certification of MMI and IR assigned by Dr. R on July 22, 2003, did not become final under Section 408.123; (4) the date of MMI is December 22, 2004; and (5) the claimant's IR is 15%. The appellant (carrier) appeals the hearing officer's determinations on the issues of the extent of the compensable injury, disability, MMI, and IR. The claimant responds, requesting affirmance. There is no appeal of the hearing officer's determination that the first certification of MMI and IR assigned by Dr. R did not become final under Section 408.123.

DECISION

Affirmed in part, reversed and rendered in part, and reversed and remanded in part.

BACKGROUND INFORMATION

It is undisputed that the claimant sustained a compensable injury on ____, when he fell 8 to 10 feet from a falling ladder onto concrete, landing on his buttocks. The parties stipulated that the claimant sustained a compensable injury in the form of lumbar and cervical sprains/strains. Initial medical reports reflect that the claimant complained of back and neck pain after falling from the ladder, that he had numbness in the bilateral legs, and that he complained of aching in his bilateral lower extremities radiating toward the knees at physical therapy.

EXTENT OF INJURY AND DISABILITY

The hearing officer's determinations that the compensable injury of ____, extends to and includes an L4-5 disc herniation and lumbar radiculopathy, and that due to the claimed injury the claimant had disability from (1 day after date of injury), and continuing through (five days after date of injury), and beginning on June 11, 2003, and continuing through the date of the CCH are supported by sufficient evidence and are not so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. We affirm the hearing officer's determinations on the issues of the extent of the compensable injury and disability.

MMI AND IR

It is undisputed that the Guides to the Evaluation of Permanent Impairment, fourth edition (1st, 2nd, 3rd, or 4th printing, including corrections and changes as issued by the American Medical Association prior to May 16, 2000) (AMA Guides) applies to this case. Dr. R, the designated doctor, examined the claimant on July 22, 2003, and certified that the claimant reached clinical MMI on July 22, 2003, with a 10% IR. Dr. R assigned the claimant 5% impairment under Diagnosis-Related Estimate (DRE) Lumbosacral Category II: Minor Impairment, and 5% impairment under DRE Cervicothoracic Category II: Minor Impairment. Dr. R noted that the claimant complained of intermittent numbness and tingling in his right leg, that he had slight loss of reflexes, and that he had some slight decreased circumference in the right leg but it was only about a centimeter (cm). Dr. R determined that the claimant did not have lumbar radiculopathy.

On April 30, 2004, which was after Dr. R's evaluation, the claimant underwent an MRI study that concluded that the claimant has a central disc herniation at L4-5 with encroachment on the thecal sac, but no encroachment on exiting nerve roots. On May 7, 2004, (Dr. C), the claimant's treating doctor at that time, noted that the claimant had not reached MMI. In July 2004, (Dr. P), a neurosurgeon, reported that the claimant was complaining of severe back pain, neck pain, and numbness in the legs, that the claimant's severe back pain with leg numbness was most likely due to the herniated disc at L4-5, and that the herniated disc would most likely occur from a major traumatic event. A CT scan done in July 2004 revealed a left paracentral disc protrusion, which is compressing the left L5 nerve root. Dr. P recommended that the claimant undergo lumbar spine surgery in August 2004, noting that the claimant has an L4-5 central herniation with compressive polyradiculopathy, and stating that the claimant should never have been placed at MMI with his present symptoms and findings. (Dr. L), the claimant's current treating doctor, diagnosed the claimant as having lumbar spine radiculopathy and opined that the claimant's present symptoms are a direct result of the compensable injury. The carrier's required medical examination doctor reported in August 2005 that the claimant has an obvious lumbar radiculopathy in the L5 nerve root, that the claimant's compensable injury had not resolved, and that the claimant would benefit from surgery at the L4-5 level. A carrier peer review doctor testified that the claimant's herniated disc and radicular symptoms were not caused by his fall from the

ladder. The claimant said he has not had lumbar spine surgery as of the date of the CCH because surgery had been denied.

Dr. L, the claimant's current treating doctor, examined the claimant on October 24, 2005, and in a report of the same date certified that the claimant reached statutory MMI on July 27, 2005, with a 15% IR. Dr. L assigned the claimant 10% impairment under DRE Lumbosacral Category III: Radiculopathy, and 5% impairment under DRE Cervicothoracic Category II: Minor Impairment. With regard to MMI, Dr. L stated that the claimant was at MMI by statute, but not clinically, and believed that the statutory date of MMI was July 27, 2005, because he understood that the claimant had not lost time from work initially after the work-related injury. With regard to the impairment for the lumbar region, Dr. L noted that the claimant continued to have pain in his lower back and pain in the left lower extremity and continued to have lumbar radiculopathy. Dr. L noted that the claimant had a 2 cm difference in the calf measurement from left to right, with the left measurement being 30 cm and the right measurement being 32 cm. Dr. L also noted that the claimant's deep tendon reflexes were equal and symmetric in the patellar, but decreased in the left ankle. Dr. L also noted that he believes that the claimant needs surgery and that the claimant's present symptoms are related to his injury.

