

APPEAL NO. 121215
FILED AUGUST 30, 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 May 14, 2012, in [City], Texas, with [hearing officer] presiding as hearing officer. The hearing officer resolved the disputed issues by deciding that: (1) the compensable injury of [date of injury], does not extend to pain disorder with stress reaction and post-traumatic depression; (2) the first certification of maximum medical improvement (MMI) and assigned impairment rating (IR) from [Dr. M] on April 28, 2010, became final under Section 408.123 and 28 TEX. ADMIN. CODE § 130.12 (Rule 130.12); (3) the date of MMI is April 28, 2010; and (4) the appellant's (claimant) IR is 0%. The claimant appealed, disputing the hearing officer's determinations on extent of injury, finality, MMI and IR. The respondent (self-insured) responded, urging affirmance.

DECISION

Affirmed in part, reversed and rendered in part, and reversed and remanded in part.

The parties stipulated that the Texas Department of Insurance, Division of Workers' Compensation (Division) appointed Dr. M as the designated doctor to address MMI and IR. The claimant testified that she hurt her low back at work while lifting a heavy box. In the Background Information section of his decision, the hearing officer stated that the claimant was initially diagnosed with lumbosacral sprain.

It was undisputed that in a prior CCH, the Division administratively determined that the compensable injury of [date of injury], extends to disc bulges at L3-4, L4-5, and L5-S1.

There are four certifications of MMI and IR in evidence. There is one by Dr. M, the designated doctor. There are three by [Dr. H], the doctor selected by the treating doctor to act in place of the treating doctor. None of Dr. H's three certifications of MMI and IR rated the diagnosed lumbar disc bulges at L3-4, L4-5, and L5-S1. Dr. H's third alternative certification of MMI and IR included the claimed extent-of-injury conditions but not the disc bulges at L3-4, L4-5, and L5-S1, and he certified that the claimant reached MMI on October 27, 2010, with 15% IR.

EXTENT OF INJURY

The hearing officer's determination that the compensable injury of [date of injury], does not extend to pain disorder with stress reaction and post-traumatic depression is supported by sufficient evidence and is affirmed.

FINALITY

Section 408.123(e) provides that except as otherwise provided by Section 408.123, an employee's first valid certification of MMI and first valid assignment of an IR is final if the certification or assignment is not disputed before the 91st day after the date written notification of the certification or assignment is provided to the employee and the carrier by verifiable means. Rule 130.12(b) provides, in part, that the first MMI/IR certification must be disputed within 90 days of delivery of written notice through verifiable means; that the notice must contain a copy of a valid Report of Medical Evaluation (DWC-69), as described in Rule 130.12(c); and that the 90-day period begins on the day after the written notice is delivered to the party wishing to dispute a certification of MMI or an IR assignment, or both. Section 408.123(f) provides in part that an employee's first certification of MMI or assignment of an IR may be disputed after the period described in Subsection (e) if: (1) compelling medical evidence exists of: (A) a significant error by the certifying doctor in applying the appropriate American Medical Association guidelines or in calculating the [IR]; or (B) clearly mistaken diagnosis or a previously undiagnosed medical condition.

The claimant appeals Finding of Fact No. 7, which states that Dr. M's assigned IR was a valid rating; Finding of Fact No. 8, which states that Dr. M's IR was provided to the claimant by verifiable means on May 11, 2010; and Finding of Fact No. 9, which states that the claimant did not dispute Dr. M's IR within 90 days after the date the rating was provided. Findings of Fact Nos. 7, 8, and 9 are supported by sufficient evidence.

Also in her appeal, the claimant contends that Dr. M, the designated doctor, diagnosed lumbar disc disease and spondylosis L3-S1 as the compensable injury. Therefore, Dr. M did not rate the entire compensable injury, which includes disc bulges at L3-4, L4-5, and L5-S1, which were administratively determined (subsequent to the date of the designated doctor's certifying exam) to be part of the compensable injury of [date of injury]. The claimant argues that she established an exception to finality under Section 408.123(f)(1)(A) and (B).

