APPEAL NO. 081877
FILED FEBRUARY 20, 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 November 18, 2008. The issues before the hearing officer were:

(1) Whether the appellant's (claimant) compensable injury of _____, includes a herniated L4-5 disc, lumbar disc bulges, degenerative disc disease at L4-S1 levels, and an osteophyte at the L4-5 level?

(2) Whether the respondent (carrier) waived its right to dispute the compensability of the claimant's herniated L4-5 disc, lumbar disc bulges, and degenerative disc disease at L4-S1 levels (in accordance with Section 409.021)?

(3) What is the claimant's correct date of maximum medical improvement (MMI)?

(4) What is the claimant's correct impairment rating (IR)?

The hearing officer determined that the carrier waived the right to contest compensability of the: (1) herniated L4-5 disc[1] (hereinafter referred to as L4-5 herniated nucleus pulposus (HNP)); and (2) lumbar disc bulges by not timely contesting in accordance with Section 409.021. The hearing officer determined that the compensable injury of _____, includes: (1) L4-5 HNP; and (2) lumbar disc bulges. These carrier waiver and extent-of-injury determinations with regard to L4-5 HNP and lumbar disc bulges have not been appealed and have become final pursuant to Section 410.169.

Although listed in the carrier waiver and extent-of-injury issues, the hearing officer failed to include in her decision: (1) whether the carrier waived the right to contest compensability of degenerative disc disease at L4-S1 levels by not timely contesting the condition in accordance with Section 409.021; and (2) whether the compensable injury of _____, includes degenerative disc disease at L4-S1 levels. Also, the hearing officer failed to include in her decision whether the compensable injury of _____, includes an osteophyte at the L4-5 level, a condition listed in the extent-of-injury issue. We note that the hearing officer did make findings of fact and conclusions of law on these conditions. The hearing officer's decision is incomplete as to these extent of injury conditions.

[1] We note that the carrier waiver and extent-of-injury issues list the condition "herniated L4-5 disc" rather than a "L4-5 HNP." However, the hearing officer refers to herniated L4-5 disc as L4-5 HNP. Neither party appeals that reference.

The hearing officer determined that the claimant reached MMI on April 13, 2007, and that the claimant's IR is 0%.

The claimant appealed the carrier waiver and extent-of-injury determinations that were adverse to the claimant, and also disputed the MMI and IR determinations. The appeal file does not contain a response from the carrier.

DECISION

Reversed and rendered in part and reversed and remanded in part.

The claimant testified that she sustained a back injury at work on _____. At the CCH, the carrier stated on the record that it accepted "a lumbar strain with exacerbation of pre-existing spondylosis/spondylolisthesis in the lumbar area" as a compensable injury, based on the designated doctor's report dated April 13, 2007.[2]

CARRIER WAIVER

Section 409.021(a) provides that for claims based on a compensable injury that occurred on or after September 1, 2003, that not later than the 15th day after the date on which an insurance carrier receives written notice of an injury, the insurance carrier shall: (1) begin the payment of benefits as required by the 1989 Act; or (2) notify the Texas Department of Insurance, Division of Workers' Compensation (Division) and the employee in writing of its refusal to pay. Section 409.021(c) provides that if an insurance carrier does not contest the compensability of an injury on or before the 60th day after the date on which the insurance carrier is notified of the injury, the insurance carrier waives its right to contest compensability. In Appeals Panel Decision (APD) 041738-s, decided September 8, 2004, the Appeals Panel established that when a carrier does not timely dispute the compensability of an injury, the compensable injury is defined by the information that could have been reasonably discovered by the carrier's investigation prior to the expiration of the waiver period.

In an unappealed finding, the hearing officer found that the carrier first received written notice of the claimed injury on July 24, 2006. The expiration of the 60-day waiver period is therefore September 22, 2006. It is undisputed that the carrier did not dispute the claimed injuries prior to the expiration of the waiver period.

With regard to degenerative disc disease at L4-S1, the hearing officer failed to include a determination in her decision as to whether the carrier waived the right to contest compensability of this condition by not timely contesting this condition in accordance with Section 409.021. We note that the hearing officer did make a finding that the carrier could not have reasonably discovered that the claimant sustained degenerative disc disease "[w]ithin [60] days of July 24, 2006." The hearing officer

[2] We note that the hearing officer did not specifically include findings of fact, conclusions of law or a decision regarding "spondylosis/spondylolisthesis." Further, we note no appeal was made regarding these conditions.

concluded that the carrier did not waive the right to contest compensability of the degenerative disc disease. In the Background Information section of her decision the hearing officer states that "[i]nsofar as [c]laimant's degenerative disc disease is concerned, the [h]earing [o]fficer was unable to locate a reference to this condition prior to September 22, 2006; as this condition apparently was not identified within the waiver period applicable to this case, [c]arrier has not waived its right to dispute the compensability thereof."