The carrier appeals the following findings of fact and conclusions of law with regard to MMI and IR:

FINDINGS OF FACT

5. [Dr. R], the designated doctor, did not take into consideration the Claimant's herniated disc at L4-5, with resulting lumbar radiculopathy, in assessing the Claimant's [IR] or date of [MMI].
6. The Claimant has been determined to be a surgical candidate as a result of the effects of the damage or harm sustained prior to the date of [MMI] assigned by [Dr. R], the designated doctor.
7. At the time of the date of [MMI] assigned by [Dr. R], the designated doctor, there was a reasonable medical probability that further material recovery from or lasting improvement to the Claimant's injury could still be reasonably anticipated.
9. The Claimant's date of statutory [MMI] was December 22, 2004.
10. The [IR] and date of [MMI] assigned by the designated doctor are contrary to the great weight of the other medical evidence.
11. The report of [Dr. R], the designated doctor, is not entitled to presumptive weight.

CONCLUSIONS OF LAW

6. The date of [MMI] is December 22, 2004.
7. The Claimant's [IR] is 15%.

In discussing the date of MMI in the Background Information section of his decision, the hearing officer stated in part:

It was [Dr. L's] expressed intent to find the Claimant at MMI on his date of statutory MMI, as opposed to clinical MMI, which [Dr. L] believed the Claimant had not yet obtained due to his being determined to be a surgical candidate. [Dr. L] did not accurately determine the Claimant's date of MMI, as he apparently used an unsubstantiated date in July 2003 as the beginning of the Claimant's 104 weeks following the date on which temporary income benefits [TIBs] began to accrue. However, the Claimant testified that he returned to work a couple of days after the date of the compensable injury. In addition, there is a [Work Status Report (TWCC-73)] dated (two days after date of injury), which takes the Claimant off work from (two days after date of injury) through (five days after date of injury), which is the Sunday following the Claimant's injury on the prior Tuesday. Therefore, the Claimant began missing time from work as a result of his compensable injury on (1 day after date of injury). That would make his date of statutory MMI December 22, 2004. That date precedes [Dr. L's] [IR] so that his rating is not based on a prospective date of MMI.

The hearing officer found that the claimant's TIBs began to accrue on (1 day after date of injury), and that the claimant's date of statutory MMI was December 22, 2004. The carrier appeals the hearing officer's finding that the claimant's date of statutory MMI was December 22, 2004, and the hearing officer's conclusion that the date of MMI is December 22, 2004. The carrier contends that the correct MMI date is July 22, 2003, as certified by Dr. R, the designated doctor.

Section 401.011(30) provides that MMI means the earlier of:

- (A) the earliest date after which, based on reasonable medical probability, further material recovery from or lasting improvement to an injury can no longer reasonably be anticipated;
- (B) the expiration of 104 weeks from the date on which income benefits begin to accrue; or
- (C) the date determined as provided by Section 408.104.

28 TEX. ADMIN. CODE § 124.7 (Rule 124.7) pertaining to the initial payment of TIBs provides in subsections (a) and (b) as follows:

- (a) As used in this section, the following terms have the following meanings, unless the context clearly indicates otherwise: “Accrual date” means the day an injured worker’s income benefits begin to accrue. “Day of disability” means a day when the worker is unable to obtain and retain employment at wages equivalent to the pre-injury wage because of a compensable injury. Intermittent days of disability shall be cumulated to calculate the accrual date.
- (b) An injured worker’s accrual date is the worker’s eighth day of disability.

In this case, we are affirming the hearing officer’s determination that the claimant had disability from (1 day after date of injury), and continuing through (five days after date of injury), and beginning on June 11, 2003, and continuing through the date of the CCH. Thus, the claimant’s accrual date for income benefits was June 13, 2003, which was his eighth day of disability, and not (1 day after date of injury), as found by the hearing officer. Based on the June 13, 2003, accrual date, we calculate the claimant’s statutory date of MMI, which is the expiration of 104 weeks from the date on which income benefits began to accrue per Section 401.011(30)(B), to be June 10, 2005. Consequently, the hearing officer’s finding that the claimant’s date of statutory MMI was December 22, 2004, is incorrect and is reversed because the correct date of statutory MMI is June 10, 2005.

