

APPEAL NO. 132055
FILED OCTOBER 24, 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 August 5, 2013, in [City], Texas, with [hearing officer] presiding as hearing officer. The hearing officer resolved the sole disputed issue by deciding that the compensable injury of [date of injury], does not extend to disc protrusions at L4-5 and L5-S1 and lumbar radiculopathy. The appellant (claimant) appealed the hearing officer's extent-of-injury determination as being against the great weight and preponderance of the evidence. Also, the claimant states in his appeal that the respondent (carrier) did not dispute the claimant's 10% impairment rating (IR) which rated lumbar radiculopathy, therefore the carrier accepted the lumbar radiculopathy. The carrier responded, urging affirmance of the hearing officer's decision.

DECISION

Reversed and remanded.

FACTUAL SUMMARY

The claimant testified that he sustained a back injury at work when he was lifting a shelving unit and felt a pop in his back on [date of injury]. The Texas Department of Insurance, Division of Workers' Compensation (Division) appointed [Dr. S] to determine the claimant's date of maximum medical improvement (MMI) and IR, and subsequently re-appointed Dr. S to determine the extent of the compensable injury. Dr. S examined the claimant on December 7, 2010, and in a Report of Medical Evaluation (DWC-69) dated December 14, 2010, he certified that the claimant reached MMI on December 7, 2010, with a 10% IR. In assessing the 10% IR, Dr. S placed the claimant in Diagnosis-Related Estimate (DRE) Lumbosacral Category III: Radiculopathy for a 10% whole person impairment. In his narrative report dated December 14, 2010, Dr. S referenced an MRI of the lumbar spine dated December 12, 2008, that showed disc herniations at L4-5 and L5-S1. In evidence is an MRI of the lumbar spine dated December 13, 2010, that shows disc protrusions at L4-5 and L5-S1.

The claimant's treating doctor, [Dr. F], examined the claimant on December 16, 2010, and in a DWC-69 dated December 18, 2010, certified that the claimant reached MMI on December 17, 2010, with a 10% IR for lumbar radiculopathy under DRE Lumbosacral Category III: Radiculopathy.

In 2013, Dr. S re-examined the claimant to opine on the extent of the compensable injury. In a narrative report dated February 8, 2013, Dr. S diagnosed the

claimant with degenerative lumbar disc disease and he opined that there is “radiologic evidence of L4-5 and L5-S1 disc bulging” and the claimant “exhibits signs and symptoms of lumbar radiculopathy.”

At the CCH held on August 5, 2013, the carrier stated that it had accepted a lumbar strain as a compensable injury.

EXTENT OF INJURY

The sole issue in dispute is whether the compensable injury of [date of injury], extends to disc protrusions at L4-5 and L5-S1 and lumbar radiculopathy. The hearing officer found that the compensable injury of [date of injury], does not extend to disc protrusions at L4-5 and L5-S1 and lumbar radiculopathy. In the Background Information section of the decision, the hearing officer explains that the extent-of-injury conditions at issue require expert evidence to establish a causal connection with the compensable injury. See City of Laredo v. Garza, 293 S.W.3d 625 (Tex. App.-San Antonio 2009, no pet.) citing Guevara v. Ferrer, 247 S.W.3d 662 (Tex. 2007). We agree with the hearing officer regarding expert evidence for the conditions at issue in this case. The Appeals Panel acknowledges that injuries can evolve over time and claimants may claim that additional injuries or conditions are compensable. However, at the CCH the claimant stated that the lumbar radiculopathy, a condition at issue, was included in the 10% IR assessed by the designated doctor in his DWC-69 dated December 14, 2010. Further, the claimant asserts on appeal that the 10% IR was not disputed by the carrier.

Although there was no finality issue reported out of the benefit review conference report nor was there a request to add an issue of finality at the CCH, the claimant contended at the CCH, at least by argument, that the designated doctor assessed a 10% IR that specifically rated lumbar radiculopathy, a condition that was specific to the extent-of-injury issue. Further, the hearing officer admitted without objection the certifications of MMI and IR from the designated doctor, Dr. S, and the treating doctor, Dr. F. Both Dr. S and Dr. F assessed a 10% IR for lumbar radiculopathy, and Dr. S reviewed the MRI of the lumbar spine specific to lumbar disc levels at L4-5 and L5-S1. We note that based on the dates of the certifications in evidence, Dr. S’s certification appears to have been issued prior to Dr. F. There is no evidence that the 10% IR assessed by Dr. S was ever disputed by the parties.

In this case, the extent-of-injury conditions in dispute (disc protrusions at L4-5 and L5-S1 and lumbar radiculopathy) are the conditions included in the 10% IR as assessed by the designated doctor as evidenced by Dr. S’s DWC-69 and narrative report (Claimant’s Exhibit No. 6, pages 1 through 5). The claimant by argument stated that the lumbar radiculopathy was included in the 10% IR. However, the hearing officer failed to make findings of fact, conclusions of law, or a decision on whether a

certification of MMI and IR became final pursuant to Section 408.123 and 28 TEX. ADMIN. CODE § 130.12 (Rule 130.12), and if so, what conditions were included in the IR that became final, if any. Section 401.011(24) defines IR as the percentage of permanent impairment of the whole body resulting from a compensable injury. Rule 130.1(c)(1) states that an IR is the percentage of permanent impairment of the whole body resulting from the current compensable injury.

Consequently, we reverse the hearing officer's determination that the compensable injury of [date of injury], does not extend to disc protrusions at L4-5 and L5-S1 and lumbar radiculopathy, and we remand for the hearing officer to make a determination on: (1) whether there is a first valid certification of MMI and IR; (2) if so, whether the first valid certification of MMI and IR became final pursuant to 408.123 and Rule 130.12; (3) if so, what are the underlying conditions that were included in the IR; and (4) whether the compensable injury of [date of injury], extends to disc protrusions at L4-5 and L5-S1 and lumbar radiculopathy.

REMAND INSTRUCTIONS

The hearing officer is to make a determination on: (1) whether there is a first valid certification of MMI and IR; (2) if so, whether the first valid certification of MMI and IR became final pursuant to Section 408.123 and Rule 130.12; (3) if so, what are the underlying conditions that were included in the IR; and (4) whether the compensable injury of [date of injury], extends to disc protrusions at L4-5 and L5-S1 and lumbar radiculopathy.

The hearing officer is to either request a stipulation from the parties or make a determination on the claimant's MMI date and IR. The hearing officer is to either request a stipulation from the parties or make a determination on what conditions are included in the claimant's IR.

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 Appeals Panel Decision 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

**RICHARD GERGASKO, PRESIDENT
6210 EAST HIGHWAY 290
AUSTIN, TEXAS 78723.**

Veronica L. Ruberto
Appeals Judge

CONCUR:

Carisa Space-Beam
Appeals Judge

Margaret L. Turner
Appeals Judge