APPEAL NO. 090419
FILED JUNE 1, 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 January 26, 2009, with the record closing on February 26, 2009. The issues before the hearing officer were:

(1) Has the appellant (self-insured) waived the right to contest compensability of a 3-mm right paracentral disc protrusion at L5-S1, lumbar facet disease, and spondylosis by not timely contesting the diagnoses in accordance with Section 409.021?

(2) Does the compensable injury of _____, extend to include a 3-mm right paracentral disc protrusion at L5-S1, lumbar facet disease, and spondylosis?

(3) Did the respondent (claimant) have disability resulting from a compensable injury from November 14, 2007, through July 28, 2008?

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

(5) What the claimant's impairment rating (IR)?

The hearing officer determined that: (1) the self-insured waived the right to contest compensability of a 3-mm right paracentral disc protrusion at L5-S1, lumbar facet disease, and spondylosis by not timely contesting the diagnoses in accordance with Section 409.021; (2) the compensable injury of _____, extends to a 3-mm right paracentral disc protrusion at L5-S1, lumbar facet disease, and spondylosis; (3) the claimant had disability resulting from the compensable injury from November 14, 2007, through July 28, 2008, but not thereafter through the date of the CCH; (4) the claimant's date of MMI is July 28, 2008, as certified by the designated doctor; and (5) the claimant's IR is five percent as certified by the designated doctor.

The self-insured appealed the hearing officer's determinations on the issues of carrier waiver, extent of injury, disability, MMI and IR. Additionally, the self-insured argues that the hearing officer incorrectly determined that the claimant's IR is five percent as certified by the designated doctor because the designated doctor did not certify the claimant had an IR of five percent. The claimant responded, urging affirmance.

DECISION

Affirmed in part and reversed and rendered in part.

The claimant testified that he injured his low back while driving a forklift over a railroad track at work on _____. The parties stipulated that: (1) the claimant sustained a compensable injury on _____; (2) the self-insured received first written notice of the compensable injury on August 28, 2007; (3) the Texas Department of Insurance, Division of Workers' Compensation (Division)-selected (Dr. Y) to serve as its designated doctor for MMI/IR; (4) the Division-selected designated doctor certified that the claimant reached MMI on January 8, 2008, with a zero percent IR; and (5) the claimant's treating doctor, (Dr. R), certified that the claimant reached MMI on July 28, 2008, with a five percent IR.

CARRIER WAIVER, EXTENT OF INJURY AND DISABILITY

The hearing officer's decision that the self-insured waived the right to contest compensability of a 3-mm right paracentral disc protrusion at L5-S1, lumbar facet disease, and spondylosis by not timely contesting the diagnoses in accordance with Section 409.021 is supported by sufficient evidence and is affirmed.

The hearing officer's decision that the compensable injury of _____, extends to a 3-mm right paracentral disc protrusion at L5-S1, lumbar facet disease and spondylosis is supported by sufficient evidence and is affirmed.

The hearing officer's decision that the claimant had disability resulting from the compensable injury from November 14, 2007, through July 28, 2008, but not thereafter through the date of the CCH is supported by sufficient evidence and is affirmed.

MMI AND IR

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. *See* Appeals Panel Decision (APD) 040313-s, decided April 5, 2004.

In the instant case, the designated doctor, Dr. Y, initially examined the claimant on January 8, 2008, and diagnosed the claimant with a lumbar strain. Dr. Y certified that the claimant reached MMI on January 8, 2008, with a zero percent IR, based on Diagnosis-Related Estimate (DRE) Lumbosacral Category I: Complaints or 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). Subsequently, the claimant's treating doctor, Dr. R, examined the claimant on July 28, 2008, and diagnosed the claimant with a L5-S1 disc protrusion. Dr. R certified that the claimant reached MMI on July 28, 2008, with a five percent IR, based on DRE Lumbosacral Category II: Minor Impairment.

The hearing officer held the record open to obtain clarification from the designated doctor with regard to the MMI/IR. In a letter of clarification dated January 26, 2009, the hearing officer informed the designated doctor that the extent of the claimant's compensable injury was still in dispute and asked the designated doctor to provide an alternate IR which included the disputed extent-of-injury conditions. In a response dated February 9, 2009, Dr. Y amended the claimant's date of MMI to July 28, 2008, with a zero percent IR. In his response Dr. Y noted that he amended the MMI date based "on the office visit dated July 2, 2008, by [Dr. R], which states that there was an exacerbation of lower back pain. On July 28, 2008, [Dr. R] felt that [the claimant] had reached MMI for this and I am in agreement with him." Dr. Y provided an amended Report of Medical Evaluation (DWC-69) that lists the date of examination as January 8, 2008, and certifies that the claimant reached MMI on July 28, 2008, with a zero percent IR. We note that Dr. Y amended his certification of MMI without re-examining the claimant. *See* Rule 130.1(b)(4)(B). *See also* APD 071988, decided January 3, 2008.

In the instant case, a review of the record indicates that Dr. Y, the designated doctor, did not assign an IR of five percent as determined by the hearing officer. Dr. Y changed the MMI date from January 8, 2008, to a later date of MMI of July 28, 2008, without re-examining the claimant as required by Rule 130.1(b)(4)(B). Accordingly, we reverse the hearing officer's decision that the claimant reached MMI on July 28, 2008, with a five percent IR as certified by the designated doctor.

OTHER CERTIFICATIONS OF MMI/IR

Given that we have reversed the hearing officer's decision that the claimant reached MMI on July 28, 2008, with a five percent IR as certified by the designated doctor, we consider two other certifications of MMI/IR in evidence.

Dr. Y, the designated doctor, initially examined the claimant on January 8, 2008, and in his first certification Dr. Y certified that the claimant reached MMI on January 8, 2008, with a zero percent IR. In his narrative report dated January 8, 2008, Dr. Y diagnosed the claimant with only a lumbar strain injury. In that we have affirmed the hearing officer's extent-of-injury determination, Dr. Y's certification of MMI and IR dated January 8, 2008, does not take into consideration the extent-of-injury conditions. Accordingly, Dr. Y's certification that the claimant reached MMI on January 8, 2008, with a zero percent IR cannot be adopted. *See* APD 080380, decided May 8, 2008.

The other certification of MMI/IR is from Dr. R, the treating doctor. The evidence reflects that Dr. R examined the claimant on July 28, 2008, and certified that the claimant reached MMI on that date, with a five percent IR, based on DRE Lumbrosacral

Category II: Minor Impairment. Dr. R's narrative report references the claimant's MRI of the lumbar spine dated October 6, 2007, which indicates that Dr. R considered the extent-of-injury conditions that were in dispute when he assessed an IR. Accordingly, we render a new decision that the claimant reached MMI on July 28, 2008, with a five percent IR as certified by Dr. R, the treating doctor.

SUMMARY

We affirm the hearing officer's decision on the issues of carrier waiver, extent of injury and disability.

We reverse the hearing officer's decision that the claimant reached MMI on July 28, 2008, with a five percent IR as certified by the designated doctor, and we render a new decision that the claimant reached MMI on July 28, 2008, with a five percent IR as certified by the treating doctor, Dr. R.

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

(NAME)
(ADDRESS)
(CITY), TEXAS (ZIP CODE).

_____
Veronica L. Ruberto
Appeals Judge

CONCUR:

_____
Cynthia A. Brown
Appeals Judge

_____
Margaret L. Turner
Appeals Judge