

APPEAL NO. 120271  
FILED APRIL 12, 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 January 17, 2012, in [City], Texas, with [hearing officer] presiding as hearing officer. The disputed issues before the hearing officer were:

Does [the appellant's (claimant)] compensable injury of [date of injury], extend to and include lumbar radiculopathy?

Did [the] [c]laimant sustain disability from November 3, 2009, through July 12, 2010? (This was the period of disability in dispute as amended by the parties on the record at the CCH.)

What is [the] [c]laimant's correct [i]mpairment [r]ating [(IR)]?

The hearing officer resolved the disputed issues by deciding that: (1) the claimant's compensable injury of [date of injury], does not extend to lumbar radiculopathy; (2) the claimant did not sustain disability from July 10, 2009, through July 12, 2010; and (3) the claimant's IR is 10% as certified by [Dr. E]. The claimant appealed, disputing the hearing officer's determinations on extent of injury, disability, and IR. The claimant further contends that the hearing officer erred, as a matter of law, in affording Dr. E's IR evaluation presumptive weight and adopting his assigned 10% IR because Dr. E is not the designated doctor appointed by the Texas Department of Insurance, Division of Workers' Compensation (Division) but rather the post-designated doctor required medical evaluation (RME) doctor. In his appeal, the claimant contended that he had disability for a two-week period, from May 28, 2010 (date of lumbar ESI) through June 11, 2010. The respondent (carrier) responded, urging affirmance. In its response, the carrier acknowledged that the hearing officer erred in finding that Dr. E is the designated doctor, but contended it was harmless error because the special status accorded to the opinion of a designated doctor is just a rebuttable presumption and that the claimant failed to prove that his IR is 15% as assigned by [Dr. K], the designated doctor.

DECISION

Reversed and remanded.

The hearing officer did not take any stipulations; however, the parties agreed on the record at the CCH that the claimant reached maximum medical Improvement (MMI)

on July 12, 2010. The claimant, a painter's helper, testified that he injured his neck and back when the driver of the truck, in which he was a passenger, backed into a pipeline.

It is undisputed that the carrier accepted a cervical strain and a herniated disc at L5-S1 only as the claimant's compensable injury.

In evidence is a Benefit Dispute Agreement (DWC-24) signed by the parties on November 2, 2009, and approved by the Division on November 3, 2009, which stated that the parties agreed that: (1) the compensable injury of [date of injury], does extend to a herniated disc at L5-S1; and (2) the claimant sustained disability from July 8, 2008, through October 6, 2008, but did not sustain disability from October 7, 2008, through the present (November 2, 2009).

## **DESIGNATED DOCTOR AND PRESUMPTIVE WEIGHT**

### *Legal Standard*

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]t the request of the insurance carrier, an injured employee, the injured employee's representative, or on its own motion, the Division may order a medical examination by a designated doctor to resolve questions about the following: (1) the impairment caused by the employee's 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 injured employee to [RTW]; or (6) issues similar to those described by paragraphs (1)-(5) of this subsection.

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.

Dr. K, Designated Doctor

The evidence establishes that Dr. K is the designated doctor appointed by the Division to determine MMI, IR, the extent of the compensable injury and whether disability is a direct result of the claimant's work-related injury.

Dr. K initially examined the claimant on April 15, 2009, and certified that the claimant was not at MMI but was expected to reach MMI on or about July 15, 2009. Dr. K opined that the injury sustained on [date of injury], extends to cervical strain and lumbar disc herniation. In his narrative report, Dr. K stated, "[I] [h]ave reviewed the [lumbar] MRI result. It does show a 7 mm lumbar herniation on the left, which is compatible with his physical findings. This is at L5-S1 and the MRI does show contact with the exiting nerves at that level." In this same narrative, Dr. K further stated that "[p]er the medical records submitted and reviewed as well as the findings on today's examination, it is my opinion the compensable injury is a cause of the [claimant's] inability to earn pre-injury wages during the disability period in question."

A letter of clarification (LOC) dated July 20, 2009, was sent to Dr. K, confirming the issues for which Dr. K was appointed, noting an inconsistent identification of the claimant as male and female by Dr. K in his narrative report, advising Dr. K that the carrier accepted only a cervical strain as the compensable injury (this was prior to the approved DWC-24 and acceptance of the herniated disc at L5-S1), and requesting a Report of Medical Evaluation (DWC-69) addressing a cervical strain injury only.

In a response dated July 23, 2009, to the LOC, Dr. K confirmed that the claimant he examined was a male and any reference to a female was a typographical error. Dr. K stated "[t]he cervical strain portion of his injury has resulted in a 5% loss of function or [IR] to his cervical spine based on the continued muscle spasm. I feel that the lumbar spine is also a component of [the claimant's] injury . . . . I do feel that the extent of injury also includes the lumbar spine based on his history and physical findings."

Dr. K re-examined the claimant on August 12, 2010, and certified that the claimant reached MMI clinically on that date with 10% IR. Dr. K placed the claimant in Diagnosis-Related Estimates (DRE) Lumbosacral Category III: Radiculopathy, 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). In the narrative report, Dr. K obtained girth measurements (in centimeters, and reported no atrophy for the thighs but a 4 cm atrophy between the left calf (37.5 cm) and the right calf (41.5 cm). Also, Dr. K noted on the claimant's reflexes, "the right patellar reflex is 2+, the left is 1+. His Achilles' reflexes are 0." "Based on the lateral calf numbness, the differences in his patellar reflexes and the calf circumference difference that [the claimant] is a [DRE

Lumbosacral] Category III, which is a 10% [whole person].” However, Dr. K did not consider or rate a cervical injury as part of the compensable injury in his IR evaluation.

