APPEAL NO. 141799
FILED OCTOBER 6, 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 January 24, 2013, in Fort Worth, Texas, with [hearing officer] presiding as hearing officer. The appellant (claimant) did not appear at the January 24, 2013, CCH. A 10-day show cause letter for his failure to appear was sent to the claimant, and the claimant responded. The case was rescheduled and heard on August 2, 2013, with [hearing officer] presiding as hearing officer. At the CCH held on August 2, 2013, the hearing officer held a show cause hearing and determined that the claimant had good cause for not attending his January 24, 2013, CCH. The hearing officer closed the record on September 20, 2013.

The hearing officer resolved the disputed issues by deciding that the claimant reached maximum medical improvement (MMI) on May 8, 2012, and the claimant's impairment rating (IR) is 5%. The claimant appealed the hearing officer's MMI and IR determinations based on sufficiency of the evidence. The respondent (carrier) responded urging affirmance.

DECISION

Reversed and remanded.

The claimant testified that he sustained a low back injury while lifting water hoses at work on [Date of Injury]. The parties stipulated that the claimant sustained a compensable injury on [Date of Injury]. In an unappealed finding of fact, the hearing officer determined that the carrier had accepted a [Date of Injury], compensable injury in the nature of a lumbar sprain/strain and a herniated nucleus pulposus (HNP) at L5-S1. The Texas Department of Insurance, Division of Workers' Compensation (Division) appointed (Dr. T) as the designated doctor for purposes of MMI, IR, and extent of injury.

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. Rule 130.1(d)(1) states that a certification of MMI and assignment of an IR requires completion, signing, and submission of the Report of Medical Evaluation (DWC-69) and a narrative report.

The hearing officer determined that the claimant reached MMI on May 8, 2012, with a 5% IR as certified by Dr. T, the designated doctor. Dr. T examined the claimant on May 23, 2012, and certified that the claimant reached MMI on May 8, 2012, with a 5% IR based on the lumbar and cervical spine injuries 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. T assessed 5% impairment for the lumbar spine under Diagnosis-Related Estimate (DRE) Lumbosacral Category II: Minor Impairment and zero percent for the cervical spine under DRE Cervicothoracic Category I: Complaints or Symptoms.

In a letter of clarification (LOC) dated September 5, 2013, the hearing officer informed Dr. T that the certification of MMI/IR included a rating for a non-compensable injury to the cervical spine and requested a certification of MMI/IR for the compensable injuries of a lumbar sprain/strain and lumbar HNP at L5-S1. In a response dated September 11, 2013, Dr. T stated that the claimant reached MMI on May 8, 2012, with a 5% IR for the compensable lumbar sprain/strain and lumbar HNP at L5-S1. Based on Dr. T's LOC response dated September 11, 2013, the hearing officer determined that the clamant reached MMI on May 8, 2012, with a 5% IR. However based on Dr. T's LOC response, it is clear Dr. T misapplied the AMA Guides and misread Appeals Panel decisions in certifying the claimant's MMI/IR and consequently his certification of MMI/IR cannot be adopted as explained below.

As previously mentioned, the carrier has accepted as compensable a lumbar sprain/strain and an HNP at L5-S1. Dr. T examined the claimant on May 23, 2012, for purposes of MMI and IR. Dr. T's narrative report dated May 23, 2012, states that the claimant does not meet the strictest criteria as clarified by Appeals Panel decisions for

the presence of radiculopathy and that the Appeals Panel has held that radiculopathy "requires the presence of atrophy of the affected muscle groups (lower extremities) of over 2 cm and/or the loss of relevant reflexes as neither of those findings are present at this time [the claimant] does not meet the strictest criteria for assignment to DRE [Lumbosacral Category III: Radiculopathy]." We note that Dr. T does not document atrophy measurements in his narrative report. However, Dr. T documents deep tendon reflexes in his narrative report by specifically stating that:

Deep tendon reflexes are 1+/4+, brisk, intact, and symmetric in all tested areas of both upper extremities. There is a slightly decreased less than 1+ response in both knees. A 1+/4+ response is present in the right ankle while the left ankle exhibits an intermittent, but definitely present less than 1+ response on multiple attempts.

