APPEAL NO. 111386
FILED NOVEMBER 28, 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 July 18, 2011, with the record closing on August 17, 2011. With regard to the issues before her, the hearing officer determined that: (1) the respondent/cross-appellant's (claimant) compensable (date of injury), injury extends to a disc herniation at L4-5, neural compression at L4-5, an annular tear at L4-5 and L5 lumbar radiculopathy but does not extend to stenosis at L4-5; (2) the first certification of maximum medical improvement (MMI) and impairment rating (IR) assigned by (Dr. C) on November 5, 2010, did not become final under Section 408.123; (3) the claimant reached MMI on November 5, 2010, with a five percent IR per the report of Dr. C; (4) it was appropriate under 28 TEX. ADMIN. CODE § 127.20(a) (Rule 127.20(a)) for the Texas Department of Insurance, Division of Workers' Compensation (Division) to contact the designated doctor, Dr. C, to resolve the MMI and IR issues regarding Dr. C's November 5, 2010, report; and (5) the claimant had disability due to the compensable injury from November 6, 2010, through August 17, 2011, the date the record of the CCH was closed.

The appellant/cross-respondent (carrier) appealed the hearing officer's determinations regarding: (1) the extent-of-injury conditions adverse to the carrier; (2) disability; and (3) finality. The claimant responded, urging affirmance on those determinations appealed by the carrier. The claimant cross-appealed the determinations regarding: (1) the extent-of-injury conditions adverse to the claimant; (2) MMI; and (3) IR. The carrier responded to the claimant's cross-appeal urging affirmance on those determinations appealed by the claimant. The hearing officer's determination that it was appropriate under Rule 127.20(a) for the Division to contact the designated doctor, Dr. C, to resolve the MMI and IR issues regarding Dr. C's November 5, 2010, report was not appealed and has become final pursuant to Section 410.169.

DECISION

Affirmed in part and reversed and remanded in part.

The parties stipulated in part that: (1) on (date of injury), the claimant sustained a compensable lumbar sprain/strain injury while in the course and scope of her employment; (2) Dr. C is the designated doctor on the issues of MMI, IR, and return to work; (3) the first certification of MMI and IR was issued by Dr. C on November 5, 2010; (4) the only period in dispute relative to the disability issue is from November 6, 2010,

through the present; and (5) the claimant disputed the first certification of MMI and IR on March 30, 2011.

It was undisputed that the carrier accepted a lumbar and a thoracic sprain/strain as established by the documentary evidence: (1) Notice of Disputed Issue(s) and Refusal to Pay Benefits (PLN-11) dated December 3, 2009; (2) the carrier's "statement of position" addressed to the designated doctor, Dr. C, dated January 15, 2010; and (3) Hearing Officer's Exhibit No. 1, the Benefit Review Conference Report dated May 24, 2011, stating under the disputed issue of extent of injury that the carrier's position is "[t]he compensable injury is limited to a thoracic and lumbar sprain/strain." We note that the carrier never disputed or litigated at the CCH that the thoracic spine was not part of the compensable injury of (date of injury).

EXTENT OF THE COMPENSABLE INJURY, FINALITY, AND DISABILITY

The following hearing officer's determinations are supported by sufficient evidence and are affirmed: (1) the compensable (date of injury), injury extends to a disc herniation at L4-5, neural compression at L4-5, an annular tear at L4-5 and L5 lumbar radiculopathy but does not extend to stenosis at L4-5; (2) the first certification of MMI and IR assigned by Dr. C on November 5, 2010, did not become final under Section 408.123; and (3) the claimant had disability due to the compensable injury from November 6, 2010, through August 17, 2011, the date the record of the CCH was closed.

