APPEAL NO. 122417
FILED FEBRUARY 11, 2013

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 October 25, 2012, in [City], Texas, with [hearing officer] presiding as hearing officer. With regard to the disputed issues before him, the hearing officer determined that: (1) the appellant/cross-respondent (claimant) had disability from January 26, 2012, through the date of the CCH; (2) the compensable injury of [date of injury], does not extend to C6-7 herniated nucleus pulposus (HNP), C7 nerve root impingement, L2-3 and L4-5 disc bulge, and L3-4 disc protrusion; (3) the claimant has not reached maximum medical improvement (MMI); and (4) because the claimant has not reached MMI, he has no impairment rating (IR).

The claimant appealed the hearing officer's extent-of-injury determination. The respondent/cross-appellant (carrier) responded, urging affirmance of the extent-of-injury determination. The carrier cross-appealed the hearing officer's determinations on MMI, IR, and disability. The claimant responded to the carrier's cross-appeal, urging affirmance of those determinations disputed by the carrier.

DECISION

Affirmed in part and reversed and rendered in part.

The parties stipulated to the following facts: (1) on [date of injury], the claimant sustained a compensable injury to at least his lower back; (2) the claimant was not earning wages from the employer from January 26, 2012, through the date of the CCH; (3) the claimant has been diagnosed with C6-7 HNP, C7 nerve root impingement, L2-3 and L4-5 disc bulge, and L3-4 disc protrusion; (4) the first designated doctor selected by the Texas Department of Insurance, Division of Workers' Compensation (Division), [Dr. Q], was appointed to determine MMI/IR, extent of injury, and return to work; (5) Dr. Q determined that the claimant had not reached MMI, that the compensable injury of [date of injury], was a lumbar sprain/strain and lumbar contusion, and that the claimant could return to work with restrictions; (6) the second designated doctor selected by the Division, [Dr. B], was appointed to determined MMI/IR and return to work; (7) Dr. B determined that the claimant reached MMI on January 25, 2012, with a zero percent IR, and that the claimant could return to work without restrictions on March 25, 2012; and (8) [Dr. G], a referral doctor selected by the treating doctor to act in his place, determined that the claimant was not at MMI.

Contrary to the hearing officer's decision, Carrier's Exhibit H was not admitted into evidence at the CCH because it was not timely exchanged.

DISABILITY AND EXTENT OF INJURY

The hearing officer's determinations that: (1) the claimant had disability from January 26, 2012, through the date of the CCH; and (2) the compensable injury of [date of injury], does not extend to C6-7 HNP, C7 nerve root impingement, L2-3 and L4-5 disc bulge, and L3-4 disc protrusion are supported by sufficient evidence and are affirmed.

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. 28 TEX. ADMIN. CODE § 130.1(c)(3) (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.

The carrier submitted a Request for Designated Doctor (DWC-32) and listed injuries determined to be compensable by the Division or accepted by the carrier as the neck and lower back. In an analysis letter dated May 2, 2012, to Dr. B, the carrier stated the compensable body parts are the cervical spine and lumbar spine.

Dr. B examined the claimant on May 23, 2012, and certified that the claimant reached MMI on January 25, 2012, with zero percent IR. Dr. B placed the claimant in Diagnosis-Related Estimate Lumbosacral Category I: Complaints or Symptoms for zero percent impairment and assigned no impairment for a resolved cervical sprain/strain. Regarding the claimant's MMI date, Dr. B stated:

The [claimant] has been at [MMI] since the time of his first [d]esignated [d]octor [e]valuation with Dr. [Q] [on] January 25, 2012. There has been no objective change in his condition in the intervening months. There are no objective findings. Therefore, the

[claimant's] date of [MMI] is assigned as that time at which the [claimant] appears to have plateaued.

In the Background Information section of his decision, the hearing officer stated:

The [c]arrier argues that the [c]laimant's pain generator has not been identified. The medical evidence supports this conclusion and the certification by Dr. [Q] and Dr. [G] that the [c]laimant has not reached [MMI] and that further treatment is needed to establish the pain generator and stabilize [the claimant's] current medical condition.