It is clear from the hearing officer’s discussion of the evidence and his findings of fact, that he found that the great weight of the other medical evidence is contrary to the designated doctor’s MMI date of July 22, 2003, and that the claimant had not reached MMI until the date of statutory MMI. The hearing officer’s determination is based at least in part on Dr. L’s statement in his report of October 24, 2005, that the claimant was at MMI by statute but not clinically. If the claimant was not clinically at MMI on October 24, 2005, as found by Dr. L, then the earliest date the claimant would have been at MMI was the statutory date, which was June 10, 2005. The June 10, 2005, date of statutory MMI is earlier than the July 27, 2005, statutory MMI date reported by Dr. L.

We note that Section 408.1225, effective September 1, 2005, provides that the report of the designated doctor has presumptive weight, and the Division shall base its determination of whether the employee has reached MMI on the report of the designated doctor unless the preponderance of the other medical evidence is to the contrary. The preponderance standard in Section 408.1225 applies to this case because the CCH was held on or after September 1, 2005. Section 410.165(a) provides that the hearing officer is the sole judge of the relevance and materiality of the evidence offered and of the weight and credibility to be given to the evidence. It is clear that the hearing officer meant to find that the claimant did not reach MMI until the statutory MMI date was reached, which would be consistent with Dr. L’s report, but

incorrectly determined the statutory date of MMI, as did Dr. L. A determination that the claimant did not reach MMI until he reached statutory MMI is supported by sufficient evidence and is not against the great weight and preponderance of the evidence. However, the statutory date of MMI is June 10, 2005, not December 22, 2004. We reverse the hearing officer's determination that the claimant reached MMI on December 22, 2004, and we render a decision that the claimant reached MMI on June 10, 2005.

Section 408.125(c), effective September 1, 2005, provides that the report of the designated doctor shall have presumptive weight, and the Division shall base the IR on that report unless the preponderance of the other medical evidence is to the contrary, and that if the preponderance of the medical evidence contradicts the IR contained in the report of the designated doctor chosen by the Division, the Division shall adopt the IR of one of the other doctors. Rule 130.1(c)(3) provides that the assignment of an IR for the current compensable injury shall be based on the injured employee's condition as of the MMI date considering the medical record and the certifying examination.

In this case, no doctor has assigned an IR for the compensable injury based on the claimant's condition as of the MMI date of June 10, 2005, considering the medical record and the certifying examination. Dr. R, the designated doctor, assigned a 10% IR based on an MMI date of July 22, 2003, and Dr. L assigned a 15% IR based on an MMI date of July 27, 2005. Consequently, we reverse the hearing officer's determination that the claimant's IR is 15% and we remand the IR issue to the hearing officer to determine the claimant's IR as of the MMI date of June 10, 2005. On remand, the hearing officer is to request Dr. R, the designated doctor, to assign an IR for the claimant's current compensable injury based on the claimant's condition as of the MMI date of June 10, 2005, considering the medical record and the certifying examination, which means that the designated doctor will have to reexamine the claimant. The hearing officer is to inform the designated doctor that the claimant's compensable injury includes a herniated disc at L4-5 and radiculopathy. The designated doctor will need to determine whether the radiculopathy is ratable under the criteria of the AMA Guides. If the designated doctor is no longer qualified or available to be the designated doctor, a second designated doctor will need to be appointed. The hearing officer shall provide the parties an opportunity to respond to any report of the designated doctor and to present additional evidence, including additional medical reports from authorized doctors assigning an IR based on the claimant's condition as of the MMI date of June 10, 2005, considering the medical record and the certifying examination.

We affirm the hearing officer's determinations that the compensable injury extends to and includes an L4-5 disc herniation and lumbar radiculopathy, and that the claimant had disability from (1 day after date of injury), and continuing through (five days after date of injury), and beginning on June 11, 2003, and continuing through the date of the CCH. We reverse the hearing officer's decision that the date of MMI is December 22, 2004, and we render a decision that the date of MMI is June 10, 2005. We remand the IR issue to the hearing officer to make a determination of the IR based on an MMI date of June 10, 2005.

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, as amended effective June 17, 2001, to exclude Saturdays and Sundays and holidays listed in Section 662.003 of the Texas Government Code in the computation of time in which a request for appeal or a response must be filed.

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.**

Robert W. Potts
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Margaret L. Turner
Appeals Judge