APPEAL NO. 150360
FILED APRIL 06, 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 was held on December 16, 2014, in Dallas, 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 a lumbar disc herniation at L3-4 and depression; (2) the appellant (claimant) reached maximum medical improvement (MMI) on December 13, 2013; and (3) the claimant's impairment rating (IR) is five percent.

The claimant appealed the hearing officer's MMI and IR determinations, contending that the preponderance of the evidence does not support those determinations. The claimant also contends that he has received no treatment for the conditions found compensable by the hearing officer, and therefore he cannot be at MMI. The respondent (carrier) responded, urging affirmance of the hearing officer's determinations.

The hearing officer's determination that the compensable injury of [Date of Injury], extends to a lumbar disc herniation at L3-4 and depression was not appealed and has become final pursuant to Section 410.169.

DECISION

Reversed and rendered.

STIPULATIONS

The parties stipulated on the record that: (Dr. J), the designated doctor appointed by the Texas Department of Insurance, Division of Workers' Compensation (Division) examined the claimant on July 23, 2014; Dr. J provided alternate certifications of MMI and IR; and, for diagnostic codes 847.2 and 311, Dr. J certified that the claimant reached MMI on November 27, 2013, with a zero percent IR. In evidence is Dr. J's Report of Medical Evaluation (DWC-69) for diagnostic codes 847.2 and 311, which reflects that Dr. J assessed a zero percent IR. However, Stipulation No.1. F.2 states that for diagnostic codes 847.2 and 311 the claimant reached MMI on November 27, 2013, with a nine percent IR. We reform Finding of Fact No. 1.F.2 as follows to reflect the correct IR as stipulated to by the parties and as contained on Dr. J's alternate DWC-69:

> 1.F.2 For diagnostic codes 847.2 and 311, [the] [c]laimant reached MMI on November 27, 2013, with [zero percent] IR.

The parties also stipulated on the record that for diagnostic codes 847.2, 722.10, and 311, Dr. J certified that the claimant reached MMI on December 13, 2013, with a five percent IR. The parties further stipulated that Dr. J made a clerical error in his narrative report regarding the date of MMI, and that the date of MMI in the narrative report should have been listed as December 13, 2013, as certified on the DWC-69 rather than December 13, 2014. However, Stipulation No. 1.G states that the clerical error in Dr. J's report was December 13, 2014, and the correct date should have been December 12, 2013. In evidence is Dr. J's DWC-69 for diagnostic codes 847.2, 722.10, and 311, in which Dr. J certified that the claimant reached MMI on December 13, 2013, as stipulated to by the parties. We note that there is no DWC-69 in evidence from Dr. J certifying that the claimant reached MMI on December 12, 2013. We reform Finding of Fact No. 1.G as follows to reflect the correct MMI date as contained on Dr. J's alternate DWC-69 and as stipulated to by the parties:

> 1.G [Dr. J] made a clerical error on page 5 of his eight-page report. [Dr. J] noted the date of MMI to be December 13, 2014, but it should have been December 13, 2013.

The parties also stipulated that the claimant sustained a compensable injury on [Date of Injury], to include at least a lumbar strain. The claimant testified that he injured his back when he forcefully lifted a bar weighing approximately 80 to 95 pounds that caught on the ramp on which he was standing.

MMI

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 13, 2013, with a five percent IR as certified by Dr. J, the designated doctor.

Dr. J examined the claimant on July 23, 2014, and provided four MMI/IR certifications. However, only one certification considers the entire compensable injury, which includes a lumbar strain as stipulated to by the parties, and a lumbar disc herniation at L3-4 and depression as determined by the hearing officer and unappealed by the parties. In an attached narrative report, Dr. J noted that, considering the disc herniation at L3-4, the claimant reached MMI on December 13, 2013, the date the claimant received a lumbar epidural steroid injection (ESI). We note that elsewhere in his narrative report, Dr. J states that the claimant reached MMI on "the date of the lumbar [ESI], December 13, 2014." The parties stipulated that Dr. J's reference to December 13, 2014, was a clerical error, and the actual date should have been December 13, 2013. The record reflects that the claimant underwent a lumbar ESI on December 13, 2013, not December 13, 2014, and that the claimant has had no further lumbar ESIs.

Dr. J stated that for a lumbar sprain/strain only, the claimant reached MMI on November 27, 2013, the date of a psychological evaluation. Dr. J also stated that for depression MMI "would have occurred on the date of the psychological evaluation of November 27, 2013. . . ."

