APPEAL NO. 101425
FILED DECEMBER 2, 2010

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 September 7, 2010. With regard to the two disputed issues before her the hearing officer determined that the appellant (claimant) reached maximum medical improvement (MMI) on September 2, 2009, and that the claimant had a 0% impairment rating (IR) as certified by the designated doctor.

The claimant appealed, contending that the designated doctor had failed to rate the entire compensable injury. The respondent (carrier) responded, urging affirmance.

DECISION

Affirmed in part and reversed and remanded in part.

The hearing officer in an unappealed finding, found that the claimant sustained a compensable injury on _____. The medical evidence indicates that the claimant sustained a low back lifting injury on _____. In a Notice of Disputed Issue(s) and Refusal to Pay Benefits (PLN-11) dated May 29, 2009, in evidence the carrier states that it "accepts a diagnosis of posterior 2-3 mm disc protrusion/herniation at L5-S1 with anterolisthesis and 2-3 mm disc protrusion/herniation at L4-5 and a mild 1-2 mm disc protrusion/herniation at L2-3 and L3-4 levels."

MMI

The hearing officer's determination that the claimant reached MMI on September 2, 2009, 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.

(Dr. RP), the designated doctor appointed to determine MMI and IR, in a report dated September 2, 2009, certified clinical MMI on that date and assessed a 0% IR. Dr.

RP referenced an MRI performed on July 8, 2009, which showed "[d]iscogenic lumbar pain, a L4-5 and L5-S1 disc herniation, and a left lumbar radiculopathy." Dr. RP also listed other diagnostic studies including an MRI of the lumbar spine performed on May 22, 2009. Dr. RP ordered a functional capacity evaluation which was performed on September 2, 2009. Dr. RP diagnosed a "[l]umbar sprain/strain" and an "[a]bdominal [h]ernia" (which was not at issue). The 0% IR was assessed based on Diagnosis-Related Estimates (DRE) Lumbosacral Category I: Complaints and Symptoms of 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). In view of the accepted compensable injury which includes disc protrusions/herniations at all levels of the lumbar spine, Dr. RP clearly did not rate the entire compensable injury.

A letter of clarification (LOC) dated April 15, 2010, was sent to Dr. RP advising him that the extent of the injury has been determined to include "lumbar spine 2-3 mm disc protrusion/herniation at L5-S1 with anterolisthesis, 2-3 mm disc protrusion/herniation at L4-5 and a mild 1-2 mm protrusion/herniation at L2-3 and L3-4 levels" and that the compensable injury does not include "any hernia diagnosis." Dr. RP replied by letter dated April 22, 2010, stating that he had reviewed the information submitted and was "rescinding the 0% [IR] on the hernia." No mention is made of the lumbar herniations which have been accepted as part of the compensable injury.

The hearing officer adopted Dr. RP's 0% IR stating in the Discussion portion of her decision:

> Claimant's argument that [Dr. RP] failed to rate the entire compensable injury is unpersuasive, since [c]laimant has not demonstrated that his admittedly compensable disc protrusions [herniations] and anterolisthesis compel the award of an [IR] greater than zero.

We hold that the hearing officer misinterpreted Dr. RP's report and response to the April 15, 2010, LOC because Dr. RP did not list the disc protrusions/herniations and anterolisthesis as a diagnosis and omitted any reference to the disc protrusions/herniations and anterolisthesis in assessing the IR. Furthermore, the claimant did submit evidence of lumbar abnormalities which might support an IR greater than zero. Therefore, the preponderance of the evidence, based on Dr. RP's own report and LOC response, is that Dr. RP has failed to rate, or discuss, the disc protrusions/herniations and anterolisthesis that are part of the compensable injury.

In reviewing a "great weight" challenge, we must examine the entire record to determine if: (1) there is only "slight" evidence to support the finding; (2) the finding is so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust; or (3) the great weight and preponderance of the evidence supports its nonexistence. *See* Cain v. Bain, 709 S.W.2d 175 (Tex. 1986). Accordingly, we reverse the hearing officer's determination that the claimant's IR is 0% as being so

against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust.

Also in evidence is a report from (Dr. WP), a referral doctor from the treating doctor. Dr. WP certified clinical MMI as being August 19, 2009, (approximately two weeks prior to the affirmed MMI date from the designated doctor) and assessed a 10% IR based on DRE Lumbosacral Category III: Radiculopathy. Dr. WP's IR cannot be adopted because it was not based on the claimant's condition as of the September 2, 2009, MMI date, which has been affirmed. *See* Rule 130.1(c)(3).

We remand the case back to the hearing officer for further consideration consistent with this opinion. Dr. RP had initially failed to rate the entire compensable injury. Dr. RP is still the designated doctor. On remand the hearing officer is to determine whether Dr. RP is still qualified and available to be the designated doctor, and if so, request that Dr. RP rate the entire compensable injury as accepted by the carrier in accordance with the AMA Guides based on the claimant's condition as of the affirmed September 2, 2009, MMI date considering the medical record, the certifying examination and the rating criteria in the AMA Guides. If Dr. RP is no longer qualified or available or refuses to rate the entire accepted injury in accordance with AMA Guides criteria, then another designated doctor is to be appointed pursuant to Rule 126.7(h) to determine the claimant's IR. If a new designated doctor is appointed he or she is to be advised that the date of MMI is September 2, 2009, and that the doctor is to rate the entire compensable injury including the conditions accepted by the carrier. The parties are to be advised of the designated doctor's appointment and to be allowed to comment and present evidence regarding the designated doctor's report.

SUMMARY

We affirm the hearing officer's determination that the claimant reached MMI on September 2, 2009.

We reverse the hearing officer's determination that the claimant has a 0% IR as a result of his compensable injury of _____, and remand the case to the hearing officer for action consistent with this opinion.

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 **ACE AMERICAN INSURANCE COMPANY** and the name and address of its registered agent for service of process is

CT CORPORATION SYSTEMS
350 NORTH ST. PAUL STREET
DALLAS, TEXAS 75201.

_____
Thomas A. Knapp
Appeals Judge

CONCUR:

_____
Cynthia A. Brown
Appeals Judge

_____
Margaret L. Turner
Appeals Judge