

APPEAL NO. 151592
FILED OCTOBER 6, 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 July 31, 2014, with the record closing on July 28, 2015, in Dallas, Texas, with (hearing officer) presiding as hearing officer. The hearing officer resolved the disputed issues by deciding that: (1) the appellant's (claimant) average weekly wage (AWW) is \$760.65; (2) the compensable injury of (date of injury), does not extend to right hip osteoarthritis; (3) the date of maximum medical improvement (MMI) is January 14, 2014; and (4) the claimant's impairment rating (IR) is 5%.

The claimant appealed, requesting that the Appeals Panel "abate" the CCH Officer's Decision and Order and approve the parties executed Benefit Dispute Settlement (DWC-25). Additionally, the claimant argued that he met his burden of proof on all the disputed issues and requested that the disputed issues be reversed and rendered in the claimant's favor. The respondent (carrier) responded, urging affirmance of the disputed determinations. The carrier argued that the Appeals Panel does not have jurisdiction to consider the claimant's argument regarding the DWC-25.

DECISION

Affirmed in part and reversed and remanded in part.

The parties stipulated in part that the claimant sustained a compensable injury on (date of injury), which includes a lumbar strain, L3-5 disc bulges, a right hip fracture, and a right hip contusion and that the date of statutory MMI for this claim is January 26, 2014. The CCH was initially held on July 31, 2014. After conclusion of the presentation of the evidence, it was determined that a letter of clarification to the designated doctor needed to be sent and the record held open. The hearing officer noted in the Discussion portion of his decision that the response from the first designated doctor, (Dr. S), was unsatisfactory and that a new designated doctor had to be appointed because before Dr. S could further clarify his response he "came off" the designated doctor list. A new designated doctor, (Dr. Sc), was appointed and submitted his report. The hearing officer further notes in his discussion that upon receipt of the new designated doctor's report the parties indicated they were going to submit a DWC-25 settling this claim. The evidence reflects that the DWC-25, which was submitted as a hearing officer's exhibit, was denied by the Texas Department of Insurance, Division of Workers' Compensation (Division). The denial letter was also submitted into the record of the CCH as a hearing officer's exhibit.

We note that the approval or denial of the DWC-25 was not an issue before the hearing officer; therefore, the Appeals Panel does not have jurisdiction to review that issue or have any authority to “abate” the proceedings as requested by the claimant.

EXTENT OF INJURY

The hearing officer’s determination that the compensable injury of (date of injury), does not extend to right hip osteoarthritis is supported by sufficient evidence and is affirmed.

AWW

The hearing officer’s determination that the claimant’s AWW is \$760.65 is supported by sufficient evidence and is affirmed.

MMI AND 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.

Dr. S was initially appointed as the designated doctor for purposes of MMI and IR. A second designated doctor, Dr. Sc was subsequently appointed for purposes of MMI and IR. Because Dr. Sc was the most recently appointed designated doctor for purposes of MMI and IR his certification had presumptive weight. However, the hearing officer determined that the claimant reached MMI on January 14, 2014, with a 5% IR based on the report and certification of Dr. S.

Dr. S examined the claimant on January 14, 2014, and provided alternate certifications. In his first certification, Dr. S certified that the claimant reached MMI on January 14, 2014, with a 5% 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), placing the claimant in Lumbosacral Diagnosis-Related Estimate (DRE) Category II: Minor Impairment. However, this certification only rates the lumbar strain and does not rate the L3-5 disc bulges, right hip fracture, or right hip contusion. Because the certification does not consider and rate the entire compensable injury, it cannot be adopted. Accordingly, we reverse the hearing officer's determination that the date of MMI is January 14, 2014, and the claimant's IR is 5%.

Another certification from Dr. S certified that the claimant reached MMI on January 14, 2014, with a 20% IR for impairment of the claimant's right hip. Dr. S used Table 36, on page 3/76 of the AMA Guides, for gait derangement. Dr. S noted the claimant routinely used a cane and it is secondary to arthritis. As previously noted the hearing officer's determination that the compensable injury does not extend to right hip osteoarthritis is affirmed. Because this certification is based on a condition that is not included in the compensable injury and does not consider conditions that are part of the compensable injury (lumbar strain, L3-5 disc bulges, right hip fracture, or right hip contusion) it cannot be adopted.

A third certification from Dr. S was in evidence in which Dr. S certified that the claimant reached MMI on January 14, 2014, with a 24% IR. In this certification Dr. S combined the 20% IR based on gait derangement for the right hip with the 5% IR for the lumbar spine based on Lumbosacral DRE Category II: Minor Impairment. However, as discussed above neither component of this rating properly considers the entire compensable injury and the 20% IR is assigned for an injury which is not part of the compensable injury; therefore, it cannot be adopted.

