APPEAL NO. 101953
FILED FEBRUARY 14, 2011

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 November 18, 2010. The hearing officer determined that: (1) the appellant (claimant) reached maximum medical improvement (MMI) on August 12, 2009; (2) the claimant's impairment rating (IR) is five percent; and (3) the compensable injury of _____, does not extend to include an injury to the lumbar spine consisting of degenerative disc disease at the L1-2, L2-3, L3-4, and L5-S1 levels, a perineural cyst in the sacral canal, lumbar spondylosis without myelopathy, neuralgia, lumbar radiculopathy, scoliosis, and chronic pain syndrome. The claimant appeals the hearing officer's determinations. The respondent (carrier) responds, urging affirmance.

DECISION

Reversed and remanded.

The parties stipulated that the claimant sustained a compensable injury on _____, and that (Dr. H) was the designated doctor appointed by the Texas Department of Insurance, Division of Workers' Compensation (Division) to determine MMI, IR, and extent of injury.

EXTENT OF INJURY

The hearing officer's determination that the compensable injury of _____, does not extend to include an injury to the lumbar spine consisting of degenerative disc disease at the L1-2, L2-3, L3-4, and L5-S1 levels, a perineural cyst in the sacral canal, lumbar spondylosis without myelopathy, neuralgia, lumbar radiculopathy, scoliosis, and chronic pain syndrome is supported by sufficient evidence and is affirmed.

MMI/IR

Dr. H, the designated doctor, initially examined the claimant on May 1, 2009, to determine MMI and IR. Dr. H determined the claimant had not reached MMI as of that date.

(Dr. G), a post-designated doctor required medical examination doctor, examined the claimant on June 24, 2009, and certified that the claimant reached MMI on May 31, 2009, with a five percent IR.

A letter of clarification (LOC) was sent to Dr. H, and he requested a re-examination of the claimant. Dr. H re-examined the claimant on August 12, 2009, and again determined the claimant had not reached MMI as of that date. Dr. H noted in his narrative report of August 12, 2009, that the claimant's medical treatment had been

suspended, and that she had still not seen a neurosurgeon or had a consultation with a pain management doctor making it difficult to evaluate whether the claimant had been completely treated.

Subsequent to the August 12, 2009, examination, another LOC dated December 29, 2009, was sent to Dr. H along with a surveillance video of the claimant's activities on various dates in October and November 2009. In a response dated January 4, 2010, Dr. H stated:

> After careful review, it appears that no additional treatment has been authorized since my evaluation and there has been no documented change in [the claimant's] condition. In all medical probability, she has reached MMI for her lumbar strain as of August 12, 2009, with a [five percent] whole person impairment.

Dr. H included an amended Report of Medical Evaluation (DWC-69) with his response to the LOC.

On March 24, 2010, an LOC was sent to Dr. H noting additional reports had become available that may have not been included in Dr. H's initial review. Dr. H responded on March 25, 2010, stating there was no documented change in the claimant's condition since the August 12, 2009, evaluation and no additional treatment had been approved other than three office visits, and therefore Dr. H did not change his assessment from his previous January 4, 2010, response.

On April 14, 2010, (Dr. W), the claimant's treating surgeon and a referral doctor, examined the claimant, and on May 3, 2010, completed a DWC-69, noting the claimant had not reached MMI as of that date.

On November 9, 2010, the claimant's treating doctor, (Dr. Ws) examined the claimant and certified that the claimant had not yet reached MMI as of that date. However, Dr. Ws did not attach a narrative to his DWC-69.

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.

As previously mentioned, Dr. H initially examined the claimant on May 1, 2009, and then again on August 12, 2009, and based upon each of those examinations Dr. H determined the claimant had not reached MMI as of either date and did not assign an IR. However, on January 4, 2010, without physically re-examining the claimant, Dr. H amended his prior certification by certifying MMI on August 12, 2009, and assigning a five percent IR based upon the LOCs and the video surveillance submitted after his August 12, 2009, examination. The Appeals Panel has held that an amended certification of MMI/IR done without a medical examination is a violation of Rules 130.1(b)(4)(B) and 130.1(c)(3), which require the certifying doctor to perform a complete medical examination of the injured employee for the explicit purpose of determining MMI/IR. *See* Appeals Panel Decision (APD) 100152, decided April 8, 2010; *See also* APD 010297-s, decided March 29, 2001. Dr. H's amended certification of MMI of August 12, 2009, cannot be adopted because Dr. H amended his certification of MMI without an examination in violation of Rule 130.1(b)(4)(B). Accordingly, we reverse the hearing officer's determination that the claimant reached MMI on August 12, 2009. Given that we have reversed the hearing officer's determination that the claimant reached MMI on August 12, 2009, and given that an IR is required under Rule 130.1(c)(3) to be based on the claimant's condition as of the MMI date, we also reverse the hearing officer's determination that the claimant's IR is five percent.

The report of the designated doctor has presumptive weight. The hearing officer did not determine whether Dr. H's August 12, 2009, certification that the claimant has not reached MMI had presumptive weight. Rather, the hearing officer adopted Dr. H's January 4, 2010, certification, which is in violation of Rules 130.1(b)(4)(B) and 130.1(c)(3). The hearing officer did not determine whether the preponderance of the evidence is contrary to Dr. H's other certification of MMI/IR prior to determining whether there is another certification of MMI/IR in evidence that can be adopted. Accordingly, we remand the MMI and IR issues to the hearing officer.

REMAND INSTRUCTIONS

The hearing officer is to determine whether or not Dr. H's August 12, 2009, certification that the claimant has not reached MMI is supported by, or contrary to, the preponderance of the medical evidence. If the hearing officer determines that Dr. H's August 12, 2009, certification is contrary to the preponderance of the other medical evidence, the hearing officer is to determine whether there is another certification of MMI/IR supported by the evidence that can be adopted.

If the hearing officer determines that there are no other certifications of MMI/IR that are supported by the evidence that can be adopted, the hearing officer is to determine whether Dr. H is still qualified and available to be the designated doctor, and if so, order Dr. H to re-examine the claimant and provide a DWC-69 and narrative report certifying MMI/IR based on the claimant's compensable injury considering the medical record and certifying examination in accordance with this decision. The hearing officer

is to provide the LOC and the designated doctor's response to the parties and allow the parties an opportunity to respond and then make a determination regarding the MMI date and the IR. If Dr. H is no longer qualified and available to serve as the designated doctor, then another designated doctor is to be appointed pursuant to Rule 126.7(h)[1] to determine the claimant's MMI date and IR.

SUMMARY

We affirm the hearing officer's determination that the compensable injury of _____, does not extend to include an injury to the lumbar spine consisting of degenerative disc disease at the L1-2, L2-3, L3-4, and L5-S1 levels, a perineural cyst in the sacral canal, lumbar spondylosis without myelopathy, neuralgia, lumbar radiculopathy, scoliosis, and chronic pain syndrome.

We reverse the hearing officer's determination that the claimant reached MMI on August 12, 2009, and that the claimant's IR is five percent as certified by Dr. H and remand the MMI and IR issues to the hearing officer.

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.

[1] We note that the Division has adopted new rules concerning designated doctor scheduling and examinations effective February 1, 2011. The pertinent part of Rule 126.7(h) cited above is provided in the new Rule 127.5(d).

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 SYSTEM
350 NORTH ST. PAUL STREET
DALLAS, TEXAS 75201.

_____
Carisa Space-Beam
Appeals Judge

CONCUR:

_____
Cynthia A. Brown
Appeals Judge

_____
Thomas A. Knapp
Appeals Judge