APPEAL NO. 141170
AUGUST 4, 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 21, 2013, with the record closing March 25, 2014, in Houston, Texas, with [hearing officer] presiding as hearing officer. The hearing officer resolved the disputed issues by deciding that: (1) the [date of injury], compensable injury extends to chronic pain syndrome and a head contusion; (2) the [date of injury], compensable injury does not extend to a lumbar herniated nucleus pulposus (HNP) at L4-5, a lumbar HNP at L5-S1, lumbar radiculitis, lumbar radiculopathy, a cervical herniation at C6-7, cervical radiculopathy, anxiety, depression, or a head laceration; (3) the appellant/cross-respondent (claimant) reached maximum medical improvement (MMI) on August 14, 2012; (4) the claimant's impairment rating (IR) is 10%; and (5) the claimant had disability from August 15, 2012, through the date of the CCH.

The claimant appealed the hearing officer's extent-of-injury determination adverse to him, as well as the hearing officer's MMI and IR determinations. The claimant contends that the preponderance of the evidence does not support the hearing officer's determinations. The respondent/cross-appellant (carrier) responded, urging affirmance of those determinations. The carrier cross-appealed the hearing officer's disability determination. The carrier contends that the hearing officer's disability determination is so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust. The appeal file does not contain a response from the claimant to the carrier's cross-appeal. The hearing officer's determination that the [date of injury], compensable injury extends to chronic pain syndrome and a head contusion 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 claimant sustained a compensable injury on [date of injury], that includes lumbar, thoracic, and cervical sprain/strains, bilateral shoulder sprain/strains, and a sprain/strain of the ribs, and that (Dr. S), is the designated doctor appointed by the Texas Department of Insurance, Division of Workers' Compensation (Division) to determine MMI and IR. The claimant testified he was injured when he slipped and fell off of a ladder onto concrete, landing on his back, shoulders, neck, and head. The claimant also testified that he did not sustain a head laceration when he fell.

**EXTENT OF INJURY**

The hearing officer's determination that the [date of injury], compensable injury does not extend to a lumbar HNP at L4-5, a lumbar HNP at L5-S1, lumbar radiculitis, lumbar radiculopathy, a cervical herniation at C6-7, cervical radiculopathy, anxiety, depression, or a head laceration is supported by sufficient evidence and is affirmed.

## DISABILITY

The hearing officer's determination that the claimant had disability from August 15, 2012, through the date of the CCH is supported by sufficient evidence and is affirmed.

## MMI/IR

The hearing officer determined that the claimant reached MMI on August 14, 2012, with a 10% IR as certified by Dr. S, the designated doctor appointed to determine MMI and IR.

Dr. S initially examined the claimant on August 14, 2012. In his narrative report Dr. S noted the following diagnoses as being compensable: cervical and lumbar sprain/strains, bilateral shoulder sprain/strain, thoracic rib sprain/strain, and head/scalp contusion. Dr. S also noted a diagnosis of sacroiliac sprain/strain. 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. S placed the claimant in Diagnosis-Related Estimate (DRE) Lumbosacral Category II: Minor Impairment for 5% impairment, and DRE Cervicothoracic Category II: Minor Impairment for 5% impairment. Dr. S also assessed 0% impairment for "[h]ead/[m]ental behavioral" using Section 4.1, The Central Nervous System–Cerebrum or Forebrain on page 4/140, of the AMA Guides. Dr. S further assessed 0% impairment for the claimant's bilateral shoulders due to the claimant's guarded effort during the range of motion (ROM) evaluation. Combining the above impairments, Dr. S assigned 10% whole person impairment (WPI). We note that although Dr. S discussed a thoracic rib sprain/strain in his narrative report, Dr. S did not discuss a thoracic spine sprain/strain.

Dr. S also completed an alternate Report of Medical Evaluation (DWC-69), certifying that the claimant had not reached MMI but was expected to do so on November 14, 2012. In his narrative report Dr. S explained that the claimant had not reached MMI at that time for the disputed condition of lumbar radiculitis.

