APPEAL NO. 150341
FILED APRIL 24, 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 January 13, 2015, in San Antonio, 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 lumbar radiculopathy, L3-4 herniation with annular tearing, and L5-S1 herniation; (2) the respondent (claimant) reached maximum medical improvement (MMI) on February 28, 2014; (3) the claimant's impairment rating (IR) is five percent; and (4) the claimant had disability beginning on January 15, 2014, and continuing through the date of the CCH. The appellant (carrier) appealed all of the hearing officer's determinations, arguing that the hearing officer's determinations are so against the great weight and preponderance of the evidence as to be manifestly erroneous and unjust. The appeal file does not contain a response from the claimant.

DECISION

Affirmed in part, reversed and remanded in part.

The parties stipulated that the claimant sustained a compensable injury in the form of a lumbar sprain while lifting and moving a patient on [Date of Injury]. Also, the parties stipulated that (Dr. DM) was appointed by the Texas Department of Insurance, Division of Workers' Compensation (Division) to determine MMI, IR and extent of injury, and that the claimant stopped earning wages from the employer on January 15, 2014, and has not earned any wages or worked for the employer since that date.

DISABILITY

The hearing officer's determination that the claimant had disability beginning on January 15, 2014, and continuing through the date of the CCH is supported by sufficient evidence and is affirmed.

EXTENT OF INJURY

The hearing officer's determination that the compensable injury of [Date of Injury], extends to lumbar radiculopathy, L3-4 herniation with annular tearing, and L5-S1 herniation is supported by sufficient evidence and is affirmed.

MMI AND 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 adopted (Dr. MM), the referral doctor, certification of MMI/IR. Dr. MM examined the claimant on October 20, 2014, and certified that the claimant reached MMI on February 28, 2014, with a five percent IR, in accordance with 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). Specifically, Dr. MM placed the claimant in Diagnosis-Related Estimate (DRE) Lumbosacral Category II: Minor Impairment for a five percent IR for the lumbar sprain/strain, herniated nucleus pulposus at L3-4 and L5-S1 injuries. As previously mentioned above, the compensable injury includes a lumbar sprain, lumbar radiculopathy, L3-4 herniation with annular tearing, and L5-S1 herniation. Dr. MM did not rate the lumbar radiculopathy and annular tearing at L3-4. Dr. MM's certification does not consider and rate the entire compensable injury. Accordingly, we reverse the hearing officer's determination that the claimant reached MMI on February 28, 2014, with a five percent IR.

There are four other certifications of MMI/IR in evidence. Dr. MM provided an alternate certification of MMI/IR in which he certified that the claimant reached MMI on December 27, 2013, with a five percent IR for the lumbar strain only. Dr. MM did not consider or rate the compensable lumbar radiculopathy, L3-4 herniation with annular tearing, and L5-S1 herniation injuries. Dr. MM's certification cannot be adopted because he did not consider or rate the entire compensable injury which includes a lumbar sprain, lumbar radiculopathy, L3-4 herniation with annular tearing, and L5-S1 herniation.

(Dr. D), the post-designated doctor required medical examination doctor examined the claimant on December 18, 2014, and certified that the claimant reached MMI on February 28, 2014, with a five percent IR for the lumbar strain only. Dr. D did not consider or rate the lumbar radiculopathy, L3-4 herniation with annular tearing, and L5-S1 herniation injuries. Dr. D's certification cannot be adopted because he did not consider or rate the entire compensable injury which includes a lumbar sprain, lumbar radiculopathy, L3-4 herniation with annular tearing, and L5-S1 herniation.

Dr. DM, the designated doctor, examined the claimant on March 28, 2014, and provided two alternate certifications of MMI/IR. For the lumbar strain injury, Dr. DM certified that the claimant reached MMI on December 27, 2013, with a five percent IR. Dr. DM's certification cannot be adopted because he did not consider or rate the entire compensable injury which includes lumbar radiculopathy, L3-4 herniation with annular tearing, and L5-S1 herniation.

Dr. DM provided an alternate certification of MMI/IR for the lumbar strain, lumbar radiculopathy, L3-4 herniation with annular tearing, and L5-S1 herniation. Dr. DM certified that the claimant reached MMI on March 28, 2014, with a five percent IR. Dr. DM states in his narrative report dated March 28, 2014, that he reviewed (Dr. W) medical reports dated from November 15, 2013, through January 27, 2014. Dr. DM states that the claimant received one lower extremity epidural steroid injection (ESI) on January 27, 2014, and that there is no documentation to suggest a second ESI was prescribed or recommended, or that any surgical or treatment procedure is pending after January 27, 2014. However, in evidence is a subsequent medical report from Dr. W dated February 28, 2014, that states that the claimant had zero relief from the ESI injection and opined that a surgical consultation was recommended. This report was in existence prior to Dr. DM's date of examination on March 28, 2014. Furthermore, a medical report dated April 23, 2014, from (Dr. P), the claimant's treating doctor, states that the claimant has failed conservative treatment and he recommends lumbar spine surgery. We note that although a letter of clarification dated December 9, 2014, was sent to Dr. DM requesting an amended Report of Medical Evaluation (DWC-69) to correct an inconsistency between the narrative report and the DWC-69 regarding the claimant's date of MMI, however the evidence does not show that the subsequent reports from Dr. W and Dr. P were sent to Dr. DM for his review to determine MMI and IR.

