

APPEAL NO. 160937
FILED JULY 21, 2016

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 March 8, 2016, in San Antonio, 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 a lumbar sprain/strain, L5-S1 disc displacement, and tenosynovitis of the right wrist; (2) the respondent/cross-appellant (claimant) reached maximum medical improvement (MMI) on June 15, 2015; (3) the claimant's impairment rating (IR) is two percent; and (4) the claimant had disability from July 30, 2014, through June 30, 2015, but at no other times through the date of the CCH.

The appellant/cross-respondent (carrier) appealed the hearing officer's disability determination in favor of the claimant, contending that determination is not supported by the evidence. The appeal file does not contain a response from the claimant to the carrier's appeal. The claimant cross-appealed the hearing officer's extent of injury, MMI, and IR determinations, contending those determinations are not supported by the evidence. The carrier responded to the claimant's cross-appeal, urging affirmance of those determinations.

That portion of the hearing officer's determination that the claimant did not have disability from July 1, 2015, through the date of the CCH was not appealed and has become final pursuant to Section 410.169.

DECISION

Affirmed in part and reversed and remanded in part.

The parties stipulated that the claimant sustained a compensable injury in the form of a right wrist strain, right elbow strain, and buttock strain on (date of injury). The claimant testified he was injured when he fell off a front loader Caterpillar.

EXTENT OF INJURY

The hearing officer's determination that the (date of injury), compensable injury does not extend to a lumbar sprain/strain, L5-S1 disc displacement, and tenosynovitis of the right wrist is supported by sufficient evidence and is affirmed.

DISABILITY

Disability means the inability to obtain and retain employment at wages equivalent to the pre-injury wage because of a compensable injury. Section 401.011(16). The claimant has the burden to prove that he had disability as defined by Section 401.011(16). Disability is a question of fact to be determined by the hearing officer. See Appeals Panel Decision (APD) 042097, decided October 18, 2004. Disability can be established by a claimant's testimony alone, even if contradictory of medical testimony. APD 041116, decided July 2, 2004. The claimant need not prove that the compensable injury was the sole cause of his disability; only that it was a producing cause. APD 042097, *supra*.

That portion of the hearing officer determination that the claimant had disability from July 30, 2014, through June 30, 2015, is supported by sufficient evidence and is affirmed.

The hearing officer found in Finding of Fact No. 6 that the compensable injury was a cause of the claimant's inability to obtain and retain employment at wages equivalent to his pre-injury wage "for the period of July 30, 2014[,] and continuing through June 30, 2015, but not July 1, 2014[,] through the date of the [CCH]." We note that although the hearing officer referenced July 1, 2014, in Finding of Fact No. 6, the hearing officer's discussion makes clear that the correct date is July 1, 2015. The disability issue before the hearing officer was whether the claimant had disability from May 20, 2014, through the date of the CCH. The hearing officer made no finding of fact regarding disability beginning May 20 through July 29, 2014, which was part of the disability period in dispute. The claimant testified at the CCH that he quit work on May 20, 2014, because he could no longer work due to the pain from his injury. The hearing officer noted in the Discussion portion of the decision that whether or not the claimant retired on May 20, 2014, is not dispositive of the issue of disability. Because the hearing officer made no finding of fact regarding disability beginning May 20 through July 29, 2014, we reverse the remainder of the hearing officer's disability determination as incomplete and we remand the issue of whether the claimant had disability from May 20 through July 29, 2014, for the hearing officer to reconsider the existing record and to make a determination on that issue consistent with this decision.

MMI

The hearing officer's determination that the claimant reached MMI on June 15, 2015, is supported by sufficient evidence and is affirmed.

IR

Section 408.125(c) provides that the report of the designated doctor shall have presumptive weight, and the Texas Department of Insurance, Division of Workers'

Compensation (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's IR is two percent as certified by (Dr. L), the designated doctor appointed by the Division.

Dr. L initially examined the claimant on February 12, 2015, and certified that the claimant had not reached MMI at that point. Dr. L next examined the claimant on July 7, 2015, and provided alternate Reports of Medical Evaluation (DWC-69). In both DWC-69s Dr. L certified the claimant reached MMI on June 15, 2015, with a two percent IR. Dr. L noted in his attached narrative report that one of his MMI/IR certifications considered a lumbar sprain/strain. Because the hearing officer's determination that the compensable injury does not extend to a lumbar sprain/strain has been affirmed as being supported by the evidence, that MMI/IR certification cannot be adopted.

