APPEAL NO. 121474
FILED SEPTEMBER 27, 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 March 15, 2012, with the record closing on June 26, 2012, in [City], Texas, with [hearing officer] presiding as hearing officer. The hearing officer resolved the disputed issues by deciding that the compensable injury of [date of injury], does not extend to lumbar radiculopathy and the appellant's (claimant) impairment rating (IR) is 5% as certified by [Dr. G]. The claimant appealed, disputing the hearing officer's extent of injury and IR determinations. The claimant further contended that the hearing officer erred by denying a Motion to Recuse Hearing Officer on the grounds of bias against the law firm representing the claimant as well as bias against Hispanics. The respondent (carrier) responded, urging affirmance and arguing there was no error in denying the Motion to Recuse Hearing Officer.

DECISION

Affirmed in part and reversed and remanded in part.

The parties stipulated that the claimant reached maximum medical improvement (MMI) on the statutory date of May 18, 2011, in accordance with the findings of Dr. G and [Dr. N]. It is undisputed that the compensable injury of [date of injury], extends to disc protrusions at L1-2, L2-3, L4-5, L5-S1, and lumbar sprain/strain (as accepted by the carrier) as well as depressive disorder, anxiety disorder, and pain disorder (as administratively determined in a prior CCH). We note that in listing the exhibits admitted into evidence, the hearing officer failed to list Hearing Officer's Exhibits Nos. 3 and 4. The hearing officer stated that Claimant's Exhibits Nos. 1 through 26 were admitted; however, No. 13 was withdrawn and not admitted into evidence.

MOTION TO RECUSE HEARING OFFICER

After carefully reviewing the record, we do not find any basis to conclude that the hearing officer was biased or prejudiced against the claimant or that he was unable to decide the case in a fair and impartial manner. The fact that the hearing officer resolved the conflicts and inconsistencies in the evidence against the claimant and determined that the compensable injury did not extend to the claimed condition or that the certification of the designated doctor appointed by the Texas Department of Insurance, Division of Workers' Compensation (Division) should be adopted did not demonstrate that the hearing officer abandoned his role as an impartial decision maker. We perceive no error in the denial of the Motion to Recuse Hearing Officer. *See* Appeals Panel

Decision (APD) 980602, decided May 11, 1998, and APD 962449, decided January 15, 1997.

EXTENT OF INJURY

The hearing officer's determination that the compensable injury of [date of injury], does not extend to lumbar radiculopathy is supported by sufficient evidence and is affirmed.

IR

It was stipulated that Dr. G was the Division-appointed designated doctor to determine MMI/IR. Dr. G examined the claimant on July 11, 2011, and certified that the claimant reached MMI on May 18, 2011, with 0% IR.

In his narrative report dated July 11, 2011, Dr. G stated that the carrier had accepted as compensable the disc protrusions at L4-5 and at L5-S1, depressive disorder, anxiety disorder, and pain disorder. However, as previously mentioned, it has been accepted and administratively determined that the compensable injury extends to disc protrusions at L1-2, L2-3, L4-5, L5-S1, lumbar sprain/strain, depressive disorder, anxiety disorder, and pain disorder. There is no mention concerning the disc protrusions at L1-2 and L2-3 and a lumbar sprain/strain in Dr. G's narrative report. Therefore, Dr. G did not rate the entire compensable injury.

Dr. G's narrative regarding the claimant's IR states:

[The claimant] most closely satisfies the [Diagnosis-Related Estimate (DRE) Lumbosacral Category I: Complaints or Symptoms, page 3/102 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)] which is simply subjective complaints. He has no clinical findings compatible with any particular damage or harm. He is assigned 0% [IR] for his low back.

As far as any psychological or psychiatric diagnoses are concerned including depression, anxiety and pain disorder which have been accepted by the carrier, 0% is also assigned, because per [C]hapter 14, page 301 [of the AMA Guides], he most closely satisfies class I which is no impairment when I questioned him about his [activities of daily living (ADLs)], social function, concentration and adaptation.

