APPEAL NO. 151515
FILED OCTOBER 1, 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 June 16, 2015, in Fort Worth, 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 L4-5 spinal canal stenosis, bilateral foraminal narrowing, or facet degeneration; (2) the respondent (claimant) has not reached maximum medical improvement (MMI); and (3) no impairment rating (IR) can be assigned at this time because the claimant has not reached MMI.

The appellant (carrier) appealed the hearing officer's MMI and IR determinations, contending that those determinations are against the great weight and preponderance of the evidence. The claimant responded, urging affirmance of the hearing officer's MMI and IR determinations.

The hearing officer's determination that the compensable injury of (date of injury), does not extend to L4-5 spinal canal stenosis, bilateral foraminal narrowing, or facet degeneration was not appealed and has become final pursuant to Section 410.169.

DECISION

Reversed and remanded.

The parties stipulated that the claimant sustained a compensable injury on (date of injury), that includes at least a lumbar strain. The claimant testified he injured his back while lowering a 12-foot long box of vinyl siding that weighed approximately 85 pounds to a customer. It is undisputed that the claimant underwent surgeries to his back prior to the date of injury at issue in this case.

The hearing officer determined that the claimant had not reached MMI as certified by (Dr. H), the designated doctor appointed by the Texas Department of Insurance, Division of Workers' Compensation (Division).

Dr. H initially examined the claimant on March 26, 2014, and certified in alternate MMI/IR certifications that the claimant had not reached MMI but was expected to do so on May 26, 2014. In one Report of Medical Evaluation (DWC-69) Dr. H certified that the claimant had not reached MMI based on a lumbar sprain/strain, and in the alternate DWC-69 Dr. H certified that the claimant had not reached MMI based on lumbar disc syndrome and radiculopathy. Dr. H discussed all three of these diagnoses in his

narrative report, and the sole explanation he gave regarding his opinion that the claimant had not reached MMI was that:

1. [The claimant] has NOT (emphasis original) been afforded reasonable, adequate opportunity of care for his injuries. [L]umbar ESI injections has (sic) been recommended and initiated by the [t]reating [d]octor and surgeon.

2. I am anticipating further material gain from additional medically necessary treatment.

Although Dr. H provided alternate DWC-69s, Dr. H's narrative provided only one explanation of MMI based on all three diagnoses. As noted above, the hearing officer's determination that the compensable injury of (date of injury), does not extend to L4-5 spinal canal stenosis, bilateral foraminal narrowing, or facet degeneration was not appealed and has become final pursuant to Section 410.169. Also noted above is that the parties stipulated that the compensable injury extends to a lumbar strain. Dr. H's narrative report shows that he considered more than a lumbar strain when he certified that the claimant has not reached MMI.

Dr. H next examined the claimant on August 2, 2014, and certified that the claimant had not reached MMI but was expected to do so on December 1, 2014, based on a lumbar sprain/strain, lumbar intervertebral disc disorder without myelopathy, and lumbar radiculopathy.

Dr. H next examined the claimant on December 24, 2014, and certified in alternate MMI/IR certifications on January 7, 2015, that the claimant had not reached MMI but was expected to do so on July 1, 2015. Dr. H noted in his narrative report that on January 16, 2014, the day after the injury, a physician at CareNow reported radicular symptoms in the claimant's left leg, positive orthopedic testing of root tension signs, and a past history of two previous surgeries; however, the claimant's initial diagnosis was " "strain" of the lower back . . ." and that "[i]t's my opinion that from the date of the claimed incident, [the claimant's] work related lumbar spinal disc disorder condition caused by the lumbar "[s]train" is not at MMI." Dr. H then went on to explain that the claimant's future estimated date of MMI would be July 1, 2015, because:

> This would allow for adequate time for the surgical procedure to get requested for pre-authorization and get approved, allow [the claimant] to get a medically necessary pre-surgical work-up, which may also require a psychological evaluation, have the surgery performed, allow for a healing (under non-complicated conditions) of the surgical site, and then allow for a reasonable time for post-surgical rehabilitation.