The hearing officer noted in the Discussion portion of the decision that the claimant participated in a chronic pain program from August 28 through October 24, 2012. The hearing officer stated that "[i]n other words, following the designated doctor's

MMI date (August 14, 2012), the claimant had additional treatment that could reasonably be anticipated to cause further material recovery from or lasting improvement to the claimant's injury."

On March 13, 2013, the hearing officer wrote a letter of clarification to Dr. S advising him that the claimant had participated in a chronic pain program from August 28 through October 24, 2012. The hearing officer provided the claimant's records from his chronic pain management program, and asked Dr. S to review those records and explain whether there would be any change in his MMI date or IR.

Dr. S responded on March 20, 2014. In his response Dr. S noted that he had reviewed the documentation of the claimant's treatment for chronic pain that occurred after August 14, 2012. Dr. S stated that the chronic pain treatment that occurred after the August 14, 2012, examination did not change Dr. S' MMI date or 10% IR because he had already considered and incorporated the chronic pain associated with the claimant's compensable injuries. The hearing officer adopted Dr. S' MMI/IR certification.

As discussed above, the parties stipulated that the compensable injury includes lumbar, thoracic, and cervical sprain/strains, bilateral shoulder sprain/strains, and a sprain/strain of the ribs. Dr. S' MMI/IR certification did not consider and rate a thoracic sprain/strain; and therefore, Dr. S did not consider and rate the entire compensable injury. Accordingly, we reverse the hearing officer's determination that the claimant reached MMI on August 14, 2012, with a 10% IR.

There are five other MMI/IR certifications in evidence. The first is Dr. S' alternative MMI/IR certification that the claimant had not reached MMI but was expected to do so on November 14, 2012. As noted above, Dr. S explained in his narrative report that the claimant had not reached MMI at that time for the disputed condition of lumbar radiculitis. However, the hearing officer's determination that the compensable injury does not extend to lumbar radiculitis has been affirmed as explained above. Dr. S' alternative MMI/IR certification considers and rates a condition that has been determined not to be part of the compensable injury. Accordingly, his certification that the claimant has not reached MMI cannot be adopted.

The second MMI/IR certification is from (Dr. W), the claimant's treating doctor. Dr. W examined the claimant on February 27, 2013, and certified that the claimant had not reached MMI but was expected to do so on or about August 1, 2013. In her narrative report, Dr. W noted that an MRI taken on April 12, 2012, revealed disc protrusions at L4-5 and L5-S1, and an EMG taken on May 7, 2012, revealed radiculopathy processes involving left L5 and bilateral S1 nerve root levels. Dr. W further noted that lumbar surgery was recommended but not performed because the

carrier was disputing the extent of the claimant's compensable injury. Dr. W explained that the claimant had not reached MMI in her opinion because "[the claimant] has been recommended to undergo lumbar spine surgery." However, lumbar surgery was recommended for disc protrusions at L4-5 and L5-S1. The hearing officer's determination that the compensable injury does not extend to lumbar HNPs at L4-5 and L5-S1, lumbar radiculitis, and lumbar radiculopathy has been affirmed as explained above. The specific condition of a disc protrusion at L4-5 and L5-S1 was not litigated at the CCH, nor did the parties stipulate that the compensable injury includes a disc protrusion at those levels. Dr. W considers conditions that have been determined not to be part of the compensable injury, as well as conditions that have not at this time been determined to be part of the compensable injury. Accordingly, Dr. W's certification that the claimant has not reached MMI cannot be adopted.