MMI/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. Rule 130.1(c)(3) provides in pertinent part that the assignment of an IR shall be based on the injured worker's condition as of the MMI date considering the medical record and the certifying examination and the doctor assigning the IR shall:

A. identify objective clinical or laboratory findings of permanent impairment for the current compensable injury;

B. document specific laboratory or clinical findings of an impairment;

C. analyze specific clinical and laboratory findings of an impairment;

D. compare the results of the analysis with the impairment criteria and provide the following:

[a] description and explanation of specific clinical findings related to each impairment, including zero percent . . . [IRs]; and

[a] description of how the findings relate to and compare with the criteria described in the applicable chapter of 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 doctor's inability to obtain required measurements must be explained.

See Appeals Panel Decision (APD) 110219, decided April 26, 2011.

Dr. C was appointed by the Division to address the issues of MMI, IR, and return to work. Dr. C first examined the claimant on January 19, 2010, and certified that the claimant had not yet reached MMI. Dr. C subsequently re-examined the claimant on July 1, 2010, and certified that the claimant had not yet reached MMI. In his narrative report dated July 1, 2010, Dr. C stated:

> It is my opinion that the [claimant] has not reached MMI at this time, but is expected to around [October 1, 2010]. [The claimant] has symptoms of radiculopathy which are supported by her MRI. She has not improved with conservative treatment thus far. She has been evaluated by a board certified spine surgeon and surgery is recommended. She will be at MMI if she does not wish to proceed . . . with surgery.

Dr. C examined the claimant a third time on November 5, 2010, certifying that she reached clinical MMI on that date with a five percent IR. As previously discussed, in his narrative report dated November 5, 2010, Dr. C identified the injured areas of the body as the lumbosacral and thoracic spine. He further stated that:

> It is my opinion that the [claimant] has reached MMI and did so effective on [November 5, 2010]. The [claimant] has received treatment that has met or exceeded those recommended by the [Official Disability Guidelines

(ODG)] for the condition. [The claimant] does not wish to undergo surgery at this time and has received conservative treatment as recommended by the ODG Guidelines.

The clinical condition is not likely to improve with further active medical treatment. Medical maintenance care only is warranted. Employability is not likely to improve with further active medical treatment. The degree of improvement is not likely to change by more than [three percent] in either direction.

[omission]

The [claimant's] [IR] is calculated after a full physical exam including [range of motion] measurements. The [claimant] has a whole person [IR] of [five percent], corresponding to [Diagnosis-Related Estimates] Category II.

In a July 25, 2011, letter of clarification (LOC) to Dr. C, the hearing officer informed the designated doctor that she had held a CCH on the disputed issues of MMI, IR, and extent of injury. The hearing officer requested that Dr. C provide alternative certifications of MMI and IR relative to the disputed conditions if necessary. The hearing officer stated:

I say 'if necessary' because it appears that you were aware of at least some of these conditions when you evaluated the claimant on [November 5, 2010], and opined that she reached MMI on that date with a [five percent] IR. According to its analysis letter to you, the carrier has accepted a lumbar and thoracic sprain/strain only. The other conditions, for which the Division needs alternative certifications, are: 1) disc herniation at L4-5; 2) neural compression at L4-5; 3) stenosis at L4-5 with an annular tear; and 4) lumbar radiculopathy.

Dr. C responded to the LOC in a letter dated July 26, 2011, stating:

I was aware of the dispute regarding the areas accepted by the insurance carrier. The [IR] remains [five percent] if I only include lumbar strain/sprain. [The claimant] has muscle spasm/guarding on exam and therefore [five percent] is an appropriate rating for her condition. To clarify, her [IR] is [five percent] if one includes disc herniation at L4-5, neural (sic) compression at L4-5, stenosis at L4-5 with an annular tear, and/or L5 lumbar radiculopathy. [The claimant] has symptoms of

radiculopathy but no objective evidence of atrophy of loss or reflex. Therefore, [five percent] is an appropriate rating for her condition.

