APPEAL NO. 150866
FILED ON JULY 13, 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 April 2, 2015, in San Antonio, Texas, with (hearing officer) presiding as hearing officer. The hearing officer resolved the disputed issues by determining that: (1) the compensable injury of (date of injury), extends to disc disorder; (2) the compensable injury of (date of injury), does not extend to L4-5 and L5-S1 degenerative disc disease or stenosis; (3) the respondent/cross-appellant (claimant) reached maximum medical improvement (MMI) on March 19, 2014; (4) the claimant's impairment rating (IR) is five percent; and (5) the claimant had disability from June 18, 2013, through the date of the CCH as a result of the compensable injury of (date of injury).

The appellant/cross-respondent (carrier) appealed the hearing officer's extent-of-injury determination in favor of the claimant, as well as the hearing officer's MMI, IR, and disability determinations, contending that the evidence does not support those determinations. The claimant responded to the carrier's appeal urging affirmance for the issues on which she prevailed. The claimant also cross-appealed the hearing officer's extent-of-injury determination that was adverse to her, contending that the evidence did not support that determination. The carrier responded to the claimant's cross-appeal urging affirmance of that issue.

DECISION

Affirmed as reformed.

Section 410.203(b) was amended effective September 1, 2011, to allow the Appeals Panel to affirm the decision of a hearing officer as prescribed in Section 410.204(a-1). Section 410.204(a) provides in part that the Appeals Panel may issue a written decision on an affirmed case as described in subsection (a-1). Subsection (a-1) provides that the Appeals Panel may only issue a written decision in a case in which the panel affirms the decision of a hearing officer if the case: (1) is a case of first impression; (2) involves a recent change in law; or (3) involves errors at the CCH that require correction but do not affect the outcome of the hearing. This case is a situation that requires correction but does not affect the outcome of the hearing.

The parties stipulated that the claimant sustained a compensable injury in the form of a lumbar sprain/strain on (date of injury). The claimant testified she was injured when her foot slipped off the stool on which she was standing and caused her to fall backwards.

EXTENT OF INJURY AND DISABILITY

The hearing officer's determination that the compensable injury of (date of injury), extends to disc disorder is supported by sufficient evidence and is affirmed.

The hearing officer's determination that the compensable injury of (date of injury), does not extend to L4-5 and L5-S1 degenerative disc disease or stenosis is supported by sufficient evidence and is affirmed.

The hearing officer's determination that the claimant had disability from June 18, 2013, through the date of the CCH as a result of the compensable injury of (date of injury), is supported by sufficient evidence and is affirmed.

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 March 19, 2014, with a five percent IR. The hearing officer specifically found in Finding of Fact No. 5 that "[t]he determination of the designated doctor, (Dr. L), that [the] [c]laimant reached MMI on March 19, 2014, with a [five percent IR] is supported by the preponderance of the evidence."

Dr. L examined the claimant on August 25, 2014, and provided two Reports of Medical Evaluation (DWC-69) dated September 2, 2014, both certifying that the claimant reached MMI on March 19, 2014, with a five percent IR. Dr. L made clear in his attached narrative report that his first MMI/IR certification was based on a diagnosis

of only a lumbar sprain/strain. Dr. L also made clear that his second MMI/IR certification was based on diagnoses of a lumbar sprain/strain, lumbar disc disorder, and lumbar degenerative disc disease. As discussed above, we have affirmed the hearing officer's determination that the compensable injury extends to disc disorder, as well as the hearing officer's determination that the compensable injury does not extend to L4-5 and L5-S1 degenerative disc disease or stenosis. Dr. L's first MMI/IR certification does not consider the entire compensable injury. Dr. L's second MMI/IR certification considers lumbar degenerative disc disease. We note that the parties neither stipulated to nor actually litigated lumbar degenerative disc disease at any levels other than L4-5 and L5-S1. Dr. L's second MMI/IR certification considers a condition that has been determined to not be part of the compensable injury. The hearing officer's finding that Dr. L's MMI/IR certification is supported by the preponderance of the evidence is so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust. *See* Appeals Panel Decision 142675, decided January 28, 2015. Accordingly, we reform the hearing officer's decision by striking Finding of Fact No. 5.

There are four other MMI/IR certifications in evidence, which are from (Dr. O), the post-designated doctor required medical examination doctor, (Dr. Mr), the first designated doctor appointed by the Division to determine MMI and IR, and (Dr. M), a doctor selected by the treating doctor to act in place of the treating doctor.

Dr. O examined the claimant on December 11, 2014, and provided alternate certifications, both certifying that the claimant reached MMI on December 6, 2013, with a zero percent IR. Dr. O noted in his report that one of his two MMI/IR certifications considered only a lumbar sprain/strain. Because this MMI/IR certification does not consider the entire compensable injury, it cannot be adopted. Dr. O noted in his report that his alternate MMI/IR certification considered lumbar disc disorder and lumbar degenerative disc disease. As discussed above, we have affirmed the hearing officer's determination that the compensable injury does not extend to L4-5 and L5-S1 degenerative disc disease or stenosis, and the parties neither stipulated to nor actually litigated lumbar degenerative disc disease at any levels other than L4-5 and L5-S1. Dr. O's alternate MMI/IR certification cannot be adopted.

Dr. Mr, the first designated doctor, examined the claimant on October 2, 2013, and certified that the claimant had not reached MMI at that point but was expected to do so on or about December 6, 2013. Dr. Mr's report made clear that he based his certification on a lumbar sprain/strain.

Dr. M, the doctor selected by the treating doctor to act in place of the treating doctor, examined the claimant on October 3, 2014, and certified that the claimant

reached MMI on March 19, 2014, with a five percent IR. Dr. M noted in his attached narrative report that he agreed with Dr. L's MMI date of March 19, 2014, and five percent IR. Dr. M's report noted diagnoses of a lumbar sprain/strain and disc disorder. As discussed above, the parties have stipulated that the compensable injury was in the form of a lumbar sprain/strain, and we have affirmed the hearing officer's determination that the compensable injury extends to disc disorder. Dr. M considered the entire compensable injury.

Because an MMI date of March 19, 2014, and an IR of five percent are supported by the evidence, based on the report of Dr. M rather than the report of Dr. L, the hearing officer's determination that the claimant reached MMI on March 19, 2014, with a five percent IR is affirmed but reformed to reflect that the claimant reached MMI on March 19, 2014, with a five percent IR as certified by Dr. M.

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

RICHARD J. GERGASKO, PRESIDENT
6210 EAST HIGHWAY 290
AUSTIN, TEXAS 78723.

Carisa Space-Beam
Appeals Judge

CONCUR:

Veronica L. Ruberto
Appeals Judge

Margaret L. Turner
Appeals Judge