Dr. L noted in his narrative report that his second MMI/IR certification is based on a right wrist strain, right elbow strain, and buttock strain, all of which the parties stipulated are part of the compensable injury. 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. L placed the claimant in Diagnosis-Related Estimate Lumbosacral Category I: Complaints or Symptoms for zero percent impairment for the claimant's buttocks strain. Dr. L also assessed zero percent impairment for the claimant's right elbow, and four percent upper extremity impairment for the claimant's right wrist, which using Table 3 on page 3/20 of the AMA Guides converts to two percent whole person impairment. The narrative report reflects that the examination of the claimant lasted thirty minutes and listed the medical records Dr. L reviewed. The narrative report also reflects range of motion (ROM) measurements taken of the claimant's hips, as well as muscle strength of the claimant's elbow and reflexes of the upper extremity; however, the narrative report does not contain any ROM measurements taken of the claimant's right wrist, which was the basis of Dr. L's two percent IR.

Rule 130.1(c)(3) provides in pertinent part that the assignment of an IR shall be based on the injured worker's condition as of the MMI date considering the medical record and the certifying examination and the doctor assigning the IR shall:

- (A) identify objective clinical or laboratory findings of permanent impairment for the current compensable injury;
- (B) document specific laboratory or clinical findings of an impairment;
- (C) analyze specific clinical and laboratory findings of an impairment;
- (D) compare the results of the analysis with the impairment criteria and provide the following:
 - (i) [a] description and explanation of specific clinical findings related to each impairment, including zero percent [IRs]; and
 - (ii) [a] description of how the findings relate to and compare with the criteria described in the applicable chapter of the AMA Guides. The doctors inability to obtain required measurements must be explained.

Dr. L's narrative accompanying his DWC-69 does not document clinical findings from an examination of the claimant's right wrist that was used to assess impairment; therefore, his narrative report does not comply with Rule 130.1(c)(3). Accordingly, Dr. L's assessment of IR cannot be adopted.

There are multiple MMI/IR certifications in evidence; however, only two certify the claimant reached MMI on June 15, 2015. These MMI/IR certifications are from (Dr. V), a post-designated doctor required medical examination doctor, and Dr. G, a doctor acting in place of the treating doctor. Both Dr. V and Dr. G considered and rated a right wrist strain, right elbow strain, and buttock strain, and both properly utilize the AMA Guides in assessing their respective IRs. Dr. V assigned a zero percent IR, and Dr. G assigned a two percent IR. Because there are two IRs in evidence that can be adopted, we do not consider it appropriate to render a decision on the claimant's IR. Consequently, we reverse the hearing officer's determination that the claimant's IR is two percent, and we remand the issue of the claimant's IR to the hearing officer for further action consistent with this decision.

SUMMARY

We affirm the hearing officer's determination that the (date of injury), compensable injury does not extend to a lumbar sprain/strain, L5-S1 disc displacement, and tenosynovitis of the right wrist.

We affirm that portion of the hearing officer's determination that the claimant had disability from July 30, 2014, through June 30, 2015.

We reverse the remainder of the hearing officer's disability determination as incomplete and we remand the issue of whether the claimant had disability from May 20 through July 29, 2014, for further action consistent with this decision.

We affirm the hearing officer's determination that the claimant reached MMI on June 15, 2015.

We reverse the hearing officer's determination that the claimant's IR is two percent, and we remand the issue of the claimant's IR to the hearing officer for further action consistent with this decision.

REMAND INSTRUCTIONS

On remand the hearing officer is to make a determination of the claimant's IR as of the June 15, 2015, date of MMI that is supported by the evidence and is consistent with this decision. The hearing officer is also to make a determination of whether the claimant had disability from May 20 through July 29, 2014, that is supported by the evidence and is consistent with this decision. No new evidence is to be taken and no rehearing shall be held on remand.

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 **ARCH 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.**

Carisa Space-Beam
Appeals Judge

CONCUR:

K. Eugene Kraft
Appeals Judge

Margaret L. Turner
Appeals Judge