In her cross-appeal, the claimant contended that the preponderance of the evidence is contrary to the designated doctor's opinion and it cannot be adopted. The claimant contends that the designated doctor did not have all her medical records (including diagnostic testing, treatment, and surgical recommendations concerning the disputed extent-of-injury conditions) subsequent to the date of Dr. C's certifying examination on November 5, 2010. The claimant further contends that the medical evidence establishes that based on reasonable medical probability, further material recovery from or lasting improvement to the compensable injury could be reasonably anticipated after November 5, 2010, and that her medical condition had not stabilized at the time of Dr. C's certifying exam, thus Dr. C prematurely placed the claimant at clinical MMI with an IR. The claimant also contends that Dr. C's IR did not rate the entire compensable injury.

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).

Dr. C's Report of Medical Evaluation (DWC-69) and narrative report dated November 5, 2010, reflect that in certifying clinical MMI, Dr. C only considered the lumbar spine, and in assigning an IR, Dr. C only rated the claimant's lumbar spine, thus failing to include any impairment (which could have included a zero percent) for the thoracic spine. The hearing officer found that the November 5, 2010, date of MMI and five percent IR certified by Dr. C is not contrary to the preponderance of the evidence. That finding is so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust. Accordingly, we reverse the hearing officer's determination that the claimant reached MMI on November 5, 2010, with a five percent IR. Because there is no other certification of MMI/IR, we remand the issues of MMI/IR to the hearing officer for actions consistent with this decision.

REMAND INSTRUCTIONS

Dr. C is the designated doctor. On remand the hearing officer is to determine whether Dr. C is still qualified and available to be the designated doctor. If Dr. C is no longer qualified or available or refuses to rate the compensable injury in accordance with the AMA Guides criteria, then another designated doctor is to be appointed pursuant to Rule 127.5(c) to determine MMI, which cannot be later than the statutory

date of MMI (*See* Section 401.011(30)) and IR. The hearing officer is to determine the date of statutory MMI whether by stipulation or by a finding of fact.

The hearing officer is to ensure that the designated doctor has all the pertinent medical records, including those of (Dr. E) and (Dr. L) as well as the lumbar MRI report dated March 22, 2011. The hearing officer is to inform the designated doctor that: (1) the claimant's compensable (date of injury), injury includes a lumbar and a thoracic sprain/strain; (2) it has been administratively determined that the compensable injury extends to a disc herniation at L4-5, neural compression at L4-5, an annular tear at L4-5 and L5 lumbar radiculopathy; and (3) the date of statutory MMI.

The hearing officer is to request that the designated doctor: (1) determine MMI, which cannot be later than the statutory date of MMI and (2) determine the IR by rating the entire compensable injury in accordance with the AMA Guides based on the claimant's condition as of the MMI date, considering the medical records, the certifying examination and the rating criteria in the AMA Guides.

The hearing officer is to provide the designated doctor's report to the parties, allow the parties an opportunity to respond and to present further evidence, and then determine whether the claimant has reached MMI, and if so, the date of MMI, and the claimant's IR consistent with this decision.

SUMMARY

We affirm the hearing officer's determination that the compensable (date of injury), injury extends to a disc herniation at L4-5, neural compression at L4-5, an annular tear at L4-5 and L5 lumbar radiculopathy but does not extend to stenosis at L4-5.

We affirm the hearing officer's determination that the first certification of MMI/IR assigned by Dr. C on November 5, 2010, did not become final under Section 408.123.

We affirm the hearing officer's determination that the claimant had disability due to the compensable injury from November 6, 2010, through August 17, 2011, the date the record of the CCH was closed.

We reverse the hearing officer's determination that the claimant reached MMI on November 5, 2010, with a five percent IR and remand the issues of MMI/IR to the hearing officer for actions 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 **h**earing 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 ZURICH INSURANCE COMPANY** and the name and address of its registered agent for service of process is

CORPORATION SERVICE COMPANY
211 EAST 7TH STREET, SUITE 620
AUSTIN, TEXAS 78701-3218.

Cynthia A. Brown
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Margaret L. Turner
Appeals Judge