Dr. K re-examined the claimant on October 13, 2010, and certified that the claimant reached MMI on August 12, 2010, with 15% IR, using the AMA Guides and placing the claimant in DRE Lumbosacral Category III: Radiculopathy (10%) and in DRE Cervicothoracic Category II: Minor Impairment (5%). In his narrative report, Dr. K stated that the claimant’s lumbar evaluation was in his exam of August 12, 2010, which showed “the right patellar reflex is 2+, the left is 1+. His Achilles’ reflexes are 0.” “If [the claimant’s] lumbar 10% is combined with his cervical 5% that does make a 15% total whole person [IR].”

A LOC dated August 30, 2011, was sent to Dr. K, advising Dr. K that the date of statutory MMI is July 12, 2010, and requesting an amended DWC-69 to reflect an MMI date on or before the statutory date.

In a response dated August 31, 2011, to the LOC, Dr. K opined that the claimant reached MMI on the date of statutory MMI, July 12, 2010, with 15% IR and attached an amended DWC-69.

Dr. K re-examined the claimant on November 3, 2011, for the purpose of determining extent of injury and whether disability is a direct result of the work-related injury. In a narrative report dated that same day, Dr. K stated the mechanism of injury was “[the claimant] was a passenger in a truck when the co-worker backed up into a pipeline and the [claimant] jerked forward and backwards sustaining injury to his neck and low back.” Under conclusions, Dr. K stated:

[The claimant’s] left calf circumference is 2.7 cm smaller on the left than it is on the right . . . . The Achilles reflexes are bilateral 0. The patellar reflexes are 0-1+; there is no clonus. His main abnormality is the circumference of his calf, which the left is 2.7 cm smaller showing some atrophy . . . . We did do the measurements on the calf three times.

Under extent of injury, Dr. K stated:

I think the injury sustained on [[date of injury]], extends to include cervical strain, lumbar disc herniation and I think the atrophy does confirm the diagnosis of radiculopathy. He does have signs of sciatic nerve irritation. On DRE [L]umbosacral [C]ategory III, an anterolateral atrophy of greater than 2 cm above or below the knee compared to the contralateral side at the same location is considered significant signs of radiculopathy. I really did not notice a calf circumference measurement on the other doctor evaluations.

Under disability as a direct result, Dr. K stated:

Per the medical records submitted and reviewed as well as the findings on today's examination, it is my opinion the [claimant's] medical condition [disability] is a direct result of the work-related injury.

Furthermore, regarding disability, the hearing officer stated in Finding of Fact No. 8 that "[f]rom October 10, 2009, through July 12, 2010 [the] [c]laimant's compensable injury of [date of injury], did not prevent [the] [c]laimant from obtaining and retaining employment at wages equivalent to the wage he earned prior to [date of injury]." In her Conclusion of Law No. 4, the hearing officer stated that "[the] [c]laimant did not sustain disability from July 10, 2009, through July 12, 2010. In her Decision, the hearing officer states that the claimant's compensable injury of [date of injury], "did not result in disability from October 10, 2009, through July 12, 2010."

### **SUMMARY**

The hearing officer's finding of fact, conclusion of law, and decision regarding disability are inconsistent and outside the scope of the disputed period of disability as agreed to by the parties at the CCH (from November 3, 2009, through July 12, 2010).

The extent of the claimant's compensable injury has not been resolved and the extent-of-injury issue is to be remanded to the hearing officer.

The hearing officer incorrectly found that Dr. E, the RME doctor, was appointed by the Division as a designated doctor at least as to the issue of IR.

The hearing officer failed to make any specific finding of fact concerning Dr. K who was appointed by the Division as designated doctor to determine MMI, IR, extent of injury, and disability.

Accordingly, the hearing officer failed to properly analyze the evidence regarding disability, extent of injury, and IR based on the designated doctor's opinion being given presumptive weight according to Sections 408.0041(e) and 408.125(c).

For all the above-mentioned reasons, we reverse the following hearing officer's determinations: (1) the claimant's compensable injury of [date of injury], does not extend to include lumbar radiculopathy; (2) the claimant did not sustain disability from July 10, 2009, through July 12, 2010; and (3) the claimant had 10% IR. We remand the issues of disability, extent of injury, and IR to the hearing officer for further action consistent with this decision

## REMAND INSTRUCTIONS

Dr. K is the designated doctor in this case. On remand, the hearing officer is to determine whether Dr. K is still qualified and available to be the designated doctor. If Dr. K 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 IR for the compensable injury. The hearing officer is to advise the designated doctor that the claimant reached MMI statutorily on July 12, 2010, and that the carrier has accepted a cervical strain and a herniated disc at L5-S1 but lumbar radiculopathy is a disputed diagnosis/condition. The designated doctor is then to be requested to give alternative ratings on IR for the claimant's compensable injury of [date of injury], based on the injured employee's condition (with and without lumbar radiculopathy) as of the MMI date (July 12, 2010) considering the medical record and the certifying examination. 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. The hearing officer is then to make a determination on IR 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 Appeals Panel Decision 060721, decided June 12, 2006.

The true corporate name of the insurance carrier is **ZURICH AMERICAN 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 78701-3232.**

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Cynthia A. Brown  
Appeals Judge

CONCUR:

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Thomas A. Knapp  
Appeals Judge

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Margaret L. Turner  
Appeals Judge