APPEAL NO. 142598
FILED JANUARY 29, 2015

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, 2014, in Midland, 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], extends to thoracic disc disruptions at T6-7 and T7-8; (2) the compensable injury of [Date of Injury], does not extend to an injury to the synovial facet joint; (3) the respondent (claimant) reached maximum medical improvement (MMI) on October 22, 2013, the statutory date; and (4) the claimant's impairment rating (IR) is five percent.

The appellant (carrier) appeals the hearing officer's determination that the compensable injury extends to thoracic disc disruptions at T6-7 and T7-8. The carrier additionally appeals the hearing officer's determinations of MMI and IR. The carrier contends that the evidence shows the compensable injury is limited to a "lumbar[1] sprain/strain" and that the claimant does not even have the conditions determined to be part of the compensable injury. The appeal file does not contain a response from the claimant. The hearing officer's determination that the compensable injury does not extend to an injury to the synovial facet joint 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], and that the carrier has accepted as the compensable injury a thoracic sprain/strain. The claimant testified that he injured his upper back when lifting a piece of equipment from the floor over his head to give the equipment to a co-worker.

EXTENT OF INJURY

The hearing officer's determination that the compensable injury of [Date of Injury], extends to thoracic disc disruptions at T6-7 and T7-8 is supported by sufficient evidence and is affirmed.

[1] We note that the carrier accepted a thoracic sprain/strain and that no lumbar condition was at issue in the CCH.

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 Texas Department of Insurance, Division of Workers' Compensation (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.

(Dr. H), was initially appointed by the Division as the designated doctor for purposes of MMI and IR. Dr. H examined the claimant on November 12, 2012, and certified that the claimant reached MMI on June 6, 2012, with a zero 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. H placed the claimant in Diagnosis-Related Estimate (DRE) Thoracolumbar Category I: Complaints or Symptoms. However, according to his narrative report, Dr. H considered and rated only a thoracic strain.

(Dr. V), a referral doctor acting in place of the treating doctor, examined the claimant on January 22, 2013, and certified that the claimant reached MMI on August 6, 2012, with a five percent IR. Dr. V noted that disc pathology was seen on the MRI but that the claimant had greater symptoms with spine extension and with left rotation, which is suggestive of synovial facet joint injury. Dr. V placed the claimant in DRE Thoracolumbar Category II: Minor Impairment. Dr. V noted that the claimant had persistent muscle spasms documented by his treating doctor and that she noted muscle spasms during her examination. However, in certifying the date of MMI and IR, Dr. V only considered and rated a thoracic sprain/strain.

(Dr. R) was appointed by the Division as a second designated doctor. Dr. R examined the claimant for purposes of extent of the compensable injury on August 8, 2013, and again on March 28, 2014. On May 23, 2014, Dr. R examined the claimant for

purposes of MMI and IR. Dr. R certified that the claimant reached MMI on October 22, 2013, the statutory date of MMI, with a five percent IR. Dr. R placed the claimant in DRE Thoracolumbar Category II: Minor Impairment. In his narrative report, Dr. R stated that "[f]or the thoracic sprain/strain, synovial facet joint injury, and thoracic disc disruption at T6-7 and T7-8, the [claimant] is assigned [five percent] whole person impairment." The hearing officer found that the certification from Dr. R was not contrary to the preponderance of the evidence. However, the hearing officer determined that the compensable injury does not extend to an injury to the synovial facet joint and that determination has become final pursuant to Section 410.169. It was error for the hearing officer to determine the claimant reached MMI on October 22, 2013, with a five percent IR because the certification from Dr. R considers and rates a condition that was determined not to be part of the compensable injury. Accordingly, we reverse the hearing officer's determination that the claimant reached MMI on October 22, 2013, and that the claimant's IR is five percent.

As stated above, the other certifications in evidence from Dr. H and Dr. V only considered and rated a thoracic sprain/strain. The hearing officer's determination that the compensable injury extends to thoracic disc disruptions at T6-7 and T7-8 has been affirmed. Accordingly, neither the certification from Dr. H nor the certification from Dr. V can be adopted. *See* Appeals Panel Decision (APD) 140002, decided March 10, 2014. No other certifications are in evidence. Accordingly, 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], extends to thoracic disc disruptions at T6-7 and T7-8.

We reverse the hearing officer's determination that the claimant reached MMI on October 22, 2013, and that the claimant's IR is five percent and remand the issues of MMI and IR to the hearing officer for further action consistent with this decision.

REMAND INSTRUCTIONS

Dr. R is the designated doctor in this case. On remand, the hearing officer is to determine whether Dr. R is still qualified and available to be the designated doctor. If Dr. R 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 thoracic disc disruptions at

T6-7 and T7-8. Further, the hearing officer is also to advise the designated doctor that the compensable injury does not extend to an injury to the synovial facet joint as administratively determined.

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.

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 **LIBERTY INSURANCE CORPORATION** and the name and address of its registered agent for service of process is

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

Margaret L. Turner
Appeals Judge

CONCUR:

Cristina Beceiro
Appeals Judge

Carisa Space-Beam
Appeals Judge