APPEAL NO. 122611
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 November 5, 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 neuro-cognitive problems, headaches, post-concussion syndrome, head injury, post-traumatic vestibulopathy, tinnitus, disc bulge/protrusions at C5-6 and C6-7 and aggravation of degenerative condition; (2) the appellant (claimant) reached maximum medical improvement (MMI) on November 30, 2011; (3) the claimant's impairment rating (IR) is five percent; and (4) the claimant did not have disability during the period beginning December 1, 2011, and continuing through the date of the CCH. We note that the statement of the issues in the hearing officer's decision and order mistakenly refers to the date of the injury in the disability issue as November 10, 2010, rather than the correct date of injury which is [date of injury].

The claimant appealed, disputing the hearing officer's determinations of the extent of the compensable injury, disability, MMI and IR. The claimant also contends in his appeal that the hearing officer abused his discretion in denying a request for continuance because the claimant had an appointment with the designated doctor appointed to opine on the extent of the claimant's compensable injury after the date of the CCH. The respondent (carrier) responded, urging affirmance of the disputed determinations.

DECISION

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

The parties stipulated that the claimant sustained a compensable injury on [date of injury], and that the Texas Department of Insurance, Division of Workers' Compensation (Division) appointed [Dr. Y] as the designated doctor on the issues of MMI and IR. The claimant testified that he was hit in the head by a door that had been disconnected from its hinges. It was undisputed that the carrier had accepted a concussion and cervical sprain as part of the compensable injury.

ABUSE OF DISCRETION

The claimant argues on appeal that the hearing officer abused his discretion when he denied the claimant's motion for continuance because a designated doctor had

been appointed on the issue of extent of injury which was a disputed issue at the CCH. Extent of injury was a disputed issue but a request for a designated doctor to be appointed was not made until after the second benefit review conference. Rulings on continuances are reviewed under an abuse-of-discretion standard and the Appeals Panel will not disturb the hearing officer's ruling on a continuance absent an abuse of discretion. Hernandez v. Hernandez, 611 S.W.2d 732 (Tex. Civ. App.-San Antonio 1981, no writ). Considering the facts of this case, we find no abuse of discretion in the hearing officer's ruling denying the claimant's motion for continuance.

DISABILITY

The hearing officer's determination that the claimant did not have disability during the period beginning December 1, 2011, and continuing through the date of the CCH is supported by sufficient evidence and is affirmed.

EXTENT OF INJURY

That portion of the hearing officer's determination that the compensable injury does not extend to neuro-cognitive problems, post-concussion syndrome, post-traumatic vestibulopathy, tinnitus, disc bulge/protrusion at C5-6 and C6-7 and aggravation of degenerative condition is supported by sufficient evidence and is affirmed.

The hearing officer determined that the claimant's compensable injury does not extend to a head injury and headaches. As previously noted, the claimant testified he was injured when he was hit in the head by a door that was off of its hinges. Additionally, it was undisputed that the carrier accepted a concussion as part of the compensable injury. The claimant's initial medical records note a "bump on the head" and headache. The claimant was given a diagnosis of contusion to the head and concussion. A medical record from the Emergency Department states that the claimant was "hit on [the] back of [the] head." A medical record dated December 8, 2010, notes that the claimant suffered an injury to the posterior head and numerous medical records in evidence diagnose the claimant with headaches.

In reviewing a "great weight" challenge, we must examine the entire record to determine if: (1) there is only "slight" evidence to support the finding; (2) the finding is so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust; or (3) the great weight and preponderance of the evidence supports its nonexistence. *See* Cain v. Bain, 709 S.W.2d 175 (Tex. 1986).

Under the facts of this case as discussed above, the hearing officer's determination that the compensable injury does not extend to headaches and a head

injury is so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust. Accordingly, we reverse that portion of the hearing officer's determination that the compensable injury of [date of injury], does not extend to a head injury and headaches and render a new decision that the compensable injury of [date of injury], does extend to headaches and a head injury.

