APPEAL NO. 130961
FILED JUNE 3, 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 January 29, 2013, with the record closing on March 22, 2013 in [City], Texas, with [hearing officer] presiding as hearing officer. The hearing officer resolved the disputed issues by deciding that: (1) the compensable injury of [date of injury], does not extend to a disc bulge at T12-L1 and a disc protrusion at L3-4; (2) the appellant (claimant) reached maximum medical improvement (MMI) on August 28, 2011; and (3) the claimant's impairment rating (IR) is five percent. The claimant appealed, disputing the hearing officer's determinations of extent of the injury, MMI, and IR. The respondent (carrier) responded, urging affirmance of the disputed determinations.

DECISION

Affirmed in part and reversed and remanded in part.

The parties stipulated that on [date of injury], the claimant sustained a compensable injury; [Dr. Y] was appointed by the Texas Department of Insurance, Division of Workers' Compensation (Division) as the first designated doctor to address MMI, IR, and extent of injury; [Dr. B] was appointed by the Division as the second designated doctor to address MMI and IR; and [Dr. W] was appointed by the Division as the third designated doctor to address MMI, IR and return to work. The claimant testified that he was injured when he fell 3 ½ to 4 feet off some "scaffolding" while working. The hearing officer noted in the Background Information section of his decision that the accepted compensable injury extends to a chest wall contusion, rib strain, lumbar strain with aggravation of pre-existing degenerative lumbar changes, and left knee strain. The prior decision from a CCH held on August 8, 2012, was in evidence. The prior decision and order determined that the compensable injury of [date of injury]: (1) extends to L4-5 and L5-S1 disc protrusions, L5-S1 radiculopathy and mild to moderate joint effusion of the left knee; (2) the first certification of MMI and IR assigned by Dr. B on October 13, 2011, did not become final under Section 408.123 and 28 TEX. ADMIN. CODE § 130.12 (Rule 130.12); (3) the claimant has not reached MMI; and (4) since the claimant has not reached MMI, he cannot be certified with an IR. Division records indicate that there was no appeal of the CCH held on August 8, 2012.

EXTENT OF INJURY

The hearing officer's determination that the compensable injury of [date of injury], does not extend to a disc bulge at T12-L1 and a disc protrusion at L3-4 is supported by sufficient evidence and is affirmed.

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 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.

Dr. W, the third designated doctor appointed to address MMI and IR, examined the claimant on September 28, 2012. Dr. W certified that the claimant reached MMI on May 9, 2012, with a five percent IR. However, Dr. W's narrative report states that the claimant reached MMI on May 9, 2011. The following diagnoses were given by Dr. W: contusion of the left knee in the presence of myxoid degeneration as noted on imaging studies; degenerative spondylosis of the lower lumbar segment with degenerative disc disease; status post lumbar strain; and chest wall contusion from blunt force trauma. The hearing officer correctly noted in his decision that Dr. W "did not specifically rate the compensable injury." On February 4, 2013, the hearing officer sent a letter of clarification (LOC) to Dr. W asking him to rate the entire compensable injury which included the conditions the carrier accepted (chest wall contusion, rib strain, lumbar strain with aggravation of pre-existing degenerative lumbar changes and left knee strain) and the conditions administratively determined to be part of the compensable injury (L4-5 and L5-S1 disc protrusions, L5-S1 radiculopathy, and mild to moderate joint effusion of the left knee). Further, the hearing officer explained that "just because a claimant's compensable injury includes radiculopathy does not mean it has become severe enough to be rated [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) (AMA Guides)]." Dr. W responded in a letter dated February 6, 2013. Dr. W explained that his previous Report of Medical Evaluation (DWC-69) contained a "typo" of May 9, 2012, but May 9, 2011, was the actual determination of MMI as stated in his narrative. Dr. W explained that if the disc protrusions and radiculopathy are included in the compensable injury it would now add time to the determination of MMI. Dr. W stated "[l]ooking at the [Medical Disability Advisor, Workplace Guidelines for Disability Duration, excluding all sections and tables relating to rehabilitation published by the Reed Group, Ltd. (MDA)]

for medically treated lumbar disc disease, approximately 168 days of disability are considered a maximum for return to work in a very heavy physical demand level. This would make the date of [MMI] on or about August 28, 2011[. . . .]"