In evidence is a medical report dated September 15, 2006, from Dr. L, the required medical examination doctor, in which he refers to a date of injury of _____, and he states that "[i]t is my assessment that on 22 June she sustained a lumbar strain/sprain and that injury is superimposed upon pre-existing spondylolisthesis/spondylolysis of the lumbar spine and degenerative [disc] disease of the lumbar spine." Additionally, in that report Dr. L states that the diagnosis is "lumbar strain/sprain, pre-existing spondylolisthesis/spondylolysis and degenerative [disc] disease." Dr. L's report dated September 15, 2006, is a report that is dated prior to expiration of the waiver period. This medical report was specifically addressed to the carrier.

The hearing officer erred in finding that the carrier could not have reasonably discovered the degenerative disc disease at L4-S1 within the waiver period based on Dr. L's report dated September 15, 2006. The hearing officer erred in concluding that the carrier did not waive the right to contest compensability of the degenerative disc disease at L4-S1. Accordingly, in that the hearing officer failed to include in her decision a carrier waiver determination on degenerative disc disease at L4-S1, we reverse that portion of the hearing officer's carrier wavier determination as incomplete as to degenerative disc disease at L4-S1 and we render a new decision that the carrier waived the right to contest compensability of the degenerative disc disease at L4-S1 by not timely contesting the injury in accordance with Section 409.021.

EXTENT OF INJURY

The hearing officer failed to include in her decision whether the compensable injury includes degenerative disc disease at L4-S1. Given that we have reversed that portion of the carrier waiver issue as to the degenerative disc disease at L4-S1 and we rendered a new decision that the carrier waived the right to contest compensability of the degenerative disc disease at L4-S1 by not timely contesting the injury in accordance with Section 409.021, that condition became compensable by virtue of carrier waiver. Accordingly, we reverse that portion of the hearing officer's decision as incomplete as to whether the claimant's compensable injury includes degenerative disc disease at L4-S1, and we render a new decision that the compensable injury includes degenerative disc disease at L4-S1.

With regard to an osteophyte at L4-5, the hearing officer also failed to include a decision on this condition and therefore her decision is incomplete. We note that she did make a finding of fact and conclusion of law that the compensable injury of

_____, does not include an osteophyte at L4-5, and this finding of fact and conclusion of law are supported by sufficient evidence. Accordingly, we reverse that portion of the hearing officer's decision as incomplete as to whether the claimant's compensable injury includes an osteophyte at L4-5, and we render a new decision that the claimant's compensable injury does not include an osteophyte at L4-5.

MMI AND IR

Section 401.011(30)(A) defines MMI as "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." Section 408.1225(c) 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. Section 408.125(c) 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. 28 TEX. ADMIN. CODE § 130.1(c)(3) (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. The preamble of Rule 130.1(c)(3) clarifies that the IR "must be based on the injured worker's condition as of the MMI date." In response to public comment on Rule 130.1, the Division, in the preamble, noted that in the situations where the claimant reaches MMI clinically, rather than with the expiration of 104 weeks or the extended date in the event of spinal surgery, future changes in the injured worker's condition may cause the MMI date to change and that "[i]n the event the MMI date is changed due to a post-MMI change in the injured employee's conditions, there should be a re-evaluation of the IR as of the new MMI date." 29 Tex. Reg. 2332 (2004). *See* APD 040313-s, decided April 5, 2004.

The designated doctor, Dr. R, examined the claimant on April 13, 2007, and certified that the claimant reached MMI on that date with a 0% IR, based on Diagnosis-Related Estimate (DRE) Lumbosacral Category I: Complaints and Symptoms using 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). In that same report, Dr. R opined that the extent of the compensable injury is a "lumbar strain with exacerbation of pre-existing spondylolysis and spondylolisthesis, grade I, at the last lumbar level." Also, Dr. R opines that the claimant's disability is a "direct result of exacerbation of a pre-existing condition at L5-S1" of which it "has not resolved." In that same report, Dr. R notes that that the claimant's leg pain has improved, but she still has back pain.

In evidence is an "Authorization After Reconsideration Notice" dated June 7, 2007, from the carrier authorizing the continuation of 10 sessions of chronic pain

management program (from June 7 through August 7, 2007). The claimant testified that her medical condition improved and her pain level decreased as a result of the chronic pain management program.

In a response dated June 8, 2007, to a letter of clarification, Dr. R states that the claimant "has reached pre-injury status since she has a significant pre-existing problem namely spondylolysis and spondylolisthesis at L5-S1 which was then treated surgically and it is my opinion that her condition has stabilized and her injury was a lumbar strain of a pre-existing condition and that's why I felt she was at [MMI]."

In another response dated November 26, 2007, to a letter of clarification, Dr. R states "[i]t continues to be my opinion that the [claimant] has extensive degenerative disease of the spine including more than likely the disc herniation that were present but not causing enough physical problems to be removed." Additionally, Dr. R opined that the claimant's "limited range of motion at the time of my examination is due to her degenerative lumbar spondylosis and pre-existing diagnoses of spondylosis as well as spondylolysis or spondylolisthesis" . . . "and that these changes are not due to the lumbar strain and therefore the [claimant's] diagnosis remains and belongs in [DRE Lumbosacral Category 1] of 0% whole person impairment." Dr. R opined that the claimant reached MMI on April 13, 2007, and he stated that there was no need to re-examine the claimant. In the Background Information section of her decision, the hearing officer states that Dr. R, the designated doctor, "considered the compensable aggravation of [c]laimant's spondylosis and spondylolisthesis" and that he gave detailed responses to letters of clarification "explaining why he declined to alter his opinion."