MMI/IR

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 parties stipulated that Dr. Y was appointed as the designated doctor for purposes of MMI and IR. Dr. Y initially examined the claimant on July 8, 2011, and certified that the claimant had not yet reached MMI, noting the anticipated MMI date was October 8, 2011. Dr. Y listed the diagnoses in this narrative as follows: blunt head injury, post-concussive syndrome, post-traumatic vestibulopathy, cervical strain, and aggravation of pre-existing multi-level degenerative changes of cervical spine. Dr. Y examined the claimant again on November 30, 2011, and certified that the claimant reached MMI on November 30, 2011, with a five percent IR, 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). Dr. Y placed the claimant in Diagnosis-Related Estimate Cervicothoracic Category II: Minor Impairment. Dr. Y did not discuss MMI, impairment, or provide any rating (including zero percent) for the accepted injury of the concussion.

The carrier argued at the CCH that the designated doctor's failure to rate the head with a zero percent does not invalidate the report. The hearing officer noted in the Background Information portion of his decision that "[i]f indeed there [was] a concussion in this case, it was transient and not permanent, without residuals that can be rated." However, the certifying doctor is required to rate the entire compensable injury. See

Appeals Panel Decision (APD) 043168, decided January 20, 2005; APD 111519, decided December 22, 2011; APD 110414, decided May 18, 2011; and APD 110267, decided April 19, 2011. Dr. Y did not rate the entire compensable injury. Therefore, the hearing officer's determinations that the claimant reached MMI on November 30, 2011, with a five percent IR is reversed.

The first certification from Dr. Y, in which Dr. Y certified that the claimant was not at MMI considered conditions which have been determined not to be part of the compensable injury. Therefore, that certification cannot be adopted. The only other certification in evidence is from [Dr. F], a doctor selected by the treating doctor to act in his place. Dr. F examined the claimant on January 18, 2012, and certified that the claimant had not reached MMI. Dr. F listed the following as impression/extent of injury: traumatic brain injury - post-concussive syndrome, vestibular trauma with resultant vertigo, cervical disc injury which is acute based on the fact he has documented edema in the bone, and cervicalgia/chronic pain. The certification from Dr. F cannot be adopted because it considered conditions which have been determined are not part of the compensable injury and failed to consider conditions which have been accepted to be part of the compensable injury.

Because there are no certifications of MMI/IR 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 claimant did not have disability during the period beginning December 1, 2011, and continuing through the date of the CCH.

We affirm that portion of the hearing officer's determination that the compensable injury of [date of injury], does not extend to neuro-cognitive problems, post-concussion syndrome, post-traumatic vestibulopathy, tinnitus, disc bulge/protrusion at C5-6 and C6-7 and aggravation of degenerative condition.

We reverse that portion of the hearing officer's determination that the compensable injury of [date of injury], does not extend to headaches and head injury and render a new decision that the compensable injury of [date of injury], extends to headaches and a head injury.

We reverse the hearing officer's determinations that the claimant reached MMI on November 30, 2011, with a five percent IR and remand the issues of MMI and IR to the hearing officer for further action consistent with this decision.

REMAND INSTRUCTIONS

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

The hearing officer is to ensure that the designated doctor is provided with the claimant's medical records not previously provided to the doctor that are necessary to determine the date of MMI and assignment of IR.

The hearing officer is to advise the designated doctor that the compensable injury of [date of injury], includes the following as accepted and/or agreed to by the parties and/or administratively determined to be part of the compensable injury of [date of injury]: (1) cervical strain; (2) headaches; (3) head injury; and (4) concussion. The hearing officer is to advise the designated doctor that the compensable injury of [date of injury], does not include: neuro-cognitive problems, post-concussion syndrome, post-traumatic vestibulopathy, tinnitus, disc bulge/protrusion at C5-6 and C6-7 and aggravation of degenerative condition.

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 zero percent [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 designated doctor is then to be requested to re-examine the claimant and to give a certification of MMI and assignment of IR for the claimant's entire compensable injury of [date of injury], based on the claimant'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 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 **SOUTHERN INSURANCE COMPANY** 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.

Margaret L. Turner
Appeals Judge

CONCUR:

Cynthia A. Brown
Appeals Judge

Thomas A. Knapp
Appeals Judge