The final MMI/IR certifications are from (Dr. R), the post-designated doctor required medical examination doctor. Dr. R examined the claimant on August 6, 2013. In his first MMI/IR certification, Dr. R certified that the claimant reached MMI on August 14, 2012, with a 9% IR. Dr. R explained in his narrative report that this MMI/IR certification pertained to only the accepted conditions of lumbar, thoracic, and cervical sprain/strains, bilateral shoulder contusions, bilateral rib sprain/strain, sacroiliac sprain/strain, and head contusion. Using the AMA Guides, Dr. R placed the claimant in DRE Lumbosacral, Thoracolumbar, and Cervicothoracic Category I: Complaints or Symptoms for a 0% impairment for the claimant's cervical, thoracic, and lumbar spine. Based on ROM measurements taken of the claimant's bilateral shoulders, Dr. R assessed an 8% upper extremity (UE) impairment for the claimant's left shoulder, and a 7% UE impairment for the claimant's right shoulder. Combining the above impairments, Dr. R assigned a 9% WPI.

The condition of a sacroiliac sprain/strain was not stipulated to by the parties as being part of the compensable injury, nor was that condition actually litigated at the CCH. Therefore, Dr. R's MMI/IR certification considers and rates a condition that has not at this time been determined to be part of the compensable injury. Accordingly, his MMI/IR certification cannot be adopted.

Dr. R also completed an alternative DWC-69, in which he certified that the claimant reached MMI on August 14, 2012, with a 0% IR. Dr. R explained in his narrative report that this certification pertained to only the disputed conditions of lumbar radiculitis, lumbar radiculopathy, cervical herniation at C6-7, cervical radiculopathy, and lumbar HNPs at L4-5 and L5-S1. However, as discussed above the hearing officer's determination that the compensable injury does not extend to these conditions has been affirmed. Accordingly, Dr. R's first alternative MMI/IR certification cannot be adopted.

Dr. R completed a second alternative DWC-69 in which he again certified that the claimant reached MMI on August 14, 2012, with a 9% IR. Dr. R explained in his narrative report that this certification pertained to both the accepted and the disputed conditions that were addressed in his two DWC-69s discussed above. However, Dr. R considered and rated sacroiliac sprain/strain, a condition that at this time has not been determined to be part of the compensable injury, as well as lumbar radiculitis, lumbar radiculopathy, cervical herniation at C6-7, cervical radiculopathy, and lumbar HNPs at L4-5 and L5-S1, which have been determined not to be part of the compensable injury. Accordingly, Dr. R's second alternative 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.

## SUMMARY

We affirm the hearing officer's determination that the [date of injury], compensable injury does not extend to a lumbar HNP at L4-5, a lumbar HNP at L5-S1, lumbar radiculitis, lumbar radiculopathy, a cervical herniation at C6-7, cervical radiculopathy, anxiety, depression, or a head laceration.

We affirm the hearing officer's determination that the claimant had disability from August 15, 2012, through the date of the CCH.

We reverse the hearing officer's determinations that the claimant reached MMI on August 14, 2012, 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. S is the designated doctor in this case. On remand, the hearing officer is to determine whether Dr. S is still qualified and available to be the designated doctor. If Dr. S is no longer qualified or available to serve as the designated doctor, then another designated doctor is to be appointed pursuant to 28 TEX. ADMIN. CODE § 127.5(c) (Rule 127.5(c)) to determine the claimant's MMI and IR.

The hearing officer is to inform the designated doctor that the [date of injury], compensable injury extends to lumbar, thoracic, and cervical sprain/strains, bilateral shoulder sprain/strains, a sprain/strain of the ribs, chronic pain syndrome, and a head contusion. The hearing officer is also to inform the designated doctor that the compensable injury does not extend to a lumbar HNP at L4-5, a lumbar HNP at L5-S1,

lumbar radiculitis, lumbar radiculopathy, a cervical herniation at C6-7, cervical radiculopathy, anxiety, depression, or a head laceration.

The hearing officer is to request the designated doctor to give an opinion on the claimant's date of 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.

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 **SERVICE LLOYDS INSURANCE COMPANY** and the name and address of its registered agent for service of process is

**JOSEPH KELLEY-GRAY, PRESIDENT**
**6907 CAPITOL OF TEXAS HIGHWAY NORTH**
**AUSTIN, TEXAS 78755.**

Carisa Space-Beam
Appeals Judge

CONCUR:

Veronica L. Ruberto
Appeals Judge

Margaret L. Turner
Appeals Judge