As noted above, the compensable injury in this case is a lumbar strain. Although Dr. H states he based his opinion that the claimant has not reached MMI on a lumbar sprain/strain, it is clear from his report that he is considering conditions other than a lumbar strain in determining the claimant has not reached MMI due to the necessity of surgical procedures. We hold that the hearing officer's determination that the claimant has not reached MMI as certified by Dr. H is so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust.

There are three other certifications in evidence that the claimant has not reached MMI, which are from (Dr. P), a doctor selected by the treating doctor to act in place of the treating doctor.

Dr. P initially examined the claimant on March 20, 2014, and certified that the claimant had not reached MMI. Dr. P stated in his narrative report that regarding the lumbar sprain/strain, the claimant "needs a CT Myelogram of the lumbar spine due to the [claimant's] prior surgeries."

Dr. P next examined the claimant on June 25, 2014, and certified that the claimant had not reached MMI but was expected to do so on September 25, 2014. Dr. P noted a diagnosis of a lumbar sprain/strain, and stated in his narrative report that the claimant's symptoms are getting worse and that the claimant "has been scheduled to see a neurosurgeon to determine if the [claimant] is a surgical candidate."

Dr. P next examined the claimant on December 10, 2014, and certified that the claimant had not reached MMI but was expected to do so on June 11, 2015. Dr. P again noted a diagnosis of a lumbar sprain/strain, and stated in his narrative report that the claimant's symptoms are getting worse and that the claimant "has been seen by a neurosurgeon and a recommendation was made for surgical intervention."

Dr. P's opinion that the claimant has not reached MMI is clearly based on his belief that the claimant requires surgery. However, the compensable injury in this case is a lumbar strain, a condition which the medical evidence does not establish requires surgery. Accordingly, Dr. P's certifications that the claimant has not reached MMI cannot be adopted.

As none of the MMI/IR certifications in evidence certifying that the claimant has not reached MMI are adoptable, we reverse the hearing officer's determinations that the claimant has not reached MMI and therefore no IR can be assigned at this time.

There are three other MMI/IR certifications in evidence. The first two are from (Dr. E), a post-designated doctor required medical examination (RME) doctor. Dr. E examined the claimant on October 10, 2014, and submitted alternate MMI/IR

certifications dated October 27, 2014. In the first certification Dr. E certified that the claimant reached MMI on January 30, 2014, with a zero percent IR. Dr. E explained in his attached narrative report that this certification is based on lumbalgia, a condition which was neither stipulated to nor litigated by the parties as being part of the compensable injury. Accordingly, this certification cannot be adopted.

Dr. E certified in his alternate certification that the claimant reached MMI on October 10, 2014, with a zero percent IR, and explained in his attached narrative report that this certification is based on a lumbar sprain/strain.

The third MMI/IR certification is from (Dr. O), a subsequent post-designated doctor RME doctor. Dr. O examined the claimant on March 2, 2015, and certified that the claimant reached MMI on September 19, 2014, with a zero percent IR based on a lumbar sprain/strain.

Dr. E's alternate certification that the claimant reached MMI on October 10, 2014, with a zero percent IR and Dr. O's certification that the claimant reached MMI on September 19, 2014, with a zero percent IR are both potentially adoptable in this case. As such, we do not consider it appropriate to render a decision on the issues of MMI and IR. Therefore, we remand the issues of MMI and IR to the hearing officer to make a determination on the claimant's MMI and IR consistent with this decision.

REMAND INSTRUCTIONS

As discussed above, the parties have stipulated that the compensable injury includes a lumbar strain. On remand the hearing officer is to fully consider Dr. E's October 10, 2014, alternate MMI/IR certification that the claimant reached MMI on October 10, 2014, with a zero percent IR, and Dr. O's March 2, 2015, MMI/IR certification that the claimant reached MMI on September 19, 2014, with a zero percent IR. The hearing officer is to make a determination of MMI and IR based on the evidence.

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 **COMMERCE & INDUSTRY 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 78701-3218.

Carisa Space-Beam
Appeals Judge

CONCUR:

Veronica L. Ruberto
Appeals Judge

Margaret L. Turner
Appeals Judge