Dr. G's Report of Medical Evaluation (DWC-69) reflects 0% IR assigned. However, the hearing officer in the Background Information section of his decision, in

his finding of fact, and in his conclusion of law states that Dr. G assigned 5% IR for the claimant's compensable injury. There is no assigned 5% IR by Dr. G or by any other certifying doctor in this case. Therefore, the hearing officer's finding of fact that "[t]he 5% [IR] certified by Dr. [G] is not contrary to the preponderance of the evidence" is so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust. Furthermore, as previously noted the 0% IR actually assigned by Dr. G does not consider the entire compensable injury. Accordingly, we reverse the hearing officer's decision that the claimant's IR is 5%.

There are two other certifications of MMI/IR in evidence with the stipulated date of MMI, May 18, 2011. They are both by Dr. N, the claimant's treating doctor.

Dr. N examined the claimant on August 18, 2011, and initially assigned the claimant 10% IR. In his narrative report of August 18, 2011, Dr. N lists the accepted compensable conditions as disc protrusions at L4-5 and L5-S1, depressive disorder, anxiety disorder, and pain disorder and diagnosed lumbar disc displacement, lumbar radiculitis, and depression. Although he acknowledged in his narrative that the carrier accepted disc protrusions at L4-5 and L5-S1, Dr. N fails to include the disc protrusions at L1-2, L2-3, and lumbar sprain/strain when he placed the claimant in DRE Lumbosacral Category II: Minor Impairment for 5% IR. Although he acknowledged in his narrative that the carrier accepted the conditions of anxiety, depression, and pain disorder, Dr. N assigned a 5% IR solely for the diagnosis of depression. Combining the 5% IR (lumbar) with the 5% (depression) resulted in 10% IR. Because Dr. N did not rate the entire compensable injury, his 10% IR cannot be adopted.

Subsequent to his initial certification of MMI/IR, in a letter dated January 16, 2012, Dr. N stated that he was providing an alternative rating because:

I feel I made a miscalculation of the psychological component of the [IR]. After consultation and review of the records, the values in social function and concentration were corrected from 5% each to 15% each to reflect the proper values from his records and evaluation by [Dr. K)] Ph.D. A change in the values for his mental and behavioral aspect of his [IR] changes to 10% and his 5% for DRE Lumboscral [C]ategory II: [Minor Impairment] gives him a 15% whole person [IR].

There is a second amended DWC-69 in evidence with the stipulated MMI date of May 18, 2011, with 15% IR. However, Dr. N did not assign a rating in the January 16, 2012, letter and second amended narrative report for the extent-of-injury conditions (disc protrusions at L1-2 and L2-3, lumbar sprain/strain, anxiety disorder, and pain disorder) which were omitted in his initial rating. Because Dr. N did not rate the entire compensable injury in his second rating, his 15% IR cannot be adopted.

Because there are no certifications of MMI/IR in evidence that can be adopted, we remand the issue of IR to the hearing officer for further action consistent with this decision.

SUMMARY

We affirm the hearing officer's decision that the compensable injury of [date of injury], does not extend to lumbar radiculopathy.

We reverse the hearing officer's decision that the claimant's IR is 5% and remand the issue of IR to the hearing officer for further action consistent with this decision.

REMAND INSTRUCTIONS

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

The hearing officer is to advise the designated doctor that the compensable injury of [date of injury], includes disc protrusions at L1-2, L2-3, L4-5, and L5-S1 and lumbar sprain/strain (accepted) and depressive disorder, anxiety disorder, and pain disorder (administratively determined). Further, the hearing officer is to advise the designated doctor that it has also been administratively determined that the compensable injury of [date of injury], does not include lumbar radiculopathy.

The hearing officer is to advise the designated doctor that 28 TEX. ADMIN. CODE § 130.1(c)(3) (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 to be requested to re-examine the claimant and to assign an IR for the claimant's compensable injury of [date of injury], based on the

injured employee's condition as of the stipulated MMI date, May 18, 2011, considering the claimant's medical record and the certifying examination.

After the designated doctor re-examines the claimant and submits a new assignment of IR (DWC-69 and narrative report), the parties are to be provided with the designated doctor's new assignment of IR. 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* APD 060721, decided June 12, 2006.

The true corporate name of the insurance carrier is **TEXAS MUTUAL INSURANCE COMPANY** and the name and address of its registered agent for service of process is

RON O. WRIGHT, PRESIDENT
6210 EAST HIGHWAY 290
AUSTIN, TEXAS 78723.

Cynthia A. Brown
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Margaret L. Turner
Appeals Judge