Furthermore, Dr. T's LOC response dated September 11, 2013, states that the Appeals Panel has held that in order to rate radiculopathy there either has to be

"atrophy of the affected extremities (lower extremities in this case) by greater than 2 cm and/or the ABSENCE of relevant reflexes. As there is no atrophy of greater than 2 cm and as the relevant reflexes are not absent in this case [the claimant] does not meet the criteria as clarified by the Appeals Panel for assignment to DRE [Lumbosacral Category III: Radiculopathy], thus [the claimant] cannot be assigned to DRE [Lumbosacral Category III: Radiculopathy] based on my findings at this time." Dr. T does not reference to any atrophy measurements in his LOC response.

We note that neither the AMA Guides require, nor Appeals Panel decisions have held, that the absence of relevant reflexes is required to rate radiculopathy. Rather the AMA Guides and Appeals Panel decisions specify that to receive a rating for radiculopathy the claimant must have significant signs of radiculopathy, such as loss of relevant reflex(es), or measured unilateral atrophy of 2 cm or more above or below the knee, compared to measurements on the contralateral side at the same location. The atrophy or loss of relevant reflex must be spine-injury-related for radiculopathy to be rated. *See* Appeals Panel Decision (APD) 072220-s, decided February 5, 2008. The AMA Guides do not require a total loss of reflexes to qualify for an IR of radiculopathy. *See* APD 111710, decided January 19, 2012. *See also* APD 071398, decided September 28, 2007, in which the Appeals Panel reversed the hearing officer's determination and rendered a new decision based on a certification of MMI/IR in evidence, where the certifying doctor documented significant signs of radiculopathy to include diminished reflexes and assigned 15% impairment for radiculopathy using the AMA Guides.

The AMA Guides at page 3/102 provides a specific description of DRE Lumbosacral Category III: Radiculopathy as:

Description and Verification: the patient has significant signs of radiculopathy, such as loss of relevant reflex(es), or measured unilateral atrophy of greater than 2 cm above or below the knee, compared to measurements on the contralateral side at the same location. The impairment may be verified by electrodiagnostic findings. See Table 71, p. 109, differentiators 2, 3, and 4.

Also, the differentiator number 3 in Table 71, page 3/109 of the AMA Guides discusses "Decreased circumference, atrophy." This differentiator clarifies that the atrophy must be spine-injury-related and that the measurements "show loss of girth of 2 cm or more" above or below the knee. In Table 71, differentiator number 3 further states that the atrophy cannot be explained by non-spine-related problems.

In this case, we read Dr. T's LOC response dated September 11, 2013, to say radiculopathy is not ratable under the AMA Guides because of the lack of clinical findings of measured atrophy greater than 2 cm and the absences of relevant reflexes. Dr. T has misapplied the AMA Guides by requiring an incorrect standard for rating radiculopathy. Accordingly, we reverse the hearing officer's determination that the claimant reached MMI on May 8, 2012, with a 5% IR.

The only other certification of MMI/IR in evidence is from (Dr. J), the referral doctor. Dr. J examined the claimant on August 7, 2012, and certified on that same date that the claimant has not reached MMI. Dr. J's narrative report dated August 13, 2012, states that the claimant is not at MMI because he has not had reasonable and adequate treatment for his lower back injury. Dr. J lists the claimant's compensable injuries as a lumbar sprain/strain, lumbar IVD disorder without myelopathy, and lumbar radiculopathy. Dr. J's certification of MM/IR cannot be adopted because he does not consider and rate the HNP at L5-S1.

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 reverse the hearing officer's determinations that the claimant's MMI date is May 8, 2012, and that the claimant's IR is 5%, and we remand the issues of MMI and IR to the hearing officer for further action consistent with this decision.

REMAND INSTRUCTIONS

Dr. T is the designated doctor in this case. The hearing officer is to determine whether Dr. T is still qualified and available to be the designated doctor. If Dr. T 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 and HNP at L5-S1. 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 hearing officer is to inform the designated doctor 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 is to inform the designated doctor that the Appeals Panel has held that to receive a rating for lumbar radiculopathy the claimant must have significant signs of radiculopathy, such as loss of relevant reflex(es), or measured unilateral atrophy of 2 cm or more above or below the knee, compared to measurements on the contralateral side at the same location.

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* APD 060721, decided June 12, 2006.

The true corporate name of the insurance carrier is **LIBERTY INSURANCE CORPORATION** and the name and address of its registered agent for service of process is

CORPORATION SERVICE COMPANY
211 EAST 7TH STREET, SUITE 620
AUSTIN, TEXAS 78701.

Veronica L. Ruberto
Appeals Judge

CONCUR:

Carisa Space-Beam
Appeals Judge

Margaret L. Turner
Appeals Judge