

APPEAL NO. 090639
FILED JULY 3, 2009

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A consolidated contested case hearing was held on April 2, 2009. The issues before the hearing officer were:

- (1) Did the appellant (claimant) have disability for the period beginning on June 9, 2008, and continuing through the date of the CCH? (Both (Docket No. 1) and (Docket No. 2) consolidated and revised the disability issues to one issue.)
- (2) Does the compensable injury extend to include an L4-5 broad based central disc protrusion with left lower radiculitis? (Docket No. 2)
- (3) What is the date of maximum medical improvement (MMI)? (Docket No. 2)
- (4) What is the impairment rating (IR)? (Docket No. 2)

The hearing officer determined that: (1) the claimant had disability beginning June 9, 2008, and continuing through the date of the CCH; (2) the compensable injury extends to a L4-5 broad-based central disc protrusion, but it does not extend to left lower radiculitis; (3) the claimant reached MMI on June 9, 2008; and (4) the claimant's IR is zero percent. The claimant appealed that portion of the hearing officer's extent-of-injury determination that the compensable injury does not extend to left lower radiculitis, as well as, the determinations on the issues of MMI and IR. The respondent (carrier) responded urging affirmance.

The hearing officer's decision on the issue of disability and that portion of the hearing officer's decision that the compensable injury extends to an L4-5 broad-based central disc protrusion have not been appealed and have become final pursuant to Section 410.169.

DECISION

Reversed and remanded.

The parties stipulated that the claimant sustained a compensable injury on _____. In evidence is an MRI of the lumbar spine dated March 21, 2007, which concludes that there is degenerative disc disease at L4-5, broad based central disc protrusion at L4-5, and minimal central spinal canal stenosis at L4-5. The Texas Department of Insurance, Division of Workers' Compensation (Division) appointed (Dr. G) as the designated doctor to opine on several issues which include MMI, IR, and extent of injury. Dr. G examined the claimant on August 10, 2007, and on August 21,

2007, certified that the claimant had not reached MMI. Dr. G's narrative report dated August 21, 2007, states that the claimant's compensable injury of _____, "extends to include a broad-based central disk protrusion at L4-5. The [claimant] has also developed left lower extremity radiculitis complaints." Dr. G re-examined the claimant on December 14, 2007, and again, certified that the claimant had not reached MMI. Dr. G's narrative report dated December 14, 2007, states that the compensable injury of _____, "extends to include a broad-based central disc protrusion at L4-5 with left lower extremity radiculitis."

The required medical examination (RME) doctor, (Dr. Z), examined the claimant on June 9, 2008, and he certified that the claimant reached MMI on that same date with a zero percent IR. In his narrative report, Dr. Z diagnosed a lumbar strain as resolved and stated that the claimant was complaining of pain radiating "from his low back to the medial aspect of the thigh and down the leg to the level of the ankle" Additionally, Dr. Z stated that according to the MRI of the lumbar spine the "L4-5 disc has nil signal when the other discs have some signal. Otherwise, no significant abnormality is noted. That is not a true abnormality, that is degenerative changes." Subsequently, the designated doctor, Dr. G re-examined the claimant on January 22, 2009, and certified that the claimant reached MMI on January 21, 2009, with a five percent IR, based on Diagnosis-Related Estimate (DRE) Lumbosacral Category II: Minor Impairment 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) (AMA Guides).

EXTENT OF INJURY

Section 408.0041(a) provides in pertinent part that at the request of an insurance carrier or an employee, or on the Commissioner's own order, the Commissioner may order a medical examination to resolve any question about: (3) the extent of the employee's compensable injury. 28 TEX. ADMIN. CODE § 126.7(c)(3) (Rule 126.7(c)(3)) provides in part that a designated doctor examination shall be used to resolve questions about the extent of the compensable injury. Rule 126.7(d) provides that the report of the designated doctor is given presumptive weight regarding the issues in question and/or dispute, unless the preponderance of the evidence is to the contrary.