The self-insured acknowledges that in some cases, with a subsequent extent-of-injury determination after the date of the certifying exam, this would be an exception to

finality. However, under the facts of this case, the certifying doctor examined and rated the lumbar spine and the subsequent extent-of-injury determination (disc bulges at L3-4, L4-5, and L5-S1) involved the same body part, the lumbar spine; therefore, there is not an exception to finality. Also, the designated doctor could have rated the lumbar disc bulges, depending on the clinical findings in Diagnosis-Related Estimate (DRE) Lumbosacral Category I: Complaints or Symptoms in accordance to 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 same manner that Dr. M placed the claimant in that category for the diagnosed lumbar disc disease and lumbar spondylosis L3-S1.

In the Background Information section, the hearing officer stated:

The designated doctor found [the] [c]laimant's lumbar injury to be rated as a DRE [Lumbosacral] Category I impairment. The fact that [the] [c]laimant was later determined to have lumbar disc bulges at three levels as part of the compensable injury does not invalidate the rating. An individual with disc bulges can be rated in DRE [Lumbosacral] Category I depending on the clinical findings. The designated doctor's report did document clinical finding consistent with a DRE [Lumbosacral] Category I impairment.

In Appeals Panel Decision (APD) 111227, decided October 13, 2011, the Appeals Panel reversed the hearing officer's determination that the first certification of MMI and assigned IR became final and rendered a new decision that the first certification did not become final. The certifying doctor had failed to rate the thoracic spine which had been administratively determined by the Division to be part of the compensable injury although he had rated other parts of the body. In that decision, the Appeals Panel stated:

The cases make clear that the failure to rate the entire compensable injury constitutes compelling medical evidence of a significant error by the certifying doctor in applying the appropriate AMA Guides or in calculating the IR.

In APD 111237, decided October 21, 2011, although there was no disputed issue on finality, the hearing officer resolved issues of MMI/IR and extent of injury. In that case, the hearing officer determined that the compensable injury in the form of a lumbar sprain/strain extended to L3-4 and L4-5 annular tears and L4-5 disc bulge. This determination was not appealed and became final. In that case, the certifying doctor examined the claimant's lumbar spine and documented the findings of MRI which included the disc bulges and annular tears but only diagnosed lumbago, placing the claimant in DRE Lumbosacral Category I: Complaints or Symptoms. The Appeals Panel reversed the hearing officer's MMI/IR determinations and remanded the issues of

MMI/IR because the certifying doctor did not rate the entire compensable injury and his certification of MMI/IR could not be adopted.

In the case before us, although the self-insured argues that the certifying doctor by examining the lumbar spine has rated the entire compensable injury, applying APD 111237, *supra*, to the question of finality, the failure to consider and rate the administratively determined lumbar disc bulges at L3-4, L4-5, and L5-S1 is compelling medical evidence of a significant error by the certifying doctor in applying the AMA Guides or in calculating the claimant's IR.

The hearing officer's determination that the first certification of MMI and assigned IR from Dr. M on April 28, 2010, became final under Section 408.123 and Rule 130.12 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 decision and render a new decision that the first certification of MMI and assigned IR by Dr. M on April 28, 2010, did not become final under Section 408.123 and Rule 130.12.

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 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, the designated doctor, examined the claimant on April 8, 2010, and certified on April 28, 2010, that the claimant reached clinical MMI on April 28, 2010, with 0% IR. Dr. M assigned 0% IR based on placing the claimant in DRE Lumbosacral Category I: Complaints or Symptoms. In his narrative report, Dr. M states that the claimant had a December 9, 2009, lumbar MRI which revealed lumbar spondylosis, worse at the L4-5 level. Dr. M states that the claimant's diagnosis as lumbar disc disease and lumbar spondylosis L3-S1 and date of MMI as April 28, 2010, without any

explanation of that date. As previously discussed, Dr. M failed to rate the entire compensable injury of [date of injury], because he did not consider or rate the administratively determined disc bulges of L3-4, L4-5, and L5-S1. The hearing officer's determination that the claimant reached MMI on April 28, 2010, with 0% IR 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 decision.

There are three other certifications of MMI/IR in evidence by Dr. H, the referral doctor.

