

APPEAL NO. 150844
FILED JUNE 18, 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 December 30, 2014, February 9, 2015, and March 25, 2015, with the record closing on April 9, 2015, in (city), 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), does not extend to major depressive disorder, L4-5 disc protrusion, L5-S1 disc protrusion, right shoulder rotator cuff syndrome, right arm triceps tendon tear, or partial tear of the right arm flexor digitorum superficialis; (2) the appellant (claimant) reached maximum medical improvement (MMI) on October 29, 2013, with an impairment rating (IR) of 11%.

The claimant appealed all of the hearing officer's determinations, essentially arguing that the hearing officer's determinations are so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust. The respondent (carrier) responded, urging affirmance of the hearing officer's determinations.

DECISION

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

The parties stipulated that the claimant sustained a compensable injury on (date of injury), that extends to the following: status post crush injury to the left pelvis with a vertical fracture through the right sacral ala extending to the SI joint; status post open reduction of the right sacral fracture with internal fixation; status post right olecranon fracture; status post open reduction and internal fixation of right olecranon fracture; status post metal removal, right elbow; and status post right triceps repair. The parties also stipulated that the claimant's date of statutory MMI is September 29, 2014. The claimant testified he injured his left hip, right elbow, right shoulder, and low back when a very heavy re-bar form fell on his left hip and pinned him to the ground.

EXTENT OF INJURY

The hearing officer's determination that the compensable injury of (date of injury), does not extend to major depressive disorder, L4-5 disc protrusion, right shoulder rotator cuff syndrome, or partial tear of the right arm flexor digitorum superficialis is supported by sufficient evidence and is affirmed.

The hearing officer also determined that the compensable injury does not extend to right arm triceps tendon tear. As noted above, the parties stipulated that the compensable injury extends to status post right triceps repair. In evidence is an operative report dated July 16, 2013, noting that the claimant underwent a repair of a complete avulsion of the right triceps muscle and excision of bony osteophyte. The operative report noted a pre and postoperative diagnosis of a rupture of the triceps tendon of the right elbow.

In reviewing a “great weight” challenge, we must examine the entire record to determine if: (1) there is only “slight” evidence to support the finding; (2) the finding is so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust; or (3) the great weight and preponderance of the evidence supports its nonexistence. See *Cain v. Bain*, 709 S.W.2d 175 (Tex. 1986).

Because the parties have stipulated that the compensable injury extends to status post right triceps repair, and the evidence reveals that the claimant underwent surgery to repair a rupture of the triceps tendon of the right elbow, we hold that the hearing officer’s determination that the compensable injury does not extend to right arm triceps tendon tear is against the great weight and preponderance of the evidence. Accordingly, we reverse the hearing officer’s determination that the compensable injury does not extend to right arm triceps tendon tear, and we render a new decision that the compensable injury extends to right arm triceps tendon tear.

The hearing officer also determined that the compensable injury does not extend to an L5-S1 disc protrusion. The hearing officer noted in the discussion portion of his decision that (Dr. B) opined in a letter dated November 10, 2014, that the mechanism of injury was a substantial factor in bringing about an L5-S1 disc protrusion. The hearing officer further noted that “[t]he causation analysis [from Dr. B] consisted of stating that the mechanism of injury ‘caused serious traumatic and compressive forces to [the] [c]laimant’s lumbar spine, which stressed the joint structures of his lumbar spine and produced L5-S1 disc protrusion.’”

The hearing officer then noted that (Dr. M) was appointed by the Texas Department of Insurance, Division of Workers’ Compensation (Division) to determine whether the compensable injury extended to right shoulder impingement syndrome, right shoulder rotator cuff syndrome, L4-5 disc bulge, major depressive disorder, pain disorder associated with both psychological factors and a general medical condition, and major depressive disorder - single episode. We note that the hearing officer did not identify an L5-S1 disc protrusion. The hearing officer stated that Dr. M did not identify and address each condition in his report. The hearing officer sent a letter of clarification (LOC) to Dr. M, requesting in part that Dr. M explain why he thought the claimant’s

mechanism of injury did or did not cause or aggravate each condition. Dr. M responded on February 16, 2015, and explained why he opined that the conditions were not part of the compensable injury. The hearing officer stated in the discussion that Dr. M addressed each of the disputed conditions as requested and explained the basis for his extent-of-injury opinion.

In evidence is the Request for Designated Doctor Examination (DWC-32) by the carrier on November 14, 2014, requesting a designated doctor examination to determine the extent of the compensable injury. The DWC-32 does not include an L5-S1 disc protrusion as a condition for the designated doctor to consider, nor does the hearing officer's LOC to the designated doctor regarding his extent-of-injury opinion identify this condition as one to be addressed by Dr. M. Dr. M did not address or discuss an L5-S1 disc protrusion in any of his extent-of-injury reports or responses to the hearing officer's LOCs. In Appeals Panel Decision (APD) 130723, decided May 6, 2013, and APD 130915, decided May 20, 2013, the Appeals Panel reversed the hearing officer's extent-of-injury determination because he had misread the causation letter in evidence. Although the hearing officer in this case could accept or reject in whole or in part the opinion of Dr. M, or any other evidence, the hearing officer misread Dr. M's extent-of-injury opinion regarding an L5-S1 disc protrusion. Accordingly, we reverse the hearing officer's determination that the compensable injury does not extend to an L5-S1 disc protrusion, and we remand the issue of whether the compensable injury extends to an L5-S1 disc protrusion to the hearing officer for further action consistent with this decision.

