APPEAL NO. 101567
FILED DECEMBER 20, 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 (CCH) was held on August 12, 2010, with the record closing on September 15, 2010. With regard to the issues before her the hearing officer determined that the date of maximum medical improvement (MMI) is June 13, 2008, and that the appellant's (claimant) impairment rating (IR) is five percent.

The claimant appealed, contending that the designated doctor's IR was "invalid" and requested that the case be remanded to the designated doctor to explain the certified MMI date and to rate the entire compensable injury. The respondent (self-insured) responded, urging affirmance.

DECISION

Reversed and remanded.

The medical records reflect that the claimant, a custodian, injured his low back at work, lifting a mop bucket full of water. The parties stipulated that: the claimant sustained a compensable injury on _____; (Dr. K) was the designated doctor appointed by the Texas Department of Insurance, Division of Workers' Compensation (Division) to determine MMI and IR; Dr. K certified that the claimant reached MMI on June 13, 2008, with a five percent IR; (Dr. S) was the second designated doctor appointed to determine MMI and IR; Dr. S certified that the claimant reached MMI on July 21, 2008 "with no permanent impairment"; and that the date of statutory MMI (SMMI) is February 26, 2010.

MMI AND IR

In a prior decision and order dated January 30, 2009 (pre State Office of Risk Mgmt. v. Lawton, 295 S.W.3d 646 (Tex. 2009)) the hearing officer, in that CCH case, determined that the claimant's compensable injury of _____, extended to "bilateral [lumbar intervertebral disc (IVD)], lumbar herniation at L4-5, annular tear at L5-S1 and lumbar radiculopathy" by virtue of carrier waiver and that decision was not appealed.

Dr. K, the first designated doctor, examined the claimant on June 13, 2008, diagnosed a lumbar strain, and certified that the claimant reached MMI on June 13, 2008, with a five percent IR based on Diagnosis-Related Estimate Lumbosacral Category II: Minor Impairment 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). Dr. K referenced March 13, 2008, MRI findings "regarding [a] herniated disc and annular tear"

which he believed were chronic "and do not fit with [the claimant's] mechanism of injury," Dr. K also noted a April 10, 2008, normal lower extremity EMG/NCV. However, as explained later, Dr. K did not rate the entire compensable injury and his certification of MMI and assessment of IR cannot be adopted.

The claimant was subsequently examined by (Dr. B), the treating doctor, on July 21, 2008. Dr. B diagnosed a bilateral IVD and certified that the claimant reached MMI on July 21, 2008, with no permanent impairment. Dr. B did not reference any MRI but did agree with Dr. K's certification of MMI and IR on Dr. K's Report of Medical Evaluation (DWC-69) on July 21, 2008. Dr. B's certification of MMI and assessment of IR cannot be adopted because Dr. B did not rate the lumbar herniation at L4-5, annular tear at L5-S1 and lumbar radiculopathy, administratively found compensable in the January 30, 2009, decision and order and therefore did not rate the entire compensable injury.

Subsequent to the extent-of-injury determination, the claimant, by letter requests dated March 2 and 30, 2010, requested a letter of clarification (LOC) be sent to Dr. K, the designated doctor at that time. The hearing officer, in this case, commented that those requests for LOC were denied and the claimant was instructed to file a new request for a designated doctor examination.

Dr. S was appointed as the second designated doctor to determine MMI and IR. In a DWC-69 and narrative report, both dated April 14, 2009, Dr. S certified MMI on July 21, 2008, with no permanent impairment. Dr. S adopted Dr. B's MMI date because the claimant's "condition has not changed since that time." Dr. S based his assessment of no permanent impairment on a diagnosis of "nonspecific lower back pain" and that the claimant only had "complaints and symptoms." Clearly Dr. S did not rate the entire compensable injury, to include those conditions administratively determined to be compensable in the January 30, 2009, decision and order.