Rules 130.1(b)(4)(A) and 130.1(c)(3) specifically require that the certifying doctor, including the designated doctor, review the medical records before certifying an MMI date and assigning an IR. In Appeals Panel Decision (APD) 062068, decided December 4, 2006, the Appeals Panel held that the 1989 Act and the Division rules require that the designated doctor conduct an examination of the claimant and review

the claimant's medical records. *See also* APD 130187, decided March 18, 2013, in which the designated doctor did not have the post-operative physical therapy medical records prior to making his first MMI/IR certification, therefore, his certification of MMI and IR could not be adopted. Rule 127.10(a)(1) provides, in part, that the treating doctor and insurance carrier shall provide to the designated doctor copies of all the injured employee's medical records in their possession relating to the medical condition to be evaluated by the designated doctor. For subsequent examinations with the same designated doctor, only those medical records not previously sent must be provided. *See also* APD 112010, decided March 2, 2012. In this case Dr. DM did not have all the medical records to determine the date that the claimant reached MMI. Therefore, Dr. DM's certification that the claimant reached MMI on March 28, 2014, is contrary to the preponderance of the evidence and cannot be adopted.

The Appeals Panel has held that MMI must be certified before an IR is assigned. 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. In this case, since Dr. DM's certification of MMI cannot be adopted, the five percent IR assigned by Dr. DM cannot be adopted. However, we note that Dr. DM placed the claimant in DRE Thoracolumbar Category II: Minor Impairment for the claimant's lumbar spine. Page 3/95 of the AMA Guides states that for purposes of the AMA Guides, the thoracic region may be considered to represent the thoracolumbar region, and the lumbar region to represent the lumbosacral region. *See* APD 051306-s, decided August 3, 2005. The claimant's compensable injuries are to the lumbar spine only and the AMA Guides do not provide for placement in a DRE Thoracolumbar Category for the lumbar region, rather it provides placement in a DRE Lumbosacral Category.

In this case there were no other certifications of MMI/IR that can be adopted. Accordingly, we remand the MMI and IR issues for further action consistent with this decision.

SUMMARY

We affirm the hearing officer's determination that the claimant had disability beginning on January 15, 2014, and continuing through the date of the CCH.

We affirm the hearing officer's determination that the compensable injury of [Date of Injury], extends to lumbar radiculopathy, L3-4 herniation with annular tearing, and L5-S1 herniation.

We reverse the hearing officer's determination that the claimant reached MMI on February 28, 2014, and remand the MMI issue to the hearing officer for further action consistent with this decision.

We reverse the hearing officer's determination that the claimant's IR is five percent and remand the IR issue to the hearing officer for further action consistent with this decision.

REMAND INSTRUCTIONS

Dr. DM is the designated doctor in this case. On remand, the hearing officer is to determine whether Dr. DM is still qualified and available to be the designated doctor. If Dr. DM 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 compensable injury of [Date of Injury]. On remand, the hearing officer should ensure that the designated doctor be forwarded the claimant's medical records that were not provided to the designated doctor, which include the medical reports from Dr. W and Dr. P, to determine the claimant's MMI and IR.

The hearing officer is to advise the designated doctor that the compensable injury of [Date of Injury], includes a lumbar sprain, and lumbar radiculopathy, L3-4 herniation with annular tearing, and L5-S1 herniation.

The hearing officer is to request that the designated doctor rate the entire compensable injury, considering the claimant's medical record and the certifying examination and in accordance with Rule 130.1(c)(3).

The hearing officer is to advise the designated doctor that if the injury is to the lumbar spine, the impairment would be under DRE Lumbosacral Category as provided in the AMA Guides.

The parties are to be provided with the hearing officer's letter to the designated doctor and the designated doctor's response. The parties are to be allowed an opportunity to respond. The hearing officer is then to make a determination on MMI and IR supported by the evidence and 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 **NEW HAMPSHIRE INSURANCE COMPANY** 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 78701-3232.

Veronica L Ruberto
Appeals Judge

CONCUR:

Carisa Space-Beam
Appeals Judge

Margaret L. Turner
Appeals Judge