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.

The hearing officer determined that the claimant reached MMI on October 29, 2013, with an 11% IR as certified by Dr. M, the designated doctor in a response to an LOC sent by the hearing officer. However, we note that there is no Report of Medical Evaluation (DWC-69) in evidence from Dr. M, or any other doctor, assessing an 11% IR.

Given that we have reversed and remanded a portion of the extent-of-injury determination to the hearing officer, we also reverse the hearing officer's determination that the claimant reached MMI on October 29, 2013, with an 11% IR, and we remand the issues of MMI and IR to the hearing officer for further action consistent with this decision.

There are several MMI/IR certifications in evidence, which are from Dr. M, the designated doctor, (Dr. VH), a referral doctor, (Dr. H), a referral doctor, and (Dr. G), a referral doctor. However, some of these certifications contain errors that would prevent their adoption regardless of however the hearing officer determines compensability of an L5-S1 disc protrusion.

Dr. VH examined the claimant on February 27, 2014, and in a certification dated March 3, 2014, certified that the claimant reached MMI on February 27, 2014, with a 16% IR. However, Dr. VH makes clear in his attached narrative report that he considered and rated right shoulder rotator cuff syndrome. As noted above the hearing officer's determination that the compensable injury does not extend to right shoulder rotator cuff syndrome has been affirmed. Dr. VH's MMI/IR certification considers and rates a condition that has been determined to not be part of the compensable injury, and as such his MMI/IR certification cannot be adopted.

Dr. H examined the claimant on July 7, 2014, and certified that the claimant reached MMI on June 11, 2014. However, the copy of Dr. H's DWC-69 in evidence is largely illegible and does not include a narrative report. Dr. H's MMI/IR certification cannot be adopted.

Dr. G examined the claimant on November 10, 2014, and certified that the claimant reached MMI statutorily on September 29, 2014, with a 29% IR. However, Dr. G makes clear in his attached narrative report that he considered and rated rheumatism, neuralgia/neuritis, and a sprain/strain of the lumbar spine. None of these conditions have been stipulated by the parties as part of the compensable injury, nor were these conditions actually litigated at the CCH to be part of the compensable injury. Dr. G considered and rated conditions that have not at this time been determined to be part of the compensable injury, and as such his MMI/IR certification cannot be adopted.

SUMMARY

We affirm the hearing officer's determination that the compensable injury of (date of injury), does not extend to major depressive disorder, L4-5 disc protrusion, right shoulder rotator cuff syndrome, or partial tear of the right arm flexor digitorum superficialis.

We reverse the hearing officer's determination that the compensable injury of (date of injury), does not extend to right arm triceps tendon tear, and we render a new decision that the compensable injury of (date of injury), extends to right arm triceps tendon tear.

We reverse the hearing officer's determination that the compensable injury of (date of injury), does not extend to an L5-S1 disc protrusion, and we remand this issue to the hearing officer for further action consistent with this decision.

We reverse the hearing officer's determination that the claimant reached MMI on October 29, 2013, with an 11% IR, and we remand the issues of MMI and IR to the hearing officer for further action consistent with this decision.

REMAND INSTRUCTIONS

The hearing officer is to make a determination whether the compensable injury of (date of injury), extends to an L5-S1 disc protrusion. Based on the hearing officer's determination regarding the compensability of an L5-S1 disc protrusion, the hearing officer is then to determine whether an MMI/IR certification that rates the entire compensable injury is in evidence or whether a new MMI/IR certification by the designated doctor is necessary.

Dr. M is the designated doctor appointed by the Division for purposes of MMI and IR. The hearing officer is to determine whether Dr. M is still qualified and available to be the designated doctor for MMI/IR. If Dr. M is no longer qualified or available to serve as the designated doctor, then another designated doctor is to be appointed pursuant to Rule 127.5(c) to determine MMI and the IR.

If a new MMI/IR certification is necessary, the hearing officer is to inform the designated doctor that the compensable injury of (date of injury), extends to status post crush injury to the left pelvis with a vertical fracture through the right sacral ala extending to the SI joint; status post open reduction of the right sacral fracture with internal fixation; status post right olecranon fracture; status post open reduction and internal fixation of right olecranon fracture; status post metal removal, right elbow; and status post right triceps repair, as stipulated by the parties. The hearing officer is also to inform the designated doctor that the compensable injury of (date of injury), extends to

right arm triceps tendon tear, and an L5-S1 disc protrusion depending upon his determination on that condition as remanded.

The hearing officer is also to inform the designated doctor that the compensable injury of (date of injury), does not extend to major depressive disorder, L4-5 disc protrusion, right shoulder rotator cuff syndrome, or partial tear of the right arm flexor digitorum superficialis, and an L5-S1 disc protrusion depending upon his determination on that condition as remanded. The hearing officer is further to inform the designated doctor that the date of statutory MMI in this case is September 29, 2014, as stipulated by the parties.

The parties are to be provided with the hearing officer's letter to the designated doctor, the designated doctor's response, and to be allowed an opportunity to respond. The hearing officer is to make determinations which are supported by the evidence on extent of injury, 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 **BITCO GENERAL INSURANCE CORPORATION** and the name and address of its registered agent for service of process is

**GLENN CAMERON
222 WEST LAS COLINAS BOULEVARD, SUITE 1720
IRVING, TEXAS 75016.**

Carisa Space-Beam
Appeals Judge

CONCUR:

Veronica L. Ruberto
Appeals Judge

Margaret L. Turner
Appeals Judge