

APPEAL NO. 110463  
FILED JUNE 13, 2011

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 March 10, 2011. The hearing officer resolved the disputed issues by deciding that: (1) the appellant/cross-respondent (claimant) reached maximum medical improvement (MMI) on May 15, 2010; (2) the claimant's impairment rating (IR) is one percent; (3) the claimant had disability beginning on July 11, 2010, and continuing through the date of the CCH; and (4) the compensable injury of \_\_\_\_\_, extends to a focal 4 mm disc herniation at T8-9, left L4 radiculopathy, and a 2 mm diffuse disc protrusion at the right at L4-5.

The claimant appealed, disputing the hearing officer's determinations of MMI and IR. The appeal file does not contain a response from the respondent/cross-appellant (carrier) to the claimant's appeal. The carrier cross-appealed, disputing the hearing officer's determinations of the extent of the claimant's injury and that the claimant had disability beginning on July 11, 2010, and continuing through the date of the CCH. The appeal file does not contain a response from the claimant to the carrier's cross-appeal.

#### DECISION

Affirmed in part and reversed and remanded in part.

The parties stipulated that the claimant sustained a compensable injury to at least his left shoulder,<sup>1</sup> cervical spine, lumbar spine, chest, abdomen, and pelvis on \_\_\_\_\_; and that (Dr. B) was appointed by the Texas Department of Insurance, Division of Workers' Compensation (Division) to serve as the designated doctor to determine the claimant's date of MMI, IR, and extent of injury. The claimant testified he was injured in a motor vehicle accident when he swerved the truck he was driving to try and avoid an animal in the road.

#### EXTENT OF INJURY

The hearing officer's determination that the compensable injury of \_\_\_\_\_, extends to a focal 4 mm disc herniation at T8-9, left L4 radiculopathy, and a 2 mm diffuse disc protrusion at the right at L4-5 is supported by sufficient evidence and is affirmed.

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<sup>1</sup> We note that a review of the record reflects the parties included the left shoulder in their stipulation although it is omitted in the decision and order.

## **DISABILITY**

The hearing officer's determination that the claimant had disability beginning on July 11, 2010, and continuing through the date of the CCH is supported by sufficient evidence and is affirmed.

## **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.

Dr. B examined the claimant on July 7, 2010, and certified that the claimant reached MMI on May 15, 2010, with a one percent IR 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). Dr. B included the cervical spine, left shoulder, lumbar spine and chest in assessment of impairment. However, Dr. B noted that the MRIs did not reveal any acute pathology and in the diagnoses considered he listed only the following: blunt trauma chest, abdomen, and pelvis; partial tear, left supraspinatus; and cervical and lumbar sprain/strain. Dr. B placed the claimant in Diagnosis-Related Estimate (DRE) Cervicothoracic Category I: Complaints or Symptoms zero percent; placed the claimant in DRE Lumbosacral Category I: Complaints or Symptoms zero percent; assessed one percent for loss of range of motion (ROM) of the left shoulder; and assessed zero percent for the claimant's chest injury. As previously noted, the hearing officer's determination that the claimant's compensable injury extends to a focal 4 mm disc herniation at T8-9, left L4 radiculopathy, and a 2 mm diffuse disc protrusion at the right at L4-5 was affirmed. Therefore, Dr. B did not consider the entire compensable injury when certifying the claimant reached MMI and assessing the IR. Accordingly, the hearing officer's determination that the claimant reached MMI on May 15, 2010, with a one percent IR is reversed. See Appeals Panel Decision (APD) 101567, decided December 20, 2010.

Two other certifications were in evidence. (Dr. D), a carrier-selected required medical examination doctor examined the claimant on December 13, 2010, certified the claimant reached MMI on March 1, 2010, with a six percent IR, using the AMA Guides. Dr. D placed the claimant in DRE Cervicothoracic Category I: Complaints or Symptoms zero percent; DRE Lumbosacral Category II: Minor Impairment five percent; and assessed one percent for loss of ROM of the left shoulder. As previously noted, the parties stipulated that the claimant sustained a compensable injury to at least his left shoulder, cervical spine, lumbar spine, chest, abdomen, and pelvis on \_\_\_\_\_, and the hearing officer's determination that the compensable injury of \_\_\_\_\_, extends to a focal 4 mm disc herniation at T8-9, left L4 radiculopathy, and a 2 mm diffuse disc protrusion at the right at L4-5 is affirmed. Therefore, Dr. D did not consider the entire compensable injury and his certification of MMI and IR cannot be adopted.

The only other certification in evidence is from (Dr. C), a doctor selected by the treating doctor acting in place of the treating doctor. Dr. C examined the claimant on September 2, 2010, and certified that the claimant had not yet reached MMI. However, Dr. C included only the following in his diagnoses: lumbar disc displacement, rotator cuff strain, neck pain, and muscle pain. Dr. C did not consider the entire compensable injury in his certification and therefore it cannot be adopted.

In reviewing a "great weight" challenge, we must examine the entire record to determine if: (1) there is only "slight" evidence to support the finding; (2) the finding is so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust; or (3) the great weight and preponderance of the evidence supports its nonexistence. See Cain v. Bain, 709 S.W.2d 175 (Tex. 1986). We reverse the hearing officer's determination that the date of MMI is May 15, 2010, and that the claimant's IR is one percent as being so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust. Because there is no report in evidence which can be adopted, we remand the issues of MMI and IR to the hearing officer for further consideration and action consistent with this decision.

### **REMAND INSTRUCTIONS**

Dr. B is the most recently appointed designated doctor to determine MMI/IR. On remand the hearing officer is to determine if Dr. B is still qualified and available to be the designated doctor, and if so, the hearing officer is to advise the designated doctor that it has been administratively determined that the compensable injury includes a focal 4 mm disc herniation at T8-9, left L4 radiculopathy, and a 2 mm diffuse disc protrusion at the right at L4-5 and the parties stipulated that the compensable injury includes at least the left shoulder, cervical spine, lumbar spine, chest, abdomen, and pelvis. The designated doctor is then to be requested to give an opinion on MMI (which cannot be after the statutory MMI date) and IR of the entire compensable injury. If Dr. B is no longer qualified or available to serve as the designated doctor, another designated doctor is to be appointed to determine MMI and IR for the compensable injury. The parties are to be provided with the hearing officer's letter to the designated doctor, the

designated doctor's response and are to be allowed an opportunity to present evidence and respond.

### **SUMMARY**

We affirm the hearing officer's determination that the compensable injury of \_\_\_\_\_, extends to a focal 4 mm disc herniation at T8-9, left L4 radiculopathy, and a 2 mm diffuse disc protrusion at the right at L4-5.

We affirm the hearing officer's determination that the claimant had disability beginning on July 11, 2010, and continuing through the date of the CCH.

We reverse the hearing officer's determination that the claimant reached MMI on May 15, 2010, with a one percent IR and remand the issues of MMI and IR to the hearing officer for further consideration and action 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 **INDEMNITY INSURANCE COMPANY OF NORTH AMERICA** 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.**

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Margaret L. Turner  
Appeals Judge

CONCUR:

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Cynthia A. Brown  
Appeals Judge

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Carisa Space-Beam  
Appeals Judge