APPEAL NO. 112026
FILED APRIL 5, 2012

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 December 8, 2011, in [City], Texas, with [hearing officer] presiding as hearing officer. With regard to the disputed issues before her, the hearing officer determined that: (1) the compensable injury of [date of injury], extends to a cervical and a lumbar sprain/strain; (2) the compensable injury of [date of injury], does not extend to headaches, an L3-4 disc herniation, an L4-5 disc bulge, and an L5-S1 disc protrusion; (3) the appellant/cross-respondent (claimant) sustained disability from July 10 through September 7, 2011, only; (4) the claimant reached maximum medical improvement (MMI) on July 28, 2011; and (5) the claimant has 0% impairment rating (IR).

The claimant appealed the hearing officer's determinations on extent of injury adverse to the claimant; on the ending period of disability; MMI; and IR. The claimant contended that the compensable injury includes the other claimed conditions, the period of disability continued to the date of the CCH, and that he is not at MMI; therefore, no IR can be assigned. The claimant also argued that [Dr. P], the designated doctor appointed by the Texas Department of Insurance, Division of Workers' Compensation (Division) on the issues of extent of injury, disability, MMI, and IR, did not examine his neck or back during the certifying examination. The respondent/cross-appellant (carrier) responded, urging affirmance of the appealed determinations. The carrier untimely cross-appealed the hearing officer's extent-of-injury determinations which were adverse to the carrier. The appeal file does not contain a response to the carrier's untimely cross-appeal.

The hearing officer's determination that the claimant sustained disability beginning July 10, 2011, was not appealed and has become final pursuant to Section 410.169.

The hearing officer's determination that the compensable injury of [date of injury], extends to a cervical and a lumbar sprain/strain was not timely appealed and have become final pursuant to Section 410.169.

DECISION

Affirmed in part and reversed and remanded in part.

It was undisputed that the claimant, a refinery construction worker, sustained an occupational exposure to hydrogen sulfide. In her Background Information section of her decision, the hearing officer stated, "[the claimant] lost consciousness before being

removed from the scaffold where he was working at the time, and may or may not have fallen during the evacuation procedure; the evidence conflicts on this particular point." The claimant testified that he has not worked since his injury occurred and his treating doctor has not released him to full-duty work. The evidence reflects that after the certified date of MMI of July 28, 2011, the claimant received physical therapy, underwent a lumbar MRI on September 23, 2011, and surgery is recommended to address the disc pathology that was revealed on the lumbar MRI.

UNTIMELY CROSS-APPEAL

The deemed date of receipt of the hearing officer's decision was December 22, 2011, and a timely appeal must have been filed by Friday, January 13, 2012. The carrier's attorney states in the cross-appeal that the carrier did not receive the hearing officer's decision until December 23, 2011, however, the mere assertion that the hearing officer's decision was received after the deemed date of receipt is not sufficient to extend the date of receipt past the deemed date of receipt provided by Division rule. Appeals Panel Decision (APD) 041319, decided July 24, 2004. The carrier's cross-appeal was dated January 16, 2012, and was filed with the Division on January 20, 2012. Accordingly, the carrier's cross-appeal, not having been mailed or filed by Friday, January 13, 2012, is untimely, and was not considered.

EXTENT OF INJURY AS TO HEADACHES, L3-4 DISC HERNIATION, L4-5 DISC BULGE, AND L5-S1 DISC PROTRUSION

The hearing officer's determination that the compensable injury of [date of injury], does not extend to headaches, an L3-4 disc herniation, an L4-5 disc bulge, and an L5-S1 disc protrusion is supported by the evidence and is affirmed.

ENDING DATE OF DISABILITY, MMI, AND IR

Section 408.0041(a) provides 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: (1) the impairment caused by the compensable injury; (2) the attainment of [MMI]; (3) the extent of the employee's compensable injury; (4) whether the injured employee's disability is a direct result of the work-related injury; (5) the ability of the employee to return to work [(RTW)]; or (6) issues similar to those described by Subdivisions (1)-(5). Section 408.0041(e) provides, in part, that the report of the designated doctor has presumptive weight unless the preponderance of the evidence is to the contrary. 28 TEX. ADMIN. CODE § 127.1(a) (Rule 127.1(a)) provides that a designated doctor examination shall be used to resolve questions about the following: (1) the impairment caused by the injured employee's compensable injury; (2) the attainment of MMI; (3) the extent of the injured employee's

compensable injury; (4) whether the employee's disability is a direct result of the work-related injury; (5) the ability of the employee to [RTW]; or (6) issues similar to those described by paragraphs (1)-(5) of this subsection.

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 employee'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:

(i) [a] description and explanation of specific clinical findings related to each impairment, including [0%] [IRs]; and

(ii) [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.

Dr. P examined the claimant on September 7, 2011. In his narrative report attached to his Report of Medical Evaluation (DWC-69), Dr. P listed the compensable area of the claimant's body as "Lungs." Under the History of Injury portion of his narrative report, Dr. P stated:

> [The claimant] was seen by [(Dr. F)], on [July 28, 2011], and evaluated at the [health center]. He x-rayed his chest and found it to be [within normal limits (WNL)]. He did an EKG which only showed resting tachycardia. His lungs were clear on auscultation and his spirometry was normal without any evidence of airway obstruction or restriction. He did not feel that his symptoms were physiologic to a toxic gas exposure.

