

APPEAL NO. 150607  
FILED MAY 19, 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 February 9, 2015, 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 does not extend to thoracic myofascitis, lumbar myofascitis, thoracic spinal stenosis, lumbar spinal stenosis, lesion of left lateral recess at L4-5, left synovial cyst L5, left L5 nerve root radiculopathy, impingement left S1 nerve root, and disc bulges at L3-4, and L4-5; (2) the respondent (claimant) reached maximum medical improvement (MMI) on October 18, 2013; and (3) the claimant's impairment rating (IR) is 10%.

The appellant (carrier) appealed the hearing officer's MMI and IR determinations, contending that the hearing officer's determinations are not supported by the credible evidence and that the hearing officer did not consider the evidence that was admitted and before her to review. The appeal file does not contain a response from the claimant to the carrier's appeal.

The hearing officer's determination that the (date of injury), compensable injury does not extend to thoracic myofascitis, lumbar myofascitis, thoracic spinal stenosis, lumbar spinal stenosis, lesion of left lateral recess at L4-5, left synovial cyst L5, left L5 nerve root radiculopathy, impingement left S1 nerve root, and disc bulges at L3-4, and L4-5 has not been appealed and has become final pursuant to Section 410.169.

**DECISION**

Reformed in part, reversed and rendered in part, and reversed and remanded in part.

The parties stipulated in part that the claimant sustained a compensable injury on (date of injury), at least in the form of a thoracic sprain/strain and lumbar sprain/strain, and that the compensable injury does not extend to a disc bulge at T7-8. The claimant testified he was injured when he picked up a pump shaft weighing approximately 50 pounds and turned to his left. The claimant testified that his back popped in two places and that he immediately felt pain in his left leg.

**STIPULATION CORRECTION**

The parties stipulated at the CCH that: on (date of injury), the claimant was the employee of Lyondell-Bessell Refining Company, the employer; on (date of injury), the

employer provided workers' compensation insurance with Ace American Insurance Company, the carrier; on (date of injury), the claimant sustained a compensable injury at least in the form of a thoracic sprain/strain and lumbar sprain/strain; and the statutory date of MMI is January 27, 2014. However, the stipulations contained in the hearing officer's decision as Finding of Fact No. 1.B., 1.C., and 1.D. are the following:

1.B. On July 7, 2014, Claimant was the employee of Lyondell-Bessell Refining Company, Employer.

1.C. On July 7, 2014, Employer provided workers' compensation insurance with Ace American Insurance Company, Carrier.

1.D. On July 7, 2014, Claimant sustained a compensable injury at least in the form of a thoracic sprain/strain and lumbar sprain/strain.

The decision does not list the correct date of injury that was stipulated by the parties at the CCH, nor does the decision contain the stipulation the parties made that the statutory date of MMI is January 27, 2014. Accordingly, we reform the hearing officer's decision by reforming Finding of Fact No. 1.B., 1.C., and 1.D. to reflect the actual stipulations made by the parties to read as follows:

1.B. On (date of injury), Claimant was the employee of Lyondell-Bessell Refining Company, Employer.

1.C. On (date of injury), Employer provided workers' compensation insurance with Ace American Insurance Company, Carrier.

1.D. On (date of injury), Claimant sustained a compensable injury at least in the form of a thoracic sprain/strain and lumbar sprain/strain.

We also reform the hearing officer's decision by adding Finding of Fact No. 1.H., the January 27, 2014, statutory date of MMI as stipulated by the parties at the CCH:

1.H. The statutory date of MMI is January 27, 2014.

### **EVIDENCE PRESENTED**

At the CCH Carrier's Exhibits A through O were admitted into evidence. However, the decision incorrectly reflects that Carrier's Exhibits A through OO were admitted. We reform the hearing officer's decision to show that Carrier's Exhibits A through O were admitted to reflect the correct exhibits offered by the carrier and admitted into evidence at the CCH.

## **DISC BULGE AT T7-8**

The extent-of-injury issue before the hearing officer as listed on the Benefit Review Conference Report and agreed to by the parties at the CCH is the following:

Does the compensable injury of (date of injury), extend to and include thoracic myofascitis (sic), lumbar myofascitis, thoracic spinal stenosis, lumbar spinal stenosis, lesion of left lateral recess at L4-5, left synovial cyst L5, left L5 nerve root radiculopathy, impingement left S1 nerve root, and disc bulges at L3-4, L4-5, and T7-8?

