

APPEAL NO. 091787
FILED JANUARY 7, 2010

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 October 6, 2009. Regarding the six issues before her, the hearing officer determined that: (1) the first maximum medical improvement (MMI) certification and assigned impairment rating (IR) issued by (Dr. E) on July 7, 2008, did not become final; (2) the appellant (claimant) is entitled to an extension of his statutory date of MMI; (3) the claimant's compensable injury of _____, includes an instability pattern (spondylolisthesis) at L5-S1 with lumbar stenosis and radiculopathy, degenerative disc disease of the lumbar spine and cervical spine but does not include depression or anxiety; (4) the claimant sustained disability from July 8, 2008, through June 22, 2009; (5) the claimant reached MMI on April 14, 2009; and (6) the claimant has a 10% whole body IR.

The hearing officer's determinations that: (1) Dr. E's first certification of MMI and IR did not become final; (2) the claimant is entitled to an extension of his statutory MMI date; (3) the claimant's compensable injury of _____, includes an instability pattern (spondylolisthesis) at L5-S1 with lumbar stenosis and radiculopathy, degenerative disc disease of the lumbar and cervical spine; and (4) the claimant sustained disability from July 8, 2008, through June 22, 2009, have not been appealed and have become final pursuant to Section 410.169.

The claimant appeals the determinations that the compensable injury does not include depression or anxiety as being against the great weight and preponderance of the evidence, and that the MMI date and IR did not consider the depression and anxiety. The respondent (carrier) responded, urging affirmance.

DECISION

Reversed and remanded.

It is undisputed that the claimant was an airline employee and that on _____, sustained a compensable injury when he tripped over a wheel "chock" and fell backward, claiming injuries to his neck and low back. In evidence is a letter (EES-14) dated June 5, 2007, appointing Dr. E as a designated doctor to determine MMI, IR, extent of injury and disability. Subsequently, another EES-14 letter dated February 28, 2008, again appointed Dr. E as a designated doctor to determine MMI/IR and disability. In evidence are Reports of Medical Evaluation (DWC-69) and narratives dated June 26, 2007, and March 7, 2008, from Dr. E stating that the claimant is not at MMI. The claimant had cervical spinal surgery on July 20, 2007. A third DWC-69 and narrative dated July 7, 2008, from Dr. E certified that the claimant reached MMI on July 7, 2008, with an 8% IR (based on cervical loss of range of motion). Dr. E opined in the July 7, 2008, narrative that the extent of injury was "a protruding disc in the cervical

spine at two levels and cervical and lumbar pain.” That IR was disputed and Dr. E amended his report in a report dated August 4, 2008, certifying MMI on July 7, 2008, with a 5% IR based on 0% impairment for the lumbar spine and 5% impairment for the cervical spine using Diagnosis-Related Estimate (DRE) Cervicothoracic Category II: Minor Impairment pursuant to 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).

The claimant had lumbar spine surgery on October 29, 2008. In evidence is a Chronic Pain Assessment report dated August 19, 2008, from (Dr. RG), a referral psychiatrist. Dr. RG discussed the claimant’s cervical surgery (of July 20, 2007) and the claimant’s complaints. Dr. RG diagnosed a “[p]ain disorder associated with both psychological factors and a general medical condition, major depressive disorder, a single episode severe without psychotic features.” Individual therapy session notes dated October 20, 2008, through April 7, 2009, diagnose severe depression. A follow-up report dated April 14, 2009, from Dr. RG references claimant’s lumbar spine surgery in October 2008 and indicates that the claimant is more depressed and “stressed out about his financial situation.”

(Dr. G), the treating doctor, in a DWC-69 and narrative dated June 22, 2009, certified MMI on that date with a 19% IR. Dr. G assessed a 5% impairment for DRE Cervicothoracic Category II: Minor Impairment; 5% impairment for DRE Lumbosacral Category II: Minor Impairment; and 10% impairment for a class 2 (mild impairment) due to mental and behavioral disorders referencing pages 14/300-301 of the AMA Guides, for a combined whole person impairment of 19%.

In evidence is an amended DWC-69 dated July 8, 2009, from Dr. E, the designated doctor, referencing a June 26, 2009, date of examination certifying “statutory” MMI of April 14, 2009, with a 10% IR. Dr. E states the claimant “falls within Category DRE III and therefore qualifies for 10 percent impairment” (apparently for DRE Lumbosacral Category III: Radiculopathy which has a 10% IR). Also in evidence is a narrative dated June 26, 2009, from Dr. E which states:

This is one of the best results of back surgery that I have seen. The issue was a letter from the [Texas Department of Insurance, Division of Workers’ Compensation (Division)] regarding the MMI date. As you are aware, the MMI determination is done on the day of the evaluation and does not take into consideration any future plans of surgery. However, on this occasion, the claimant underwent further surgery on 10-19-08¹ and it had been approved by the insurance carrier and I assume sanctioned by the [Division]. That under the circumstances changes the MMI date to 6-22-09, which had already been determined by [Dr. G]. I do not agree with the impairment [rating] determined by [Dr. G], but that is not an issue that I have been asked to address on this occasion. Attached is an amended [DWC 69] to reflect the new MMI date.

¹ We note that lumbar surgery was on October 29, 2008.

The amended DWC-69 referred to gives an MMI date of April 14, 2009. Dr. E's 10% IR does not rate the cervical injury, nor do any of Dr. E's reports reference or comment on Dr. RG's records regarding depression.

EXTENT OF INJURY

The hearing officer in the Discussion portion of her decision, writes:

Although [Dr. E] did not specifically address [c]laimant's depression and anxiety, his omission of any reference to these conditions as being compensable necessarily excludes them from the ambit of the compensable injury. As the record of the [CCH] does not persuasively indicate otherwise, it is appropriate to conclude that the claim injury does not extend to or include these matters.