Dr. H first examined the claimant on April 14, 2010, and certified that the claimant was not at MMI but was expected to reach MMI on July 14, 2010. In his narrative report, Dr. H listed multiple diagnoses to-wit: lumbar radiculitis, low back pain, stress reaction, sleep disturbance, internal derangement of knees, abnormal gait, and lumbar sprain/strain. Although Dr. H lists the December 9, 2009, MRI findings, he did not diagnose lumbar disc bulges at L3-4, L4-5, and L5-S1. Therefore, Dr. H, like the designated doctor, failed to rate the entire compensable injury and this certification of MMI/IR cannot be adopted.

Dr. H examined the claimant for a second time on July 11, 2011, and certified that the claimant reached clinical MMI on October 27, 2010, with 5% IR, placing the claimant in DRE Lumbosacral Category II: Minor Complaints. In his narrative report dated July 11, 2011, Dr. H listed the findings of the December 9, 2009, lumbar MRI and documented complaints and symptoms of radiculopathy without loss of relevant reflexes or atrophy. However, Dr. H diagnosed the claimant with the same diagnoses as listed above for his examination of April 14, 2010, and did not diagnose lumbar disc bulges at L3-4, L4-5, and L5-S1. Therefore, as previously discussed, Dr. H failed to rate the entire compensable injury as well as including diagnoses not part of the compensable injury, to-wit: stress reaction, internal derangement of knees, and abnormal gait. Dr. H's second certification of MMI/IR cannot be adopted.

Dr. H provided a third alternative rating. Dr. H examined the claimant on November 23, 2011, and certified that the claimant reached clinical MMI on October 27, 2010, with 15% IR, which included the claimed extent-of-injury condition of stress reaction with post-traumatic depression. This is a condition which the hearing officer determined to not be part of the compensable injury (and which was affirmed by the Appeals Panel); therefore, this third certification of MMI/IR cannot be adopted.

There are no other certifications of MMI/IR in evidence. Therefore, we remand the issues of MMI/IR to the hearing officer for further action consistent with this decision.

SUMMARY

We affirm the hearing officer's determination that the compensable injury of [date of injury], does not extend to pain disorder with stress reaction and post-traumatic depression.

We reverse the hearing officer's determination that the first certification of MMI and assigned IR from Dr. M on April 28, 2010, became final under Section 408.123 and Rule 130.12 and render a new decision that the first certification of MMI and assigned IR from Dr. M on April 28, 2010, did not become final under Section 408.123 and Rule 130.12.

We reverse the hearing officer's determination that the claimant reached MMI on April 28, 2010, with 0% IR and remand the issues of MMI and IR to the hearing officer for further action consistent with this decision.

REMAND INSTRUCTIONS

Dr. M is the designated doctor in this case. On remand, the hearing officer is to determine whether Dr. M is still qualified and available to be the designated doctor. If Dr. M is no longer qualified or available to serve as the designated doctor, then another designated doctor is to be appointed to determine MMI/IR for the compensable injury of [date of injury].

The hearing officer is to obtain a stipulation from the parties as to the date of statutory MMI or take evidence in order to make a finding on the date of statutory MMI. The hearing officer is to ensure that the parties provide the designated doctor with any medical records not previously provided that are necessary and appropriate to address the issues of MMI and IR, which would include but not limited to the second lumbar MRI report dated April 29, 2010, the EMG/NCV report dated June 10, 2010, and the Wol+Med Work Hardening records.

The hearing officer is to advise the designated doctor that the compensable injury of [date of injury], a lumbar sprain (as accepted and/or agreed to by the parties) has been administratively determined by the Division to extend to lumbar disc bulges at L3-4, L4-5, and L5-S1. The hearing officer is to further advise the designated doctor that the compensable injury does not extend to pain disorder with stress reaction and post-traumatic depression.

The hearing officer is to advise the designated doctor that Rule 130.1(c)(3) provides that 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; and (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 AMA Guides. The doctor's inability to obtain required measurements must be explained.

The designated doctor is then to be requested to give a certification of MMI/IR for the claimant's compensable injury of [date of injury], based on the injured employee's condition as of the MMI date, which can be no later than the date of statutory MMI, considering the claimant's 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 MMI/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 APD 060721, decided June 12, 2006.

The true corporate name of the insurance carrier is **(a certified self-insured)** 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.**

Cynthia A. Brown
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Margaret L. Turner
Appeals Judge