APPEAL NO. 140840
FILED JUNE 13, 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 March 4, 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 a traumatic disc rupture at L5-S1, pressing on the exiting nerve root; predominately L5-S1 radiculopathy with painful paresthesis; thoracic spasm; and sleep disorder/restless leg syndrome; (2) the appellant (claimant) reached maximum medical improvement (MMI) on December 10, 2011; (3) the claimant's impairment rating (IR) is 10%; and (4) the claimant had disability resulting from the compensable injury of [date of injury], during the period beginning December 11, 2011, through April 4, 2013, but she did not have disability during the period beginning April 5, 2013, through March 4, 2014, the date of the CCH.

The claimant appealed, disputing the hearing officer's determinations of the extent of the compensable injury, MMI, and IR. The claimant also disputes that portion of the hearing officer's determination that she did not have disability during the period beginning April 5, 2013, through March 4, 2014, the date of the CCH. The respondent (carrier) responded, urging affirmance of the disputed disability, extent, MMI and IR determinations.

That portion of the hearing officer's determination that the claimant had disability resulting from the compensable injury of [date of injury], during the period beginning December 11, 2011, through April 4, 2013, 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: (1) on [date of injury], the claimant sustained a compensable injury in at least the form of a thoracic sprain/strain and lumbar sprain/strain; (2) the Texas Department of Insurance, Division of Workers' Compensation (Division)-appointed designated doctor for purposes of MMI, IR, extent of injury, and return to work is [Dr. N]; (3) Dr. N certified that the claimant reached MMI on December 10, 2011, with a 10% IR; (4) [Dr. R], a doctor selected by the treating doctor to perform a certifying examination in his place, certified that the claimant has not reached MMI; and (5) the carrier's post-designated doctor, required medical examination (RME) doctor, [Dr. B] certified that the claimant reached MMI on December 10, 2011, with a 5% IR. We note that the hearing officer found in Finding of Fact No. 1.I. that the parties stipulated that the claimant reached statutory MMI on November 16,

2013. However, a review of the record reflects that the parties actually stipulated that the statutory date of MMI is November 16, 2013. The claimant testified that she was injured when lifting a pipe to put end rings on it. The claimant testified that when she was trying to move the pipe, she felt and heard a pop in her lower back.

EXTENT OF INJURY

The hearing officer's determination that the compensable injury of [date of injury], does not extend to a traumatic disc rupture at L5-S1, pressing on the exiting nerve root; predominately L5-S1 radiculopathy with painful paresthesis; thoracic spasm; and sleep disorder/restless leg syndrome is supported by sufficient evidence and is affirmed.

DISABILITY

The hearing officer's determination that the claimant did not have disability during the period beginning April 5, 2013, through the date of the CCH, March 4, 2014, the date of the CCH 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 reached MMI on December 10, 2011, with a 10% IR per Dr. N, the designated doctor appointed by the Division, for the purpose of MMI and IR.

Dr. N examined the claimant on April 17, 2012, and certified that the claimant reached MMI on December 10, 2011, with a 10% IR, using the 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. N noted that the accepted diagnoses were lumbar sprain/strain and thoracic sprain/strain. However, in a portion of his narrative entitled summation of MMI/IR, Dr. N noted that the date of MMI is December 17, 2011. Further, Dr. N in his explanation of MMI stated: "I find that the [claimant] should be at MMI according to the [Medical Disability Advisor, Workplace Guidelines for Disability Duration, excluding all sections and tables relating to rehabilitation published by the Reed Group, Ltd. (MDG)], guidelines if in fact she has only the accepted diagnoses. I would award her a 10% IR, combining a [Thoracolumbar Diagnosis-Related Estimate (DRE) Category] II with a [Lumbosacral DRE Category] II."

Dr. N based his determination of MMI solely on the MDG. Accordingly, the hearing officer's determination of MMI is so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust. *See* Appeals Panel Decision (APD) 130187, decided March 18, 2013, and APD 130191, decided March 13, 2013. We reverse the hearing officer's determination that the claimant reached MMI on December 10, 2011, and that the claimant's IR is 10%.