The hearing officer stated in Finding of Fact No. 5 that "Dr. [B's] certification . . . is not supported by the preponderance of the other medical evidence."

Dr. Q, the first designated doctor, examined the claimant on January 25, 2012, and certified that the claimant was not at MMI but was expected to reach MMI on or about April 25, 2012, based on "[f]ollow up with treating doctor for recommended physical therapy (4 to 8 weeks). May benefit from evaluation by an anesthesiologist (pain management specialist) since still very symptomatic and his low back pain is not improving." Dr. Q referred the claimant for an [orthopedic] consultation to determine if findings of the lumbar spine MRI could have been caused by the work injury. However, the hearing officer determined that the compensable injury of [date of injury], does not extend to the claimed lumbar disc pathology revealed by the lumbar spine MRI and we have affirmed that determination. Dr. Q's narrative report does not state that the claimant needs further treatment to establish the pain generator and stabilize his condition for a lumbar sprain/strain and contusion. The hearing officer states in his Background Information that "Dr. [B] opined that the [c]laimant was at [MMI] when Dr. [Q] examined the [c]laimant on January 25, 2012." Dr. B's report, as the second designated doctor for MMI/IR, is entitled to presumptive weight. As previously noted, Dr. Q, the first designated doctor, referred the claimant for further diagnostics to determine whether the lumbar disc pathology could have been caused by the injury.

Dr. G, a referral doctor, examined the claimant on August 10, 2012, and certified that the claimant was not at MMI but was expected to reach MMI on or about December 30, 2012. In his narrative report, Dr. G states the following are accepted compensable diagnoses: thoracic sprain/strain, thoracic myalgia and myositis unspecified, thoracic fasciitis, thoracic spine pain, lumbar sprain/strain, lumbar myalgia and myositis unspecified, lumbar fasciitis, low back pain, lumbar neuritis/radiculitis/radiculopathy, and aggravation/acceleration/worsening of displacement of lumbar intervertebral disc without myelopathy and of lumbar or lumbosacral intervertebral disc. Dr. G also states that documentation indicates that the carrier is not disputing cervical involvement. Dr. G further indicates his disagreement with the designated doctor on the date of MMI, IR, extent of injury and return to work status. Dr. G does not indicate if the "designated

doctor" is Dr. B or Dr. Q or both but Dr. G opines that the compensable injury is more than a sprain/strain of the lumbar and cervical spine and includes the claimed cervical and lumbar disc pathology (which the hearing officer determined to not be part of the compensable injury and which we have affirmed). In certifying that the claimant is not at MMI, Dr. G states that the claimant requires continued health care not limited to diagnostic and therapeutic injections, physical therapy, surgical intervention for the cervical and lumbar spine, work hardening/work conditioning, and chronic pain program. Dr. G recommended treatment prior to placing the claimant at MMI. The recommended treatment is for more than a lumbar sprain/strain and contusion and a cervical sprain/strain. Dr. G bases his disagreement with the determination that the claimant has reached MMI in part on the imaging findings that revealed the claimed extent-of-injury conditions found to be non-compensable by the hearing officer (and affirmed by the Appeals Panel), ie. C6-7 HNP, C7 nerve root impingement, L2-3 and L4-5 disc bulge, and L3-4 disc protrusion.

Accordingly, the hearing officer's Finding of Fact No. 5 that "Dr. [B's] certification . . . is not supported by the preponderance of the other medical evidence" is so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust. The preponderance of the evidence supports the certification of MMI/IR by Dr. B, the second designated doctor, whose report is entitled to presumptive weight. The hearing officer erred in not adopting Dr. B's certification of MMI/IR. We reverse the hearing officer's determination that the claimant is not at MMI and render a new decision that the claimant reached MMI on January 25, 2012. We reverse the hearing officer's determination that because the claimant is not at MMI, he has no IR and render a new decision that the claimant's IR is zero percent.

The true corporate name of the insurance carrier is **MARYLAND CASUALTY 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