A letter of clarification was sent to Dr. S in April of 2014, and he replied in correspondence dated April 29, 2014. Dr. S stated he had no changes to make in his diagnosis or IR. He states without explanation in his response that the 20% rating for the hip impairment is for a diagnosis of hip fracture, not contusion and arthritis. As previously noted his narrative report specifically states that the 20% impairment based on gait derangement he assigned impairment for in the right hip was secondary to arthritis. Further, Dr. S acknowledged that he did not rate the hip contusion which is part of the compensable injury.

The only other certifications in evidence are from the second designated doctor, Dr. Sc appointed for MMI and IR. Dr. Sc examined the claimant on January 30, 2015.

We note that the Report of Medical Evaluation (DWC-69) lists the date of examination as January 16, 2015, but the evidence reflects the examination actually took place on January 30, 2015. Dr. Sc certified that the claimant reached MMI on the statutory date, January 26, 2014, and assigned a 17% IR using the AMA Guides. In his narrative report dated January 30, 2015, Dr. Sc explained that he placed the claimant at statutory MMI because there is not a good indication of whether the claimant has current avascular necrosis in the right femoral neck and head. Avascular necrosis was not a condition at issue and has not been determined to be part of the compensable injury. Dr. Sc placed the claimant in Lumbosacral DRE Category III: Radiculopathy, assigning 10% IR, noting decreased relevant reflexes. Dr. Sc assigned 8% IR for the claimant's right hip based on loss of range of motion (ROM). This certification from Dr. Sc could not be adopted because he considered a condition, avascular necrosis, which has not been determined to be part of the compensable injury. Further, in a subsequent response to a letter of clarification, Dr. Sc acknowledged he made errors in assigning impairment for the claimant's ROM in his right hip.

A letter of clarification was sent to Dr. Sc and in a response dated June 1, 2015, Dr. Sc acknowledged he made errors in assigning impairment for ROM of the right hip and stated the impairment for the right hip should have been 10% based on loss of ROM. Dr. Sc also changed the impairment assigned for the claimant's lumbar spine, placing the claimant in Lumbosacral DRE II: Minor Impairment assigning 5% IR. Combining impairment of 10% for the right hip and 5% for the lumbar spine resulted in 15% IR. In his narrative report, Dr. Sc notes the claimant had 0/4 Achilles reflexes but no other correlating clinical finding for S1 radiculopathy. Dr. Sc stated when this is correlated to the MRI findings of February 6, 2013, at L5-S1 "the case material will not allow placement in the lumbosacral [DRE] category I and does not advance the subject to lumbosacral [DRE] category III." As previously noted the compensable injury as stipulated to by the parties includes lumbar strain, L3-5 disc bulges, a right hip fracture, and a right hip contusion. Dr. Sc based his rating of the lumbar spine on the L5-S1 level of the lumbar spine which has not been determined to be part of the compensable injury. The L5-S1 level of the lumbar spine was not a disputed issue in the CCH nor was it actually litigated. Accordingly, this certification from Dr. Sc cannot be adopted.

No other certification is in evidence. Therefore, the hearing officer's determinations that the date of MMI is January 14, 2014, and the claimant's IR is 5% are reversed and the issues of MMI and IR are remanded to the hearing officer for further action consistent with this decision.

SUMMARY

We affirm the hearing officer's determination that the compensable injury of (date of injury), does not extend to right hip osteoarthritis.

We affirm the hearing officer's determination that the claimant's AWW is \$760.65.

We reverse the hearing officer's determinations that the date of MMI is January 14, 2014, and the claimant's IR is 5% and remand the issues of MMI and IR to the hearing officer for further action consistent with this decision.

REMAND INSTRUCTIONS

Dr. Sc is the designated doctor in this case. On remand, the hearing officer is to determine whether Dr. Sc is still qualified and available to be the designated doctor. If Dr. Sc 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 advise the designated doctor that the compensable injury of (date of injury), includes a lumbar strain, L3-5 disc bulges, a right hip fracture, and a right hip contusion. Further, the hearing officer is also to advise the designated doctor that the compensable injury does not extend to right hip osteoarthritis.

The certification of MMI can be no later than the statutory date of MMI, which the parties have stipulated is January 26, 2014. The certification of MMI should be 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 considering the physical examination and the claimant's medical records.

The assignment of an IR is required to be based on the claimant's condition as of the MMI date considering the medical records and the certifying examination and according to the rating criteria of the AMA Guides and the provisions of Rule 130.1(c)(3). After a new certification of MMI/IR is submitted, the parties are to be provided with the designated doctor's DWC-69 and narrative report. The parties are to be allowed an opportunity to respond. The hearing officer is to determine the issues of 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 **TEXAS MUTUAL INSURANCE COMPANY** and the name and address of its registered agent for service of process is

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

Margaret L. Turner
Appeals Judge

CONCUR:

Veronica L. Ruberto
Appeals Judge

Carisa Space-Beam
Appeals Judge