Dr. P further wrote in his narrative report "Lung Exam: WNL." There is no indication in Dr. P's narrative report whether he was relying on the testing performed and resultant findings by Dr. F, and or whether Dr. P himself performed physiologic testing of pulmonary function and utilized the methodology as provided in the AMA Guides on pages 5/159-163. The required methodology includes in part measurements made from at least three acceptable spirometric tracings of forced expiration: forced vital capacity (FVC), forced expiratory volume in the first second (FEV1), and the ration of these measurements (FEV1/FVC), a predicted normal single-breath Dco Value for a man according to age, and utilization of Table 8 (page 5/162) for estimating the extent of permanent impairment.

Furthermore, within the narrative report there are no clinical or physical findings or testing regarding the claimant's cervical or lumbar spine. Dr. P does not indicate that he examined the neck or back. Rather, Dr. P only states in his narrative report that the claimant was seen and treated (with a recommendation of physical therapy) by [Dr. S] on July 18, 2011, for cervical and lumbar sprains and also noted in his narrative report, that the claimant was complaining of lower back pains on the date of his examination.

Regarding the extent of the compensable injury, Dr. P opined the following:

I feel that [the claimant] had a mild inhalation injury. I do not feel that his back or neck are included. If he had back or neck, I feel that they would be minor injuries and strain only. However, I feel his compensable injury is lungs, inhalation injury.

Regarding RTW, Dr. P opined that the claimant could return to full-duty work as of September 7, 2011 (as reflected in a Work Status Report (DWC-73) completed by Dr. P).

Under the MMI portion of his narrative report, Dr. P opined that the claimant reached MMI on July 28, 2011, and his clinical condition is not likely to improve with further active medical treatment or surgical intervention-only medial maintenance care is warranted.

Under the IR portion of his narrative report, Dr. P does not include measurements made from at least three acceptable spirometric tracings of forced

expiration or any other methodology. Rather than showing his calculations, he summarizes the following:

The [claimant's] FVC was 103% of predicted, and the FEV1 was 98% of predicted. The FEV1/FVC ratio was 77%. Using the [AMA] Guides, page 162, Table 8, with his PFT's totally WNL [the claimant] would be in Class 1. This is no impairment of the whole person [WP]. So his IR would be 0%. WP = 0%.

In the Discussion section of her decision, the hearing officer states that Dr. P, the designated doctor, "was of the opinion that the injury was limited to 'a mild inhalation injury,' and did not extend to or include the headaches and musculoskeletal extent alleged." The hearing officer stated that the claimant had not overcome the presumptive weight accorded to Dr. P's opinion ". . . and a decision in [the carrier's] favor must be entered as to this issue. Therefore, the remaining issues must be decided without inclusion of the extent of injury alleged."

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. P's certification of MMI and IR cannot be adopted for two reasons. First, the hearing officer's determination that the compensable injury of [date of injury], extends to a cervical and a lumbar sprain/strain has not been timely appealed and has become final. Therefore, Dr. P in rating only the claimant's lungs, failed to rate the entire compensable injury, which included cervical and lumbar sprain/strains. Secondly, Dr. P was required under Rule 130.1(c)(3) to identify, document, analyze clinical or laboratory findings of an impairment (which included the claimant's lungs, cervical spine, and lumbar spine) and compare that analysis to the impairment criteria in the AMA Guides, which could include 0% IR. Dr. P did not comply with Rule 130.1(c)(3).

Accordingly, the hearing officer's finding that a preponderance of the medical evidence is not contrary to Dr. P's opinion as to the claimant's extent of injury, MMI date, and IR is so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust. Based on the evidence at the CCH, the hearing officer determined that the compensable injury extended to the claimant's cervical and lumbar spine contrary to the opinion of the designated doctor. Further, the designated doctor did not comply with Rule 130.1(c)(3) to document and show his calculations for a respiratory (lung) impairment nor document any examination of the claimant's cervical and lumbar spine. Dr. P in evaluating only the lungs, failed to rate the entire compensable injury. We reverse the hearing officer's determination that the claimant

reached MMI on July 28, 2011, with 0% IR and remand the issues of MMI and IR to the hearing officer for further action consistent with this decision.

Because the hearing officer has afforded presumptive weight to the designated doctor's opinion on the claimant's ability to RTW on September 7, 2011, and on disability and because the designated doctor only considered the compensable injury to be an inhalation injury (without consideration of the cervical or lumbar spine), the hearing officer's finding that a preponderance of the evidence is not contrary to Dr. P's opinion as to disability is so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust. We reverse the hearing officer's determination that the claimant's period of disability ended on September 7, 2011, and for no other time through the date of the CCH (December 8, 2011). We remand that portion of the disability issue (the ending date of disability) to the hearing officer for further action consistent with this decision.

REMAND INSTRUCTIONS

On remand, the hearing officer should ensure that the treating doctor and insurance carrier shall send to the designated doctor all of the claimant's medical records that are in their possession relating to the issue to be evaluated by the designated doctor.

Dr. P is the designated doctor in this case. On remand, the hearing officer is to determine whether Dr. P is still qualified and available to be the designated doctor. If Dr. P is no longer qualified or available to serve as the designated doctor, then another designated doctor is to be appointed pursuant to Rule 127.5(c) to determine MMI and IR for the compensable injury. The hearing officer is to advise the designated doctor that it has been administratively determined that the compensable injury of [date of injury], extends to a cervical and a lumbar sprain/strain as well as the accepted inhalation injury. The designated doctor is then to be requested to certify an MMI date and to rate the entire compensable injury in accordance with the AMA Guides based on the claimant's conditions as of the date of MMI, considering the medical record, the certifying examination and the rating criteria in the AMA Guides.

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

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 **SEABRIGHT 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.

Cynthia A. Brown
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Margaret L. Turner
Appeals Judge