

APPEAL NO. 162441
FILED JANUARY 13, 2017

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 October 18, 2016, in (city), 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 extend to L5-S1 facet arthropathy, L5-S1 4 mm concentric annular bulge, L5 radiculopathy, and L5-S1 left foraminal disc protrusion; (2) the respondent (claimant) has not yet reached maximum medical improvement (MMI); (3) because the claimant has not reached MMI, no impairment rating (IR) can be assigned; and (4) the claimant had disability beginning on September 14, 2015, and continuing through the date of the CCH. The appellant (self-insured) appeals the hearing officer's determinations of the extent of the compensable injury, MMI, IR, and disability. The self-insured contends that the hearing officer misstates the facts in her discussion when she refers to a specific MRI in evidence by the wrong date. The self-insured contends that the designated doctor is also confused about the MRI reports. The claimant responded, urging affirmance of the disputed determinations.

DECISION

Reversed and remanded.

The parties stipulated that the claimant sustained a compensable injury on (date of injury), at least in the form of a lumbar strain. The claimant testified he was moving heavy desks with a co-worker when he felt pain in his back.

EXTENT OF INJURY

The benefit review conference (BRC) report lists the extent of injury in dispute as follows:

Does the compensable (date of injury), injury extend to and include L5-S1 facet arthropathy, L5-S1 spondylitic ridging, L5-S1 4 mm concentric annular bulge, L5 radiculopathy, and L5-S1 left foraminal disc protrusion?

The hearing officer read the disputed extent-of-injury issue from the BRC report into the record and the parties agreed that was the disputed extent-of-injury issue to be litigated. However, the hearing officer in her decision and order does not include the specific condition of L5-S1 spondylitic ridging and does not make findings of fact, conclusions of law, or a decision regarding that condition. The record does not reflect

that the parties agreed to modify the issue to omit the condition of L5-S1 spondylitic ridging from the issue. Accordingly, we reverse the hearing officer's extent-of-injury determination as being incomplete, and remand for the hearing officer to make a determination on L5-S1 spondylitic ridging.

The claimant sustained the compensable injury on (date of injury). It was undisputed that the claimant had pre-existing back problems. The record contained various diagnostic tests that pre-dated the compensable injury. Specifically, there was an MRI in evidence dated March 31, 2015, which pre-dated the (date of injury), compensable injury. Based on the discussion in the decision and order, the hearing officer mistakenly believed that the March 31 MRI was performed after the compensable injury. The hearing officer mistakenly references the March MRI as being performed on March 31, 2016, rather than the correct date of March 31, 2015. The hearing officer misread the evidence with respect to the pre-injury MRI and based her decision regarding the extent of the compensable injury in part on the MRI. Accordingly, we reverse the hearing officer's determination that the compensable injury extends to L5-S1 facet arthropathy, L5-S1 4 mm concentric annular bulge, L5 radiculopathy, and L5-S1 left foraminal disc protrusion and remand the extent-of-injury issue to the hearing officer for further action consistent with this decision.

DISABILITY

The hearing officer determined that the claimant had disability beginning on September 14, 2015, and continuing through the date of the CCH. However, as previously noted the parties stipulated that the claimant sustained a compensable injury at least in the form of a lumbar strain. Several of the Texas Workers' Compensation Work Status Reports (DWC-73) in evidence list other back conditions in addition to a lumbar strain as justification for the work restrictions listed for the claimant. Given that we have reversed and remanded the extent-of-injury issue to the hearing officer for further consideration, we also reverse and remand the disability issue to the hearing officer for further consideration 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 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 found that the preponderance of the other medical evidence is not contrary to the February 5, 2016, certification by the designated doctor, (Dr. H) that the claimant has not reached MMI. The hearing officer determined that the claimant has not yet reached MMI and therefore no IR has been assigned. Dr. H examined the claimant on December 19, 2015. Dr. H opined that the claimant had not yet reached MMI based on his opinion that the claimant's compensable injury included more than a lumbar strain. Given that we have reversed and remanded the extent of injury issue to the hearing officer for further consideration, we also reverse the determinations of MMI and IR and remand the issues of MMI and IR to the hearing officer for further consideration consistent with this decision.

SUMMARY

We reverse the hearing officer's extent-of-injury determination because it is incomplete and remand for the hearing officer to make a determination regarding whether the compensable injury extends to L5-S1 spondylitic ridging.

We reverse the hearing officer's determination that the (date of injury), compensable injury extends to L5-S1 facet arthropathy, L5-S1 4 mm concentric annular bulge, L5 radiculopathy, and L5-S1 left foraminal disc protrusion and remand the extent-of-injury issue to the hearing officer.

We reverse the hearing officer's determination that the claimant had disability beginning on September 14, 2015, and continuing through the date of the CCH and remand the disability issue to the hearing officer.

We reverse the hearing officer's determination that the claimant has not yet reached MMI and remand the MMI issue to the hearing officer.

We reverse the hearing officer's determination that because the claimant has not reached MMI, no IR has been assigned and remand the IR issue to the hearing officer.

REMAND INSTRUCTIONS

Dr. H is the designated doctor appointed by the Division for purposes of MMI, IR, and extent of injury. The hearing officer is to determine whether Dr. H is still qualified and available to be the designated doctor for MMI/IR. If Dr. H 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.

On remand the hearing officer is to consider the evidence given the correct date of the March 31, 2015, MRI which was performed prior to the date of the compensable injury. The hearing officer is to make a determination on all of the extent-of-injury conditions in dispute before her including the condition of L5-S1 spondylitic ridging. The hearing officer is then to make a determination on the disability period in dispute, September 14, 2015, through the CCH.

After determining the extent of the compensable injury, the hearing officer is to then make a determination of MMI and IR considering the entire compensable injury. If a new certification or letter of clarification is necessary, the hearing officer is to inform the designated doctor of the conditions which are part of the compensable injury. 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, disability, 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 **KLEIN INDEPENDENT SCHOOL DISTRICT**, a governmental entity that self-insures, through the **TEXAS ASSOCIATION OF SCHOOL BOARDS RISK MANAGEMENT FUND** and the name and address of its registered agent for service of process is

**JAMES W. CAIN, SUPERINTENDENT
7200 SPRING CYPRESS ROAD
KLEIN, TEXAS 77379.**

Margaret L. Turner
Appeals Judge

CONCUR:

K. Eugene Kraft
Appeals Judge

Carisa Space-Beam
Appeals Judge