The hearing officer found that the claimant's left lower radiculitis was neither caused by nor aggravated by the _____, compensable injury. In the Background Information section of the decision, the hearing officer states that Dr. G assigned a five percent IR for the lumbar spine based on DRE Lumbosacral Category II "for a radiculopathy." This statement by the hearing officer is incorrect. Further the hearing officer commented that "[Dr. G's] objective tests, however, reflected a normal gait, posture, symmetrical leg girth measurements, with only subjective tenderness at L5-S1." The AMA Guides provide that a five percent impairment based on DRE Lumbosacral Category II is for a "Minor Impairment," rather than for radiculopathy as stated by the hearing officer. The hearing officer mistakenly considered radiculitis and

radiculopathy as the same condition because he comments that Dr. G assessed an IR for radiculopathy.¹ According to Dorland's Illustrated Medical Dictionary (28th edition) radiculitis and radiculopathy are defined differently. See Appeals Panel Decision (APD) 042744, decided December 20, 2004. In APD 072220-s, decided February 5, 2008, the Appeals Panel held that to receive a rating for radiculopathy the claimant must have significant signs of radiculopathy, such as loss of relevant reflex(es), or measured unilateral atrophy of 2 centimeters or more above or below the knee, compared to measurements on the contralateral side at the same location. The atrophy or loss of relevant reflex must be spine-injury-related for radiculopathy to be rated.

In the present case, there is no indication in Dr. G's narrative reports that he opined that the claimant's injury extends to radiculopathy or that he assessed an IR for radiculopathy. Dr. G's reports reference radiculitis. We note that based on Table 72, page 3/110, of the AMA Guides, the description for DRE Lumbosacral Category II: Minor Impairment states that "clinical signs of lumbar injury are present without radiculopathy or loss of motion segment integrity." Further, the description for DRE Lumbosacral Category III: Radiculopathy states that "evidence of radiculopathy is present." As previously mentioned, Dr. G opined, in two of his narrative reports that the claimant's compensable injury of _____, extends to left lower radiculitis, and assessed an IR based on DRE Lumbosacral Category II: Minor Impairment. Additionally, (Dr. B), the referral doctor, states in his report dated May 1, 2007, that he reviewed the MRI of the lumbar spine and he diagnosed the claimant with "lumbar radiculitis." The hearing officer's mistake in considering radiculitis and radiculopathy as the same condition necessitates a reversal of the hearing officer's determination that the claimant's compensable injury does not extend to left lower radiculitis. Accordingly, we reverse that portion of the hearing officer's decision that the compensable injury of _____, does not extend to left lower radiculitis, and we remand to the hearing officer to make a determination on the issue of whether the compensable injury of _____, extends to left lower radiculitis.

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. Rule 130.1(c)(3)) provides that the assignment of an IR for the current compensable injury shall be based

¹ Radiculopathy is defined in Dorland's Illustrated Medical Dictionary (28th edition) as "a disease of the nerve roots." Radiculitis is defined in Dorland's Illustrated Medical Dictionary (28th edition) as "inflammation of the spinal nerve roots."

on the injured employee's condition as of the MMI date considering the medical record and the certifying examination. See APD 040313-s, decided April 5, 2004.

The hearing officer found that a preponderance of the evidence established that the claimant reached MMI on June 9, 2008, with a zero percent IR as certified by Dr. Z, the RME doctor. However Dr. Z did not rate the entire compensable injury when he certified MMI/IR because his narrative report states that the claimant's injury is a lumbar strain which has resolved. See APD 080380, decided May 8, 2008. Given that the hearing officer found, in an unappealed finding, that the claimant's compensable injury includes a "L4-5 broad-based central disc protrusion" and the Appeals Panel has reversed and remanded that portion of the hearing officer's decision on whether the claimant's injury extends to "lower left radiculitis," we reverse the hearing officer's determinations on the issues of MMI and IR. We note that the Appeals Panel has held that the resolution of a dispute over an IR cannot proceed unless the "threshold" issue of extent of injury is resolved either by the parties or by the hearing officer. See APD 060170-s, decided March 22, 2006. Accordingly, we reverse the hearing officer's decision that the claimant reached MMI on June 9, 2008, with a zero percent IR, and we remand to the hearing officer to make a determination on the issues of MMI and IR.

SUMMARY

We reverse that portion of the hearing officer's decision that the compensable injury of _____, does not extend to left lower radiculitis, and we remand to the hearing officer to make a determination on the issue of whether the compensable injury of _____, extends to left lower radiculitis. We reverse the hearing officer's decision that the claimant reached MMI on June 9, 2008, with a zero percent IR, and we remand to the hearing officer to make a determination on the issues of MMI and IR.

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 HOME ASSURANCE COMPANY** and the name and address of its registered agent for service of process is

**CORPORATION SERVICE COMPANY
701 BRAZOS, SUITE 1050
AUSTIN, TEXAS 78701.**

Veronica L. Ruberto
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Margaret L. Turner
Appeals Judge