

APPEAL NO. 130888
FILED MAY 28, 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 January 22, 2013, 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], extends to a lumbar disc herniation at L4-5 and lumbar degenerative disc disease at L4-5 and L5-S1; (2) the compensable injury of [date of injury], does not extend to a lumbar disc herniation at L5-S1 or lumbar radiculopathy; (3) the appellant (claimant) reached maximum medical improvement (MMI) on July 21, 2011; (4) the claimant's impairment rating (IR) is five percent; and (5) the claimant did not have disability from July 22, 2011, to March 12, 2012.

The claimant appealed, disputing the hearing officer's determinations of MMI, IR, and disability. The claimant also appealed the hearing officer's determination that the compensable injury of [date of injury], does not extend to a lumbar disc herniation at L5-S1 or lumbar radiculopathy. The respondent (carrier) responded, urging affirmance of the disputed determinations.

The hearing officer's determination that the compensable injury of [date of injury], extends to a lumbar disc herniation at L4-5 and lumbar degenerative disc disease at L4-5 and L5-S1 was not appealed and has become final pursuant to Section 410.169.

DECISION

Affirmed in part and reversed and remanded in part.

The parties stipulated that on [date of injury], the claimant sustained a compensable injury which includes lumbar and thoracic sprains/strains and that [Dr. M] was appointed by the Texas Department of Insurance, Division of Workers' Compensation (Division) for the issues of MMI, IR, extent of injury, and return to work. The claimant testified he was injured when he fell four or five feet while working on a rooftop.

EXTENT OF INJURY

The hearing officer's determination that the compensable injury does not extend to a lumbar disc herniation at L5-S1 or lumbar radiculopathy is supported by sufficient evidence and is affirmed.

DISABILITY

The hearing officer's determination that the claimant did not have disability from July 22, 2011, to March 12, 2012, the time period in dispute, is supported by sufficient evidence and is 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.

Dr. M initially examined the claimant on July 21, 2011, and certified that the claimant reached MMI on July 21, 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. M noted that no diagnostic studies were available for his review and determined the claimant had a lumbar contusion and lumbar sprain/strain. Dr. M further noted that the compensable injury according to the carrier was lumbar/thoracic contusion. The hearing officer found that the preponderance of the other medical evidence is not contrary to the designated doctor, Dr. M's opinion on MMI and IR.

The evidence reflects that the claimant underwent an MRI of both the lumbar and thoracic spine on October 21, 2011. As previously noted, the hearing officer's determination that the compensable injury includes a lumbar disc herniation at L4-5 and lumbar degenerative disc disease at L4-5 and L5-S1 was not appealed and has become

final. Dr. M's narrative report dated August 11, 2011, based on the July 21, 2011, examination did not mention the disc herniation at L4-5 or the lumbar degenerative disc disease at L4-5 and L5-S1. Dr. M specifically stated in his narrative report that he did not have any diagnostic studies available for review. The MRI of the claimant's lumbar and thoracic spine did not occur until after the initial examination by Dr. M. The certification of MMI/IR from Dr. M that was adopted by the hearing officer did not consider the entire compensable injury and cannot be adopted. See Appeals Panel Decision (APD) 121474, decided September 27, 2012. Accordingly, we reverse the hearing officer's determinations that the claimant reached MMI on July 21, 2011; and that the claimant's IR is five percent.

Dr. M examined the claimant again on June 20, 2012. Dr. M's narrative of July 12, 2012, based on the June 20, 2012, examination lists his review of the claimant's MRI of both the thoracic and lumbar spine conducted October 21, 2011. Dr. M also notes he reviewed a June 28, 2012, EMG/NCV study. Dr. M provided alternative certifications of MMI/IR. Dr. M certified that the claimant reached MMI on June 30, 2011, with zero percent impairment based only on thoracic and lumbar sprains/strains. The compensable injury includes a lumbar disc herniation at L4-5 and lumbar degenerative disc disease at L4-5 and L5-S1. Dr. M's certification that the claimant reached MMI on June 30, 2011, with zero percent impairment did not consider the entire compensable injury and cannot be adopted.

The alternative certification provided by Dr. M was for the compensable injury "combined with the non-compensable injury," which included conditions not accepted by the carrier. Dr. M opined that the compensable injury extended to a disc herniation at L4-5 and degenerative disc disease at L4-5 and L5-S1. However, in both the narrative report dated July 12, 2012, and the Report of Medical Evaluation (DWC-69), Dr. M certified the claimant reached MMI on September 15, 2012, based on an examination of June 20, 2012. This certification cannot be adopted because the proposed MMI date is prospective based on the examination of June 20, 2012. See Rule 130.12(c).

There are two other certifications in evidence. The claimant's treating doctor, [Dr. L], who examined the claimant on June 17, 2011, and certified that the claimant reached MMI on that date (June 17, 2011), with no permanent impairment based on a single diagnostic code of back contusion. No narrative report is attached to the DWC-69 from Dr. L in evidence. The certification of Dr. L cannot be adopted because it does not consider the entire compensable injury.

The only other certification in evidence is from [Dr. K]. Dr. K performed a post-designated doctor required medical examination at the request of the carrier. Dr. K examined the claimant on September 24, 2012, and certified that the claimant reached

MMI on July 21, 2011, with a five percent IR. Dr. K gave as an impression of the claimant's condition: status post thoracic and lumbar contusion evolving into chronic pain syndrome with no objective findings of radiculopathy. Dr. K did not rate the entire compensable injury so his certification cannot be adopted.

Because there are no certifications of MMI and IR in evidence that rate the claimant's entire compensable injury, 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 does not extend to a lumbar disc herniation at L5-S1 or lumbar radiculopathy.

We affirm the hearing officer's determination that the claimant did not have disability from July 22, 2011, to March 12, 2012, the time period in dispute.

We reverse the hearing officer's determinations that the claimant reached MMI on July 21, 2011, and that the claimant's IR is five percent 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 whether the claimant has reached MMI, and if so, what is 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 lumbar sprain/strain, thoracic sprain/strain, a lumbar disc herniation at L4-5 and lumbar degenerative disc disease at L4-5 and L5-S1 but does not include a lumbar disc herniation at L5-S1 or lumbar radiculopathy.

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 [IR]; 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 to be requested to re-examine the claimant and to determine whether the claimant has reached MMI, and if so, assign an IR for the claimant's compensable injury of [date of injury], based on the claimant's condition as of the MMI date considering the claimant's medical record and the certifying examination. After the designated doctor re-examines the claimant and submits a new certification of MMI and IR, the parties are to be provided with the designated doctor's DWC-69 and narrative report. 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. APD 060721, decided June 12, 2006.

The true corporate name of the insurance carrier is **INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA** 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 78701-3218.**

Margaret L. Turner
Appeals Judge

CONCUR:

Veronica L. Ruberto
Appeals Judge

Carisa Space-Beam
Appeals Judge