As noted above the hearing officer's determination that the (date of injury), compensable injury does not extend to thoracic myofascitis, lumbar myofascitis, thoracic spinal stenosis, lumbar spinal stenosis, lesion of left lateral recess at L4-5, left synovial cyst L5, left L5 nerve root radiculopathy, impingement left S1 nerve root, and disc bulges at L3-4, and L4-5 was not been appealed and has become final pursuant to Section 410.169.

The parties stipulated at the CCH that the compensable injury does not extend to a disc bulge at T7-8. Although the hearing officer noted the parties' stipulation in the decision, the hearing officer did not amend the extent-of-injury issue to exclude that condition, nor did the hearing officer make any findings of fact, conclusions of law, or a decision on that condition. The hearing officer's extent-of-injury determination is incomplete. Accordingly, we reverse the hearing officer's decision as being incomplete, and we render a new decision as follows to conform to the evidence and the parties' stipulation that the (date of injury), compensable injury does not extend to a disc bulge at T7-8:

### **Finding of Fact No. 4:**

The claimant's thoracic myofascitis, lumbar myofascitis, thoracic spinal stenosis, lumbar spinal stenosis, lesion of left lateral recess at L4-5, left synovial cyst L5, left L5 nerve root radiculopathy, impingement left S1 nerve root, and disc bulges at L3-4, L4-5, and T7-8 were not caused or aggravated by the compensable injury.

### **Conclusion of Law No. 3:**

The claimant's (date of injury), compensable injury does not extend to and include thoracic myofascitis, lumbar myofascitis, thoracic spinal stenosis, lumbar spinal stenosis, lesion of left lateral recess at L4-5, left synovial cyst L5, left L5 nerve root radiculopathy, impingement left S1 nerve root, and disc bulges at L3-4, L4-5, and T7-8.

### **Decision:**

The claimant's (date of injury), compensable injury does not extend to and include thoracic myofascitis, lumbar myofascitis, thoracic spinal stenosis, lumbar spinal stenosis, lesion of left lateral recess at L4-5, left synovial cyst L5, left L5 nerve root radiculopathy, impingement left S1 nerve root, and disc bulges at L3-4, L4-5, and T7-8.

### **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.

The hearing officer determined that the claimant reached MMI on October 18, 2013, with a 10% IR as certified by (Dr. S), the claimant's treating doctor. Dr. S examined the claimant on September 19, 2013, and on a Report of Medical Evaluation (DWC-69) dated October 18, 2013, certified the claimant reached MMI on October 18, 2013, with a 10% 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. S noted the following diagnoses, among others, in his attached narrative report: disc bulge thoracic and lumbar spine, thoracic and lumbar myofascitis, spinal stenosis of the thoracic and lumbar spine, lesion of the left lateral recess at L4-5, left synovial cyst L5, left L5 nerve root radiculopathy, and impingement left S1 nerve root.

As noted above, the hearing officer's determination that the compensable injury does not extend to thoracic myofascitis, lumbar myofascitis, thoracic spinal stenosis, lumbar spinal stenosis, lesion of left lateral recess at L4-5, left synovial cyst L5, left L5 nerve root radiculopathy, impingement left S1 nerve root, and disc bulges at L3-4, and L4-5 was not been appealed and has become final pursuant to Section 410.169. Also

noted above the parties stipulated that the compensable injury does not extend to a disc bulge at T7-8. Dr. S considered and rated conditions that have been determined to not be part of the compensable injury, and as such his MMI/IR certification cannot be adopted. Accordingly, we reverse the hearing officer's determinations that the claimant reached MMI on October 18, 2013, with a 10% IR.

There are two other MMI/IR certifications in evidence, both from (Dr. B), the designated doctor appointed by the Division.

Dr. B initially examined the claimant on March 19, 2013, and certified that the claimant reached MMI on February 15, 2013, with a 10% IR using the AMA Guides. Dr. B placed the claimant in Diagnosis-Related Estimate (DRE) Lumbosacral Category III: Radiculopathy for 10% IR for the claimant's lumbar spine. The parties stipulated that the compensable injury is at least in the form of a thoracic sprain/strain and lumbar sprain/strain. Dr. B made clear in his report that he did not consider or rate the claimant's thoracic spine. Dr. B failed to consider and rate the entire compensable injury; therefore, his first MMI/IR certification cannot be adopted.