Dr. N also provided an alternative certification based on an examination date of April 17, 2012, certifying that the claimant had not yet reached MMI. For the alternative certification, Dr. N considered lumbar disc herniation and lumbosacral radiculopathy, conditions that have been determined not to be a part of the compensable injury, and as such his certification cannot be adopted. *See* APD 110463, decided June 13, 2011; and APD 101567, decided December 20, 2010.

There are two other MMI/IR certifications in evidence. The first is from Dr. R, a doctor selected by the treating doctor to act in his place. Dr. R examined the claimant on July 17, 2012, and certified that the claimant had not yet reached MMI. In his narrative report, Dr. R failed to list the specific diagnoses he considered in certifying that the claimant had not yet reached MMI. However, it is evident from the Report of Medical Evaluation (DWC-69) and his discussion in the July 17, 2012, narrative report that Dr. R considered more than a lumbar and thoracic sprain/strain. As previously noted the parties stipulated that the statutory date of MMI is November 16, 2013. Accordingly, Dr. R's MMI/IR certification cannot be adopted. *See* APD 131554, decided September 3, 2013, and APD 132305, decided November 26, 2013.

Dr. B, a carrier-selected RME examined the claimant on April 5, 2013, and certified that the claimant reached clinical MMI on December 10, 2011, with a 5% IR, using the AMA Guides. However, Dr. B notes in his narrative report that the claimant sustained a lumbar sprain, causally related to the injury but that there was no evidence of a thoracic injury. The parties stipulated that the claimant sustained a compensable injury in at least the form of a thoracic sprain/strain and lumbar sprain/strain. Dr. B did

not consider the entire compensable injury and accordingly his certification cannot be adopted. *See* APD 130961, decided June 3, 2013.

There are no MMI/IR certifications in evidence that can be adopted. Therefore, 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 of [date of injury], does not extend to a traumatic disc rupture at L5-S1, pressing on the exiting nerve root; predominately L5-S1 radiculopathy with painful paresthesis; thoracic spasm; and sleep disorder/restless leg syndrome.

We affirm the hearing officer's determination that the claimant does not have disability resulting from the compensable injury of [date of injury], during the period beginning April 5, 2013, through March 4, 2014, the date of the CCH.

We reverse the hearing officer's determinations that the claimant reached MMI on December 10, 2011, with a 10% IR, and we remand the issues of MMI and IR to the hearing officer for further action consistent with this decision.

REMAND INSTRUCTIONS

Dr. N is the designated doctor in this case. On remand, the hearing officer is to determine whether Dr. N is still qualified and available to be the designated doctor. If Dr. N 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 for the [date of injury], compensable injury.

The hearing officer is to advise the designated doctor that the compensable injury of [date of injury], includes a thoracic sprain/strain and lumbar sprain/strain. Further, the hearing officer is also to advise the designated doctor that the compensable injury does not extend to a traumatic disc rupture at L5-S1, pressing on the exiting nerve root; predominately L5-S1 radiculopathy with painful paresthesis; thoracic spasm; and sleep disorder/restless leg syndrome as administratively determined.

The certification of MMI can be no later than the statutory date of MMI, which the parties have stipulated is November 16, 2013. The certification of MMI should be 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 considering the physical examination and the claimant's medical records and not based solely on the date the MDG states the claimant could return to work.

The assignment of an IR is required to be based on the claimant's condition as of the MMI date considering the medical records and the certifying examination and according to the rating criteria of the AMA Guides and the provisions of Rule 130.1(c)(3). The parties are to be allowed an opportunity to respond. The hearing officer is to determine the issues of 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 **HARTFORD UNDERWRITERS INSURANCE COMPANY** and the name and address of its registered agent for service of process is[1]

CT CORPORATION SYSTEM
1999 BRYAN STREET, SUITE 900
DALLAS, TEXAS 75201-3136.

Margaret L. Turner
Appeals Judge

CONCUR:

Veronica L. Ruberto
Appeals Judge

Carisa Space-Beam
Appeals Judge

[1] We note that the hearing officer's decision recites an incorrect address of the registered agent of service. The insurance carrier information sheet in evidence contains the address listed above.