In APD 071599-s, decided October 31, 2007, the medical evidence in the record established that the claimant continued to receive treatment for the compensable injury after the date of MMI certified by the designated doctor, and that the additional treatment did improve the claimant's condition. In that case, the Appeals Panel reversed the hearing officer's MMI determination because of the claimant's improved condition and rendered a new determination of a later MMI date. In the instant case, as in 071599-s, the evidence establishes that the claimant's medical condition improved after receiving treatment after the date of MMI certified by the designated doctor. Also, the Appeals Panel has held that the designated doctor's failure to consider the entire compensable injury in determining the date of MMI and assessing the IR is a valid reason to reject the designated doctor's opinion. *See* APD 032895, decided December 19, 2003, citing APD 950913, decided July 20, 1995, and APD 941428, decided December 8, 1994. Accordingly, we reverse the hearing officer's MMI determination that the claimant reached MMI on April 13, 2007.

With regard to the IR, the hearing officer determined that the claimant's IR is 0%, as certified by the designated doctor. The evidence establishes that the designated doctor only considered a lumbar strain of a pre-existing condition in determining IR. The designated doctor did not consider the entire compensable injury. The Appeals Panel has held that the doctor evaluating permanent impairment must consider the entire compensable injury. APD 043168, decided January 20, 2005. This must be

done in cases in which the condition becomes part of the compensable injury by virtue of carrier waiver. APD 071109, decided September 5, 2007. Accordingly, we reverse the hearing officer's determination that the claimant's IR is 0%

Review of the record shows that there are two other certifications of MMI and IR by Dr. B, a referral doctor. In evidence is a Report of Medical Evaluation (DWC-69) dated August 14, 2007, by Dr. B in which he lists the date of examination as August 14, 2007, and he certifies that the claimant reached MMI on that date with a 5% IR. However, there is no narrative report in evidence indicating that Dr. B considered the entire compensable injury in determining MMI and IR. Accordingly, Dr. B's certification dated August 14, 2007, cannot be adopted.

In evidence is a DWC-69 dated October 2, 2007, by Dr. B, in which he lists the date of examination as August 14, 2007, and he assessed an IR of 10%. Dr. B did not certify a MMI date on the amended DWC-69. Additionally, there is no narrative report in evidence indicating that Dr. B considered the entire compensable injury in determining MMI and IR. Accordingly, Dr. B's certification dated October 2, 2007, cannot be adopted.

Since the hearing officer's MMI and IR determinations have been reversed and there is no other certification of MMI/IR in evidence which we can adopt, we remand the MMI and IR issues to the hearing officer.

The designated doctor in this case is Dr. R. The hearing officer is to determine whether Dr. R is still qualified and available to be the designated doctor, and if so, request that Dr. R determine when the claimant reached MMI and rate the entire compensable injury consistent with this decision. The hearing officer is to provide the designated doctor's response to the parties and allow the parties an opportunity to respond and then make determinations regarding MMI and IR, and include all responses in evidence at the hearing on remand. If Dr. R is no longer qualified and available to serve as the designated doctor, then another designated doctor is to be appointed pursuant to Rule 126.7(h) to determine the claimant's MMI and IR consistent with this decision.

SUMMARY

We reverse that portion of the hearing officer's carrier wavier determination as incomplete as to degenerative disc disease at L4-S1 and we render a new decision that the carrier waived the right to contest compensability of the degenerative disc disease at L4-S1 by not timely contesting the injury in accordance with Section 409.021.

We reverse that portion of the hearing officer's decision as incomplete as to whether the claimant's compensable injury includes degenerative disc disease at L4-S1, and we render a new decision that the compensable injury includes degenerative disc disease at L4-S1, by virtue of carrier waiver. We reverse the hearing officer's decision as incomplete as to whether the claimant's compensable injury includes an osteophyte

at L4-5, and we render a new decision that the claimant's compensable injury does not include an osteophyte at L4-5.

We reverse the hearing officer's determinations that the claimant reached MMI on April 13, 2007, and that the claimant's IR is 0%, and we remand the MMI and IR issues to the hearing officer to make a determination 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* APD 060721, decided June 12, 2006.

The true corporate name of the insurance carrier is **AMERICAN ZURICH INSURANCE COMPANY** and the name and address of its registered agent for service of process is

LEO F. MALO
12222 MERIT DRIVE, SUITE 700
DALLAS, TEXAS 75251.

_____
Veronica L. Ruberto
Appeals Judge

CONCUR:

_____
Thomas A. Knapp
Appeals Judge

_____
Margaret L. Turner
Appeals Judge