In evidence is the Initial Clinical Behavioral Health Assessment dated November 27, 2013. This assessment noted that the claimant exhibited depressive symptomology as a result of his injury, and that the claimant was categorized in the mild range for depression. The assessment also states that the claimant "is experiencing psychological distress due to concerns over his health as a result of his injury. This distress, without intervention, may impede his progress in his return to work full duty. . . ." The assessment further states that "the results of this screening indicate the need for mental health intervention to address the [claimant's] psychological distress coupled with a continuation of physical therapy to aid in his future rehabilitation." The assessment recommended six individual hour-long psychotherapy sessions over eight weeks.

Dr. J stated in his narrative report that the claimant's date of MMI for depression was November 27, 2013. However, the behavioral assessment recommended that the claimant receive six hour-long sessions over eight weeks to treat the claimant's depression, a condition which has been determined to be part of the compensable injury. It was undisputed by the parties that the claimant has not received any treatment for depression. Dr. J ultimately certified that the claimant reached MMI on December 13, 2013, and makes clear in his narrative report that he based the December 13, 2013,

MMI date on the date the claimant received a lumbar ESI. Dr. J did not consider the recommended six hour-long sessions over eight weeks for the claimant's depression. In this case the November 27, 2013, behavioral assessment constituted evidence that further material recovery from or lasting improvement to the compensable injury could have been anticipated. Therefore, the hearing officer's determination that the claimant reached MMI on December 13, 2013, is so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust. Accordingly, we reverse the hearing officer's determination that the claimant reached MMI on December 13, 2013.

There are other MMI/IR certifications in evidence. As previously mentioned, Dr. J submitted alternate MMI/IR certifications; however, none of Dr. J's alternate MMI/IR certifications consider and rate the entire compensable injury. In the first MMI/IR certification, Dr. J certified that the claimant reached MMI on December 13, 2013, with a five percent IR based on conditions of a lumbar sprain/strain and a lumbar disc herniation at L3-4; Dr. J failed to consider or rate depression. In the second MMI/IR certification, Dr. J certified that the claimant reached MMI on November 27, 2013, with a zero percent IR based on a lumbar sprain/strain and depression; Dr. J failed to consider or rate a lumbar disc herniation at L3-4. In the third MMI/IR certification, Dr. J certified that the claimant reached MMI on November 27, 2013, with a zero percent IR based on a lumbar sprain/strain only. None of Dr. J's alternate MMI/IR certifications consider and rate the entire compensable injury, and as such none can be adopted.

In evidence is an MMI/IR certification from (Dr. M), a post-designated doctor required medical examination doctor. Dr. M examined the claimant on May 28, 2014, and certified that the claimant reached MMI on November 23, 2013, with a zero percent IR. However, Dr. M only considered a lumbar strain in making his certification. Dr. M failed to consider and rate the entire compensable injury, and as such his MMI/IR certification cannot be adopted.

In evidence is an MMI/IR certification that certifies the claimant has not reached MMI from (Dr. P), a doctor selected by the treating doctor acting in the treating doctor's place. Dr. P examined the claimant on September 5, 2014. Dr. P noted diagnoses of a lumbar sprain/strain and a lumbar disc herniation at L3-4, and that the claimant "has not been availed the treatment that would cause the [claimant] to make a material gain." Dr. P opined that the claimant is an excellent candidate for an ESI series, and if the ESIs fail he would be a surgical candidate. Although Dr. P does not discuss depression, which is a condition determined to be part of the compensable injury, Dr. P does consider a lumbar strain and a lumbar disc herniation at L3-4, both of which are also part of the compensable injury. As discussed above, the November 27, 2013, behavioral assessment recommended that the claimant receive six hour-long sessions

over eight weeks to treat the claimant's depression, and it was undisputed that the claimant has not received any of these sessions. We note that (Dr. G), a previously-assigned designated doctor, also certified that the claimant had not reached MMI. We render a new decision that the claimant has not reached MMI as of September 5, 2014, the date of Dr. P's MMI/IR certification, and since MMI has not been reached the claimant's IR cannot be determined.

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

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

Carisa Space-Beam
Appeals Judge

CONCUR:

Veronica L. Ruberto
Appeals Judge

Margaret L. Turner
Appeals Judge