APPEAL NO. 130200
FILED MARCH 13, 2013

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 December 18, 2012, in [City], Texas, with [hearing officer] presiding as hearing officer. The hearing officer determined that: (1) the appellant (claimant) had disability beginning April 10, 2012, and continuing through the date of the CCH; (2) the compensable injury of [date of injury], does not extend to diagnoses of L3-4 disc bulge with moderate spinal stenosis, L4-5 herniated disc with extrusion; L5-S1 disc bulge with moderate stenosis and "L4-5 herniated disc with annular tear;" (3) the claimant reached maximum medical improvement (MMI) on April 9, 2012; and (4) the claimant's impairment rating (IR) is five percent. The hearing officer's determination that the claimant had disability beginning April 10, 2012, and continuing through the date of the CCH was not appealed and has therefore, become final pursuant to Section 410.169.

The claimant appealed the extent of injury, MMI and IR determinations, contending that he has not reached MMI and therefore, an IR is premature. The respondent (carrier) responded, urging affirmance.

DECISION

Affirmed in part, reversed and rendered in part, and reversed and remanded in part.

The claimant testified that he sustained a low back injury lifting a heavy box of magazines. The claimant was initially treated by [Dr. H] who in a report dated February 28, 2011, diagnosed low back pain and a lumbosacral sprain. In a report dated April 18, 2011, Dr. H released the claimant to work with restrictions. The claimant subsequently changed treating doctors to [Dr. A] who in a report dated June 8, 2012, diagnosed lumbago, spinal stenosis of the lumbar region, and lumbar disc displacement without myelopathy.

EXTENT OF INJURY

The hearing officer's determination that the compensable injury of [date of injury], does not extend to diagnoses of L3-4 disc bulge with moderate spinal stenosis, L4-5 herniated disc with extrusion, and L5-S1 disc bulge with moderate stenosis, is supported by sufficient evidence and is affirmed.

The extent-of-injury issue from the benefit review conference, and agreed upon by the parties at the CCH, was: "[d]oes the compensable injury of [date of injury], extend to . . . the diagnoses of L3-4 disc bulge with moderate spinal stenosis, L4-5 herniated disc with extrusion and L5-S1 disc bulge with moderate stenosis?" The hearing officer's findings of fact recited those conditions. Nonetheless, in Conclusion of Law No. 4 and the Decision portion of the hearing officer's decision and order, the hearing officer added the condition of "L4-5 herniated disc with annular tear." That condition was not one of the conditions before the hearing officer or agreed or litigated by the parties. Accordingly, we reverse so much of the hearing officer's determination in Conclusion of Law No. 4 and the Decision portion of the hearing officer's decision and order that the compensable injury of [date of injury], does not extend to a L4-5 herniated disc with annular tear as not being an issue before the hearing officer. We render a new decision by striking the words "L4-5 herniated disc with annular tear" from Conclusion of Law No. 4 and the Decision portion of the hearing officer's decision and order.

The parties stipulated that the claimant sustained a compensable injury in the form of a lumbar sprain on [date of injury]. The hearing officer in Finding of Fact No. 1. D. stated that the parties stipulated that the claimant sustained a compensable injury in the form of a lumbar sprain "and lumbago" on [date of injury]. A review of the record indicates that the parties did not stipulate that the compensable injury included

lumbago. We reform the stipulation found in Finding of Fact No. 1. D. by striking the words "and lumbago."

MMI AND 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.

[Dr. C] was the designated doctor appointed to determine MMI, IR and extent of injury. Dr. C examined the claimant on May 23, 2012, and certified clinical MMI on April 9, 2012, with a five percent IR. Regarding the extent of injury, Dr. C wrote that the "extent of the compensable injury is limited to lumbago only." Dr. C explained the MMI date as "this was [the claimant's] last visit with [Dr. A] and by that time [the claimant] has had an epidural steroid injection, which provided improvement for only three to four days and [the claimant] had declined surgery. Therefore, no further treatment was indicated." Dr. C assessed a five percent impairment based on Diagnosis-Related Estimate Lumbosacral Category II: Minor Impairment 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) based on finding non-verifiable radicular complaints. The hearing officer adopted Dr. C's opinion on MMI and IR. However, the parties stipulated that the compensable injury was in the form of a lumbar sprain. The Request for Designated Doctor Examination (DWC-32) in evidence states the injury accepted as compensable by the carrier as "[l]umbar." Dr. C's certification of MMI and assessment of IR cannot be adopted because he failed to rate the stipulated compensable lumbar sprain. *See* Appeals Panel Decision (APD) 043168, decided January 20, 2005; APD 121215,

decided August 30, 2012. There was medical testimony that lumbago means lumbar pain but there was no medical evidence that he equated lumbago to a lumbar sprain.

The only other certification of MMI and IR is from [Dr. S], a doctor selected by the treating doctor acting in place of the treating doctor. Dr. S examined the claimant on August 31, 2012, and certified that the claimant was not at MMI. Dr. S based his certification that the claimant is not at MMI on "the possibility that surgery may help [the claimant] and if that is the case then by definition [the claimant] cannot be at MMI." No surgery has been recommended for a lumbar sprain. Dr. S's certification of MMI cannot be adopted.

Because there are no certifications of MMI and assessment of IR that can be adopted, we reverse the hearing officer's determinations that the claimant reached MMI on April 9, 2012, and that the claimant's IR is five percent and remand the issues of MMI and IR for further action consistent with this decision.

SUMMARY

We affirm the hearing officer's determination that the compensable injury of [date of injury], does not extend to diagnoses of L3-4 disc bulge with moderate spinal stenosis, L4-5 herniated disc with extrusion, and L5-S1 disc bulge with moderate stenosis.

We reverse the hearing officer's Conclusion of Law No. 4 and language in the Decision portion of the hearing officer's decision and order that the compensable injury of [date of injury], does not extend to "L4-5 herniated disc with annular tear" and render a new decision by striking the phrase "L4-5 herniated disc with annular tear."

We reverse the hearing officer's determinations that the claimant reached MMI on April 9, 2012, with a five percent IR and remand the issues of MMI and IR for further action consistent with this decision.

REMAND INSTRUCTIONS

The designated doctor for MMI and IR is Dr. C. On remand, the hearing officer is to determine if Dr. C is still qualified and available to serve as the designated doctor. If Dr. C is no longer qualified or available to serve as the designated doctor, another designated doctor is to be appointed to determine MMI/IR for the compensable injury of [date of injury].

The hearing officer is to advise the designated doctor that the compensable injury of [date of injury], is a lumbar sprain as stipulated to by the parties. The hearing officer is to further advise the designated doctor that the compensable injury does not extend to diagnoses of L3-4 disc bulge with moderate spinal stenosis, L4-5 herniated disc with extrusion, and L5-S1 disc bulge with moderate stenosis.

The designated doctor is then to be requested to give a certification of MMI/IR for the claimant's compensable injury of [date of injury], based on the claimant's condition as of the MMI date, considering the claimant's medical record and the certifying examination.

The parties are to be provided with the hearing officer's letter to the designated doctor and the designated doctor's response. The parties are to be allowed an opportunity to respond. The hearing officer is then to make a determination on MMI/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* APD 060721, decided June 12, 2006.

The true corporate name of the insurance carrier is **GREAT MIDWEST INSURANCE COMPANY** and the name and address of its registered agent for service of process is

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Thomas A. Knapp
Appeals Judge

CONCUR:

Carisa Space-Beam
Appeals Judge

Margaret L. Turner
Appeals Judge