The hearing officer then makes an appealed Finding of Fact No. 12 stating: "[Dr. E] was of the opinion that [c]laimant's compensable injury of _____ did not extend to or include depression or anxiety." Dr. E only gave his opinion as a designated doctor on the extent of the claimant's compensable injury in a narrative dated July 7, 2008. The claimant was not diagnosed with a major depressive disorder until August 19, 2008, by Dr. RG, a psychiatrist. Dr. E's narrative report dated June 26, 2009, states that he had records from Dr. G, the treating doctor, and the surgeon but he does not list any of Dr. RG's records in his review of the claimant's medical records that were forwarded to him. Because Dr. E's report failed to identify all findings, normal and abnormal, related to the compensable injury and an explanation of the analysis performed to find whether MMI was reached, it can not be inferred that he was of the opinion that the compensable injury does not include depression or anxiety merely by his failure to mention or address those conditions in his report. 28 TEX. ADMIN. CODE § 130.1(d)(1)(B)(iii) (Rule 130.1(d)(1)(B)(iii)). As the hearing officer commented in her discussion, Dr. E never specifically addresses claimant's alleged depression or anxiety. Further, there is no indication in the evidence that Dr. E had records from Dr. RG available for him for review.

Section 408.0041 provides that the treating doctor and carrier are both responsible for sending to the designated doctor all of the injured employees medical records relating to the issue to be evaluated by the designated doctor that are in their possession. The hearing officer finds that the preponderance of the evidence is not contrary to Dr. E's opinions regarding the extent of the claimant's compensable injury of _____. That finding is not supported by the evidence as previously discussed above. Dr. E's opinion on extent of injury was given prior to the claimant's diagnosis of major depressive disorder. There is no indication that Dr. E had the claimant's records in which he was diagnosed with a major depressive disorder at the time he assessed the claimant's IR. Accordingly, we reverse the hearing officer's determination that the claimant's compensable injury does not include depression or anxiety and we remand to the hearing officer to take such further action as directed below.

MMI/IR

Given our reversal of the extent-of-injury determination, we likewise reverse and remand the hearing officer's MMI and IR determinations for further consideration. In Appeals Panel Decision (APD) 030966, decided May 27, 2003, the Appeals Panel reversed and remanded a hearing officer's determination on extent of injury (failure to consider evidence of depression). The Appeals Panel then held that the MMI and IR issues must also be reversed and remanded.

Regarding the IR issue, we also note that Dr. E, the designated doctor, appointed under the June 5, 2007, EES-14 letter to determine the extent of injury, opined that the compensable injury included "a protruding disc in the cervical spine at two levels." The claimant had cervical spinal surgery on July 20, 2007, and Dr. E, in his July 7, 2008, report assessed a 5% impairment based on DRE Cervicothoracic Category II: Minor Impairment. In this case, in an unappealed determination, the hearing officer found the compensable injury included degenerative disc disease of the cervical spine. Nonetheless, in Dr. E's July 8, 2009, report, which the hearing officer adopted, Dr. E does not even mention, much less rate an injury to the cervical spine, attributing the 10% IR to "Category DRE III" (which can only be DRE Lumbosacral Category III: Radiculopathy under the AMA Guides). On remand the designated doctor must rate the entire compensable injury in accordance with the AMA Guides.

EXTENSION OF MMI FOR SPINAL SURGERY

The hearing officer determined that the claimant is entitled to an extension of his statutory date of MMI. That determination is supported by the evidence and was not appealed. However, the claimant does appeal the MMI date, contending that only the hearing officer or Division had authority to extend MMI past the otherwise statutory date of MMI.

Section 408.104 and Rule 126.11 are the relevant statutory and rule provisions applicable. Section 408.104(a) provides, in part, that the Division "may extend the 104-week period described by Section 401.011(30)(B) if the employee has had spinal surgery . . . within 12 weeks before the expiration of the 104-week period." The hearing officer determined that the claimant is entitled to an extension of his statutory MMI and that determination is supported by the evidence and was not appealed. However, the order extending the statutory period of MMI "shall extend the statutory period for [MMI] to a date certain, based on medical evidence . . ." Section 408.104(a). In making a determination for an extension of the date of MMI the Division hearing officer shall consider items listed in Rule 126.11(f). The hearing officer failed to extend the date of statutory MMI "to a specific and certain date." Rule 126.11(a). We remand the case to the hearing officer to determine the extension of statutory MMI to a specific and certain date.

REMAND INSTRUCTION

On remand the hearing officer is to determine an extension of the statutory date of MMI to a specific date applying the criteria in Rule 126.11(f). The hearing officer is then to determine whether Dr. E is still qualified and available to be the designated doctor, and if so, ensure that all the medical records, including the records of Dr. RG, are sent to the designated doctor. The designated doctor is to be told of the date to which statutory MMI has been extended. The designated doctor is to render an opinion on the extent of injury, MMI (which cannot be later than the extended date of statutory MMI) and IR based on the entire compensable injury, consistent with the AMA Guides and this decision. The hearing officer may request the designated doctor to give alternate opinions including and excluding depression or anxiety. The hearing officer is to provide the designated doctor's response to the parties and to allow the parties an opportunity to present evidence and respond. The hearing officer then is to make determinations regarding the extent of injury, MMI and IR. If Dr. E is no longer qualified or available to serve as the designated doctor then another designated doctor is to be appointed pursuant to Rule 126.7(h) to determine the extent of injury and the claimant's 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 STREET, SUITE 1050
AUSTIN, TEXAS 78701-3232.**

Thomas A. Knapp
Appeals Judge

CONCUR:

Veronica L. Ruberto
Appeals Judge

Margaret L. Turner
Appeals Judge