

APPEAL NO. 140505
FILED MAY 19, 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 (CCH) was held on October 28, 2013, with the record closing on February 3, 2014, 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 lumbar radiculitis, lumbar disc syndrome, T11-12, T12-L1 degenerative disc disease, lumbar scoliosis, L5-S1 degenerative hypertrophic changes, L4-5 disc bulging, L1-2 degenerative disc disease, lumbar degenerative disc disease, and lumbar disc space narrowing; (2) the compensable injury of [date of injury], extends to an L1-2 left-sided herniated disc; (3) the respondent (claimant) had disability beginning on August 23, 2012, and continuing through the date of the CCH; (4) the claimant has not reached maximum medical improvement (MMI); and (5) any impairment rating (IR) is premature.

The appellant (carrier) appealed all of the hearing officer's determinations adverse to the carrier. The carrier contended that the evidence does not support the hearing officer's determination that the compensable injury extends to L1-2 left-sided herniated disc or the hearing officer's MMI and IR determinations. The carrier also contended that the hearing officer changed the claimant's position from a cycle counter for the claimed employer to a traveling home health care nurse, and that the hearing officer based his disability determination on an incorrect statement of the claimant's position of employment. The claimant, in an untimely response, urged affirmance of the hearing officer's determinations. The hearing officer's determination that the compensable injury of [date of injury], does not extend to lumbar radiculitis, lumbar disc syndrome, T11-12, T12-L1 degenerative disc disease, lumbar scoliosis, L5-S1 degenerative hypertrophic changes, L4-5 disc bulging, L1-2 degenerative disc disease, lumbar degenerative disc disease, and lumbar disc space narrowing 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 the compensable injury includes at least a lumbar sprain/strain. The claimant testified she was an inventory cycle counter for the employer, and that she was injured while unloading cases of books.

TIMELINESS OF THE CLAIMANT'S RESPONSE

Pursuant to Section 410.202(b) the claimant's written response must be filed no later than the 15th day after the appeal is served on the claimant. The deemed date of receipt of the carrier's appeal was March 12, 2014, and therefore the claimant's response had to be filed or mailed no later than Wednesday, April 2, 2014. The claimant's response is dated April 3, 2014, was sent to the Texas Department of Insurance, Division of Workers' Compensation (Division) via facsimile transmission on April 3, 2014, and was received by the Division on that same day. The response, not having been mailed or filed by April 2, 2014, is untimely and will not be considered.

EXTENT OF INJURY

The hearing officer's determination that the compensable injury of [date of injury], extends to an L1-2 left-sided herniated disc 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.

The hearing officer determined that the claimant has not reached MMI and that any IR is premature as found by [Dr. G], the claimant's treating doctor. Dr. G examined the claimant on June 5, 2013. Dr. G noted the following diagnoses in his narrative report: lumbar intervertebral disc without myelopathy; thoracic or lumbosacral neuritis/radiculitis; and lumbar sprain/strain. As previously mentioned, the hearing

officer's determination that the compensable injury of [date of injury], does not extend to lumbar radiculitis, lumbar disc syndrome, T11-12, T12-L1 degenerative disc disease, lumbar scoliosis, L5-S1 degenerative hypertrophic changes, L4-5 disc bulging, L1-2 degenerative disc disease, lumbar degenerative disc disease, and lumbar disc space narrowing has become final pursuant to Section 410.169. Dr. G has considered and rated conditions determined not part of the compensable injury. See Appeals Panel Decision (APD) 132991, decided February 12, 2014. Accordingly, we reverse the hearing officer's determinations that the claimant has not reached MMI and that any IR is premature.

There are two other MMI/IR certifications in evidence. The first is from [Dr. B], the first designated doctor appointed by the Division to determine MMI and IR. Dr. B examined the claimant on November 28, 2012, and certified that the claimant reached MMI on August 22, 2012, 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. B placed the claimant in Diagnosis-Related Estimate (DRE) Lumbosacral Category II: Minor Impairment for a lumbar sprain/strain. Dr. B did not consider or rate L1-2 left-sided herniated disc, and therefore did not consider and rate the entire compensable injury. Accordingly, Dr. B's MMI/IR certification cannot be adopted.

The other MMI/IR certification is from [Dr. A], the second designated doctor appointed by the Division to determine MMI and IR. Dr. A examined the claimant on December 17, 2013, and certified that the claimant reached MMI on October 30, 2013, with a five percent IR using the AMA Guides. Dr. A placed the claimant in DRE Lumbosacral Category II: Minor Impairment for a lumbar sprain/strain and L1-2 herniated nucleus pulposus. However, as noted by the hearing officer in the Background Information section of the decision, there is no basis in the medical record to support the MMI date chosen by Dr. A. Accordingly, Dr. A's MMI/IR certification cannot be adopted.

As there is no MMI/IR certification 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.

DISABILITY

Disability means the inability to obtain and retain employment at wages equivalent to the pre-injury wage because of a compensable injury. Section 401.011(16). The hearing officer determined that the claimant had disability beginning on August 23, 2012, and continuing through the date of the CCH. The carrier pointed

out in its appeal that the hearing officer changed the claimant's position from an inventory cycle counter to a traveling home health nurse, and as the hearing officer based his disability determination on an incorrect position of employment that determination must be reversed. As previously noted, the claimant testified at the CCH that she was an inventory cycle counter for the employer. The hearing officer stated the following in the Background Information section of the decision:

[The claimant] also testified that she is not able to perform the duties of a traveling home health nurse. I find that the preponderance of the evidence supports a finding that the compensable injury of [date of injury], is a cause of [the] [c]laimant's inability to obtain and retain employment at her pre-injury wages beginning on August 23, 2012, and continuing through the date of this [CCH].

At no point during the CCH did the claimant testify that she was a traveling home health nurse. The hearing officer misstates the evidence in this case regarding the claimant's position of employment. We therefore reverse the hearing officer's determination that the claimant had disability beginning on August 23, 2012, and continuing through the date of the CCH, and we remand the issue of disability 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], extends to L1-2 left-sided herniated disc.

We reverse the hearing officer's determinations that the claimant has not reached MMI and that any IR is premature, and we remand the issues of MMI and IR to the hearing officer for further action consistent with this decision.

We reverse the hearing officer's determination that the claimant has had disability beginning on August 23, 2012, and continuing through the date of the CCH, and we remand the issue of disability to the hearing officer for further action consistent with this decision.

REMAND INSTRUCTIONS

Dr. A is the designated doctor. The hearing officer is to determine whether Dr. A is still qualified and available to be the designated doctor. If Dr. A 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.

The hearing officer is to inform the designated doctor that the compensable injury of [date of injury], extends to a lumbar sprain/strain as accepted by the carrier, and to an

L1-2 left-sided herniated disc as administratively determined. The hearing officer is also to inform the designated doctor that the compensable injury does not extend to lumbar radiculitis, lumbar disc syndrome, T11-12, T12-L1 degenerative disc disease, lumbar scoliosis, L5-S1 degenerative hypertrophic changes, L4-5 disc bulging, L1-2 degenerative disc disease, lumbar degenerative disc disease, and lumbar disc space narrowing as administratively determined.

The hearing officer is to request the designated doctor to give an opinion on the claimant's MMI and rate the entire compensable injury 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. The hearing officer is also to fully consider the evidence and make a determination on disability 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 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 **TEXAS MUTUAL INSURANCE COMPANY** and the name and address of its registered agent for service of process is

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

Carisa Space-Beam
Appeals Judge

CONCUR:

Veronica L. Ruberto
Appeals Judge

Margaret L. Turner
Appeals Judge