Dr. B subsequently examined the claimant on May 16, 2014, and again certified that the claimant reached MMI on February 15, 2013, with a 10% IR using the AMA Guides. Dr. B placed the claimant in DRE Thoracolumbar Category I: Complaints or Symptoms for 0% impairment for the claimant's thoracic spine. Dr. B also placed the claimant in DRE Lumbosacral Category III: Radiculopathy for 10% impairment for the claimant's lumbar spine because the claimant displayed significant signs of radiculopathy which was "verified by electrodiagnostic findings." On his DWC-69 Dr. B noted diagnoses of a thoracic sprain/strain, lumbar sprain/strain, and lumbar radiculopathy. However, as noted above the hearing officer's determination that the compensable injury does not extend to left L5 nerve root radiculopathy was not appealed and has become final pursuant to Section 410.169. No other lumbar radiculopathy was litigated by the parties at the CCH or accepted as compensable. Therefore, Dr. B considered and rated a condition that has been determined to not be part of the compensable injury, and as such his MMI/IR certification cannot be adopted.

There are no other MMI/IR certifications in evidence that can be adopted. Accordingly, we remand the issues of MMI and IR to the hearing officer for further action consistent with this decision.

## **SUMMARY**

We reform the hearing officer's decision by reforming Finding of Fact No. 1.B., 1.C., and 1.D., and by adding Finding of Fact No. 1.H. to reflect the actual stipulations made by the parties to read as follows:

1.B. On (date of injury), Claimant was the employee of Lyondell-Bessell Refining Company, Employer.

1.C. On (date of injury), Employer provided workers' compensation insurance with Ace American Insurance Company, Carrier.

1.D. On (date of injury), Claimant sustained a compensable injury at least in the form of a thoracic sprain/strain and lumbar sprain/strain.

1.H. The statutory date of MMI is January 27, 2014.

We reform the hearing officer's decision to show that Carrier's Exhibits A through O were admitted to reflect the correct exhibits offered by the carrier and admitted into evidence at the CCH.

We reverse the hearing officer's decision as being incomplete, and we render a new decision as follows to conform to the evidence and the parties' stipulation that the (date of injury), compensable injury does not extend to a disc bulge at T7-8:

Finding of Fact No. 4:

The claimant's thoracic myofascitis, lumbar myofascitis, thoracic spinal stenosis, lumbar spinal stenosis, lesion of left lateral recess at L4-5, left synovial cyst L5, left L5 nerve root radiculopathy, impingement left S1 nerve root, and disc bulges at L3-4, L4-5, and T7-8 were not caused or aggravated by the compensable injury.

Conclusion of Law No. 3:

The claimant's (date of injury), compensable injury does not extend to and include thoracic myofascitis, lumbar myofascitis, thoracic spinal stenosis, lumbar spinal stenosis, lesion of left lateral recess at L4-5, left synovial cyst L5, left L5 nerve root radiculopathy, impingement left S1 nerve root, and disc bulges at L3-4, L4-5, and T7-8.

Decision:

The claimant's (date of injury), compensable injury does not extend to and include thoracic myofascitis, lumbar myofascitis, thoracic spinal stenosis, lumbar spinal stenosis, lesion of left lateral recess at L4-5, left synovial cyst L5, left L5 nerve root radiculopathy, impingement left S1 nerve root, and disc bulges at L3-4, L4-5, and T7-8.

We reverse the hearing officer's determinations that the claimant reached MMI on October 18, 2013, 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. B is the designated doctor in this case. On remand, the hearing officer is to determine whether Dr. B is still qualified and available to be the designated doctor. If Dr. B 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 inform the designated doctor that the (date of injury), compensable injury extends to a thoracic sprain/strain and lumbar sprain/strain. The hearing officer is also to inform the designated doctor that the (date of injury), compensable injury does not extend to thoracic myofascitis, lumbar myofascitis, thoracic spinal stenosis, lumbar spinal stenosis, lesion of left lateral recess at L4-5, left synovial cyst L5, left L5 nerve root radiculopathy, impingement left S1 nerve root, and disc bulges at L3-4, L4-5, and T7-8. The hearing officer is further to inform the designated doctor that the statutory date of MMI is January 27, 2014.

The hearing officer is to request the designated doctor to give an opinion on the claimant's MMI, which can be no later than January 27, 2014, the statutory date of MMI, and IR by rating 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 **ACE AMERICAN 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 75201-3136.**

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Carisa Space-Beam  
Appeals Judge

CONCUR:

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Veronica L. Ruberto  
Appeals Judge

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Margaret L. Turner  
Appeals Judge