

APPEAL NO. 122580
FILED FEBRUARY 22, 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 was held on November 19, 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 compensable injury of [date of injury], does not include anxiety disorder; (2) the compensable injury of [date of injury], includes pain disorder associated with both psychological factors and general medical condition; (3) the appellant/cross-respondent (claimant) reached maximum medical improvement (MMI) on December 11, 2009, with a 29% impairment rating (IR).

The claimant appealed the extent-of-injury determination adverse to him. The respondent/cross-appellant (carrier) responded, urging affirmance for that issue. The carrier cross-appealed the extent-of-injury determination adverse to it, as well as the hearing officer's MMI and IR determinations. The claimant responded, urging affirmance for those issues.

DECISION

Affirmed in part and reversed and remanded in part.

It is undisputed that the claimant sustained a compensable injury on [date of injury]. The claimant testified that he sustained an injury to his back when he threw trash in a dumpster.

EXTENT OF INJURY

The hearing officer's determinations that the compensable injury of [date of injury], does not include anxiety disorder but does include pain disorder associated with both psychological factors and general medical condition are supported by sufficient evidence and therefore 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 Texas Department of Insurance, Division of Workers' Compensation (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 hearing officer determined that the claimant reached MMI on December 11, 2009, with a 29% IR as found by [Dr. B], a doctor selected by the treating doctor acting in place of the treating doctor.

Dr. B examined the claimant on October 11, 2012. Dr. B certified that the claimant reached clinical MMI on December 11, 2009, and assigned a 29% IR. In his narrative report dated October 11, 2012, Dr. B placed the claimant in Diagnosis-Related Estimate (DRE) Lumbosacral Category II: Minor Impairment and assigned a 5% impairment for the lumbar spine. Dr. B noted that the claimant had undergone psychological testing and treatment by [Dr. G], a clinical psychologist, noted that he agreed with Dr. G's 25% whole person (WP) impairment for psychological impairment. Dr. B combined the 5% and the 25% for a WP impairment of 29%.

In a Behavioral Medicine Consultation Update and Psychiatric/Psychological IR dated August 2, 2012, Dr. G listed the following multiaxial diagnoses: pain disorder associated with both psychological factors and a medical condition, chronic; and major depressive disorder, single episode, moderate. The report states that the claimant's overall psychiatric/psychological impairment "should be at **MARKED**: [emphasis in original] the impairment significantly impedes useful functioning," and that

This *Marked* psychiatric/psychological impairment translates to a percentage of the [WP] [IR] according to Chapter 14 Mental and Behavioral Disorders and page [14/301] [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 August 2, 2012, report further notes that the claimant is "likely to have developed a depression-related disorder."

A "Psychological [IR] Analysis" also dated August 2, 2012, notes the following:

As per the AMA [Guides] Table 3 Emotional or Behavioral Impairments, Chapter 4, page [4/142] the Marked category is not present. However, per page [14/301] of the Mental and Behavioral Disorders chapter the Marked category can be found between the Moderate and Severe category. Therefore, the Marked category is the equivalent of a high Moderate rating and qualifies for up to a 29% [WP] [IR]. Use of Table 3 Emotional or Behavioral Impairments is supported by the Division's Appeals Panel. With regard to [the claimant] it is recommended the higher end of Moderate be utilized with regard to psychiatric/psychological impairment, or 25% [WP].

Dr. G's 25% impairment includes a rating for depression. The extent-of-injury issue did not include depression, nor was the compensability of depression argued at the hearing. It is undisputed that a previous decision and order determined the compensable injury included an L5-S1 disc bulge with annular fissure and radiculopathy. Nothing in evidence established that the compensable injury includes depression. As such, Dr. G's 25% impairment rates an injury not determined to be a part of the compensable injury. Because Dr. B's December 11, 2009, date of MMI and 29% IR includes Dr. G's 25% impairment, it cannot be adopted. See Appeals Panel Decision (APD) 110463, decided June 13, 2011; and APD 101567, decided December 20, 2010. Accordingly, we reverse the hearing officer's determination that the claimant reached MMI on December 11, 2009, with a 29% IR.

There is only one other MMI/IR certification in evidence, which is that of [Dr. S], the designated doctor. Dr. S examined the claimant on January 20, 2012. Dr. S certified that the claimant reached clinical MMI on December 11, 2009, and assigned a 5% IR by placing the claimant in DRE Lumbosacral Category II: Minor Impairment. In his narrative report dated January 20, 2012, Dr. S lists a diagnoses of L5-S1 disc bulge with annular fissure and radiculopathy.

As previously discussed, the hearing officer's determination that the compensable injury includes pain disorder associated with both psychological factors and general medical condition has been affirmed. Nowhere does Dr. S discuss or rate this condition; therefore, Dr. S did not consider and rate the entire compensable injury. See APD 110267, decided April 19, 2011, and APD 043168, decided January 20, 2005. Accordingly, his MMI/IR certification cannot be adopted.

Since there are no other MMI/IR certifications in evidence that can be adopted, we remand the issues of MMI and 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 include anxiety disorder.

We affirm the hearing officer's determination that the compensable injury of [date of injury], includes pain disorder associated with both psychological factors and general medical condition.

We reverse the hearing officer's determination that the claimant reached MMI on December 11, 2009, with a 29% IR, and remand the issues of MMI and IR to the hearing officer to make a determination on MMI and IR consistent with this decision.

REMAND INSTRUCTIONS

Dr. S is the designated doctor in this case. On remand, the hearing officer is to determine whether Dr. S is still qualified and available to be the designated doctor. If Dr. S 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 MMI and IR for the [date of injury], compensable injury.

The hearing officer is to advise the designated doctor that the compensable injury of [date of injury], includes L5-S1 disc bulge with annular fissure; radiculopathy; and pain disorder associated with both psychological factors and general medical condition as administratively determined. Further, the hearing officer is to advise the designated doctor that the [date of injury], compensable injury does not include anxiety disorder.

The hearing officer is to request the designated doctor to give an opinion on the claimant's MMI and rate the entire compensable injury, which includes L5-S1 disc bulge with annular fissure; radiculopathy; and pain disorder associated with both psychological factors and general medical condition as administratively determined, in accordance with the AMA Guides considering the medical record and the certifying examination.

The parties are to be provided with the designated doctor's new MMI/IR certification and are to be allowed an opportunity to respond. The hearing officer is then to make a determination on MMI and 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 **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.**

Carisa Space-Beam
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Margaret L. Turner
Appeals Judge