(Dr. N), the claimant's current treating doctor, certified that the claimant reached MMI on June 4, 2010, with a five percent IR. Dr. N's report cannot be adopted because it certified an MMI date after the SMMI date stipulated by the parties. An effort to amend that report and submit an amended DWC-69 with the correct SMMI failed because the amended report was not timely exchanged and the hearing officer found no good cause was shown for the untimely exchange and the admission of the amended DWC-69 into evidence. That evidentiary ruling was not appealed.

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.

The hearing officer adopted Dr. K's report certifying MMI on June 13, 2008, with a five percent IR. The hearing officer justified the MMI date because, "[a]lthough the claimant is pending spinal surgery for this injury, at no time from the date of injury to the date of [SMMI] did he have any lasting improvement in his condition." In Appeals Panel Decision (APD) 012284, decided November 1, 2001, the Appeals Panel noted that the hearing officer appeared to have rejected a designated doctor's later date of MMI because the claimant in that case did not undergo material recovery or lasting improvement. The Appeals Panel referenced Section 401.011(30)(A) which 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." The Appeals Panel commented, in that case, that the question was not whether the claimant actually recovered or improved during the period at issue, but whether, based upon reasonable medical probability, material recovery or lasting improvement could reasonably be anticipated. The Appeals Panel held that "it is of no moment that the treatment did not ultimately prove successful in providing material recovery or lasting improvement in the claimant's condition, where, as here, the recovery and improvement could reasonably be anticipated according to the designated doctor." *See also* APD 072242, decided February 13, 2008.

The hearing officer erred in adopting Dr. K's MMI because the hearing officer did not consider potential further recovery and improvement with additional treatment which might reasonably be anticipated. Furthermore, Dr. K clearly did not rate the entire compensable injury because he only listed a diagnosis of a lumbar strain and was unaware of the subsequent administrative determination of the extent of injury as determined in the January 30, 2009, decision and order. Dr. B's certification of MMI and no permanent impairment cannot be adopted for the same reasons that precludes the adoption of Dr. K's MMI and IR. Since Dr. S was the most recently appointed designated doctor, Dr. S's report, had he rated the entire compensable injury, would have presumptive weight. *See* Section 408.1225(c) and 408.125(c).

Although Dr. S's report was after the January 30, 2009, administrative determination on the extent of injury, his adoption of Dr. B's MMI date and IR cannot be adopted (Dr. S also based his MMI date on no change in condition after July 21, 2008, without consideration of whether treatment, and possible surgery, for the conditions administratively determined to be compensable might change the MMI date). Dr. S's report cannot be adopted because he only diagnosed nonspecific lower back pain and disregarded the determinations in the January 30, 2009, decision and order.

Furthermore, Dr. N's report cannot be adopted because it certified MMI after the stipulated SMMI date.

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). We reverse the hearing officer's determination that the date of MMI is June 13, 2008, and that the claimant's IR is five percent as being so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust. Because there is no report in evidence which can be adopted, we remand the case to the hearing officer for further consideration.

REMAND INSTRUCTIONS

Dr. S is the most recent appointed designated doctor. On remand the hearing officer is to determine if Dr. S is still qualified and available to be the designated doctor and if so, the hearing officer is to advise the designated doctor that it has been administratively determined that the compensable injury includes bilateral IVD, lumbar herniation at L4-5, annular tear at L5-S1 and lumbar radiculopathy. The designated doctor is then to be requested to give an opinion on MMI (which cannot be after the SMMI date) and IR of the entire compensable injury. If Dr. S is no longer qualified or available to serve as the designated doctor, another designated doctor is to be appointed pursuant to Rule 126.7(h) to determine MMI and IR for 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 are to be allowed an opportunity to present evidence and respond.

SUMMARY

The hearing officer's determination that the claimant's MMI is June 13, 2008, with a five percent IR is reversed and the case is remanded to the hearing officer for further action.

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 **(a self-insured governmental entity)** and the name and address of its registered agent for service of process is

SUPERINTENDENT
(ADDRESS)
(CITY), TEXAS (ZIP CODE).

_____
Thomas A. Knapp
Appeals Judge

CONCUR:

Cynthia A. Brown
Appeals Judge

_____
Margaret L. Turner
Appeals Judge