APPEAL NO. 111237
FILED OCTOBER 21, 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 was held on July 14, 2011. The hearing officer resolved the disputed issues by deciding that the compensable injury of (date of injury), includes L3-4 and L4-5 annular tears and a L4-5 disc bulge and that the appellant (claimant) reached maximum medical improvement (MMI) on October 15, 2010, with a zero percent impairment rating (IR). The claimant appealed, disputing the hearing officer's determination on MMI and IR. The respondent (carrier) responded, urging affirmance.

The hearing officer's determination that the compensable injury of (date of injury), includes L3-4 and L4-5 annular tears and a L4-5 disc bulge was not appealed and has become final pursuant to Section 410.169.

DECISION

Reversed and remanded.

The parties stipulated that: on (date of injury), the claimant sustained a compensable injury in the form of a lumbar sprain/strain; (Dr. M) was appointed by the Texas Department of Insurance, Division of Workers' Compensation (Division) to determine MMI, IR, and extent of injury; and on October 15, 2010, Dr. M certified that the claimant reached MMI on that date with a zero percent 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. M examined the claimant on October 15, 2010, and certified that the claimant reached MMI on that date with a zero 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). Dr. M included the lumbar spine in his assessment of impairment. Dr. M noted in his narrative report of that date that the claimant underwent a lumbar MRI on July 7, 2010, which revealed a L4-5 disc bulge and annular tears and disc desiccation at L3-4 and L4-5. However, Dr. M only considered the diagnosis of lumbago when certifying the claimant's MMI date and assigning an IR by placing the claimant in Diagnosis-Related Estimate Lumbosacral Category I: Complaints or Symptoms. As previously noted the hearing officer's determination that the compensable injury of (date of injury), includes L3-4 and L4-5 annular tears and a L4-5 disc bulge was not appealed and became final pursuant to Section 410.169. Therefore, Dr. M did not consider the entire compensable injury and his certification of MMI and IR cannot be adopted. *See* Appeals Panel Decision (APD) 110463, decided June 13, 2011; APD 101567, decided December 20, 2010. There is no other certification of MMI and IR in evidence.

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 claimant reached MMI on October 15, 2010, with a zero percent IR as being so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust. Because there is no other certification of MMI and IR 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. M is the Division-appointed designated doctor to determine MMI and IR. On remand, the hearing officer is to determine if Dr. M 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 of (date of injury), includes annular tears at L3-4 and L4-5 and a L4-5 disc bulge. 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. M is no longer qualified or available to be the designated doctor, another designated doctor is to be appointed to determine MMI and IR for the compensable injury. *See* Rule 127.5(c).

The parties are to be provided with the hearing officer's letter to the designated doctor, the designated doctor's response and allowed an opportunity to present evidence and respond.

SUMMARY

We reverse the hearing officer's determination that the claimant reached MMI on October 15, 2010, with a zero 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 **LM INSURANCE CORPORATION** and the name and address of its registered agent for service of process is

CORPORATION SERVICES COMPANY
211 EAST 7TH STREET, SUITE 620
AUSTIN, TEXAS 78701.

Cynthia A. Brown
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Margaret L. Turner
Appeals Judge