

APPEAL NO. 140450
FILED APRIL 17, 2014

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 30, 2014, in [City], Texas, with [hearing officer] presiding as the hearing officer. The hearing officer resolved the disputed issues by deciding that: (1) the compensable injury of [date of injury], does not extend to a disc herniation and Grade I spondylolisthesis at L4-5; (2) the appellant (claimant) reached maximum medical improvement (MMI) on January 10, 2013; (3) the claimant's impairment rating (IR) is zero percent; and (4) the claimant did not have disability during the period beginning January 11 through November 27, 2013, due to the compensable injury of [date of injury].

The claimant appealed all of the hearing officer's determinations, arguing that the evidence shows that the mechanism of injury caused the disc herniation and aggravated the Grade I spondylolisthesis at L4-5, that she has not reached MMI and an IR is premature, and that she is entitled to disability for the period at issue. The respondent (carrier) responded, urging affirmance of the hearing officer's determinations.

DECISION

Reversed and remanded.

The parties stipulated on the record that: (1) the claimant sustained a compensable injury on [date of injury],¹ and (2) the Texas Department of Insurance, Division of Workers' Compensation (Division) appointed [Dr. W] as the designated doctor on the issues of MMI, IR, return to work (RTW), and extent of injury.

The claimant testified that she was a field sales associate for the employer and that on the date of injury, she was delivering grocery store merchandise. While lowering a utility cart to the ground, four carts behind it fell on the one she was holding. She further testified that it jerked her arms from about chest height down to the middle of her shins, at which point the other carts slid off and she was able to lower the cart to the ground.

¹ We note that the hearing officer erroneously stated in Finding of Fact No. 1.D. that the claimant sustained a compensable injury on [incorrect date of injury].

EXTENT OF INJURY

The hearing officer determined that the compensable injury of [date of injury], does not extend to a disc herniation and Grade I spondylolisthesis at L4-5. In the Discussion section of his decision and order, the hearing officer stated that the “preponderance of the evidence supports the determination of the designated doctor on the extent of injury issue.” There are reports in evidence of two designated doctor examinations conducted by Dr. W. The first, on May 8, 2013, was for the purposes of MMI, IR, RTW, and extent of injury. The second, on October 9, 2013, was only for MMI and IR.

Dr. W opined regarding the extent of the claimant’s injury in his May 8, 2013, narrative report, stating that “the [claimant’s] injuries include a tear of the right rotator cuff, SLAP lesion and an aggravation of a preexisting Grade I antero-listhesis of L4 on L5.” The hearing officer does not mention Dr. W’s May 8, 2013, examination in the decision and order.

Referring to the October 9, 2013, designated doctor examination in the Discussion section of his decision and order, the hearing officer stated that Dr. W “determined that the spondylolisthesis was stable and preexisted the injury, and was not aggravated or accelerated by the injury.” This language exists in the portion of Dr. W’s report labeled “[h]istory of [t]reatment” where he was listing the records reviewed and he noted that the claimant had a required medical examination (RME) with [Dr. B] on August 13, 2013, and that Dr. B was of the opinion that “the [claimant] had a stable spondylolisthesis that pre-existed the injury and was not aggravated or accelerated by the injury.” Dr. W was only appointed on and only conducted an MMI/IR examination on October 9, 2013. Dr. W did not opine regarding extent of injury in his narrative report for the October 9, 2013, examination. The hearing officer misread Dr. W’s October 9, 2013, narrative report and mistakenly applied presumptive weight to an opinion that was only expressed by the RME doctor, Dr. B, which we view as a misstatement of a material fact in evidence.

While the hearing officer can accept or reject in whole or in part Dr. W’s reports, we must reverse the hearing officer’s determination that the compensable injury of [date of injury], does not extend to a disc herniation and Grade I spondylolisthesis at L4-5 due to a misstatement of a material fact in evidence. We remand this issue to the hearing officer for further action consistent with this decision.

MMI/IR

The Appeals Panel has held that an extent-of-injury issue is a threshold issue that must be resolved before MMI and IR can be resolved, and that the resolution of the

MMI and IR issues will flow from the resolution of the extent issue. See Appeals Panel Decision (APD) 110854, decided August 15, 2011. See *also* APD 120180, decided April 2, 2012. Since we have reversed the hearing officer's determination that the compensable injury of [date of injury], does not extend to a disc herniation and Grade I spondylolisthesis at L4-5 and remanded that issue to the hearing officer, we also reverse the hearing officer's determinations that the claimant reached MMI on January 10, 2013, and that the claimant's IR is zero percent, and remand the issues of MMI and IR for further action consistent with this decision.

DISABILITY

Section 401.011(16) defines disability as "the inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage." Since we have remanded the issue of extent of injury to the hearing officer and the hearing officer's determination regarding extent of injury may affect his determination regarding disability, we also reverse the hearing officer's determination that the claimant did not have disability during the period beginning January 11 through November 27, 2013, due to the compensable injury of [date of injury], and remand the issue of disability for further action consistent with this decision.

SUMMARY

We reverse the hearing officer's determination that the compensable injury of [date of injury], does not extend to a disc herniation and Grade I spondylolisthesis at L4-5, and remand the issue of extent of injury to the hearing officer for further action consistent with this decision.

We reverse the hearing officer's determination that the claimant reached MMI on January 10, 2013, and remand the issue of MMI to the hearing officer for further action consistent with this decision.

We reverse the hearing officer's determination that the claimant's IR is zero percent, and remand the issue of IR to the hearing officer for further action consistent with this decision.

We reverse the hearing officer's determination that the claimant did not have disability during the period beginning January 11 through November 27, 2013, due to the compensable injury of [date of injury], and remand the issue of disability to the hearing officer for further action consistent with this decision.

REMAND INSTRUCTIONS

On remand, the hearing officer is to properly consider Dr. W's opinion and apply the appropriate presumptive weight to his reports. The hearing officer is then to make determinations regarding the extent of the [date of injury], compensable injury, disability, MMI, and IR that are supported by the evidence.

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, 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 **THE TRAVELERS INDEMNITY COMPANY** and the name and address of its registered agent for service of process is

**CORPORATION SERVICE COMPANY
D/B/A/ CSC-LAWYERS INCORPORATING SERVICE COMPANY
211 EAST 7TH STREET, SUITE 620
AUSTIN, TEXAS 78701-3218.**

Tracey T. Guerra
Appeals Judge

CONCUR:

Carisa Space-Beam
Appeals Judge

Margaret L. Turner
Appeals Judge