Dr. W determined the date of MMI not by specifically considering the claimant's physical examination and medical records but by applying the number of days the MDA states are considered a maximum for return to work in a very heavy physical demand level for medically treated lumbar disc disease. Dr. W did not base the certified date of MMI on the claimant's physical examination and medical records but rather he based his determination of MMI solely on the MDA. Accordingly, the hearing officer's determination of MMI is so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust. *See* Appeals Panel Decision (APD) 130187, decided March 18, 2013, and APD 130191, decided March 13, 2013. We reverse the hearing officer's determination that the claimant reached MMI on August 28, 2011, and that the claimant's IR is five percent.

The other certification from Dr. W in evidence was based on the examination of September 28, 2012. However, as previously discussed, the narrative report listed an MMI date of May 9, 2011, but the DWC-69 certified an MMI date of May 9, 2012. Further, Dr. W in a LOC acknowledged that during his initial certification he did not consider the disc protrusions and radiculopathy which were found to be part of the compensable injury in the prior CCH. Accordingly, the certification from Dr. W that assessed a five percent IR with an MMI date of May 9, 2012, cannot be adopted.

The parties stipulated that Dr. B was appointed by the Division as the second designated doctor to address MMI and IR. Dr. B examined the claimant on October 13, 2011, and certified that the claimant reached MMI on that date with a five percent IR. Dr. B gave as diagnoses: lumbar strain with radicular symptoms, chest contusion, and left knee strain. The hearing officer found in the prior CCH held on August 8, 2012, that Dr. B did not rate the entire compensable injury. The same certification is in evidence in the instant case. Dr. B did not rate the entire compensable injury and accordingly his certification cannot be adopted.

The parties stipulated that Dr. Y was appointed as the first designated doctor to address MMI and IR. Dr. Y examined the claimant on June 27, 2011, and certified that the claimant had not yet reached MMI. Dr. Y considered the following diagnoses regarding his certification: chest wall contusion, rib strain, lumbar strain with aggravation of pre-existing degenerative lumbar changes, and left knee strain. As previously noted, the compensable injury of [date of injury], extends to L4-5 and L5-S1 disc protrusions, L5-S1 radiculopathy and mild to moderate joint effusion of the left

knee. Dr. Y did not consider the entire compensable injury and his certification cannot be adopted.

In evidence is a DWC-69 from [Dr. F], a doctor selected by the treating doctor to act in his place. Dr. F examined the claimant on October 26, 2011, and certified that the claimant was not at MMI but was expected to reach MMI on February 24, 2012. Dr. F based the anticipated MMI date on the completion of a course of lumbar epidural steroid injections, rehabilitative therapies in conjunction to increase the efficacy of the injections, and consideration for participation in a functional restoration program if the claimant continued to be unable to resume his full and normal work duties. There is no evidence in the record that Dr. F examined the claimant a second time after the date he anticipated the claimant would reach MMI. At the time of the January 29, 2013, CCH more than a year had passed since Dr. F opined that the claimant would reach MMI. We note that statutory MMI was not discussed at the CCH and the hearing officer made no mention or finding of when statutory MMI occurred. The date of injury was [date of injury], and the record for the instant CCH closed on March 22, 2013. Section 401.011(30) provides MMI means the earlier of: (A) 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; (B) the expiration of 104 weeks from the date on which income benefits begin to accrue; or (C) the date determined as provided by Section 408.104. It is not clear from the record exactly when the claimant's disability began. However, the compensable injury date is [date of injury], and the claimant's accrual date for income benefits could not have been earlier than March 22, 2011. Given the earliest possible accrual date, the date of statutory MMI for the claimant could not be earlier than March 19, 2013, which is the expiration of 104 weeks from the earliest date on which income benefits could have begun to accrue. The record for the CCH closed on March 22, 2013, and the hearing officer's decision is dated April 1, 2013. Given that the statutory MMI date could be March 19, 2013, we cannot render a decision that the claimant has not reached MMI based on Dr. F's certification.

The claimant's doctor in letters of causation dated April 20, 2012, and September 23, 2012 opined that the claimant was not at MMI. However, in the September 23, 2012, letter the treating doctor based his opinion that the claimant was not at MMI in part on the consideration of conditions that have been determined not to be part of the compensable injury (disc bulge at T12-L1 and a disc protrusion at L3-4). In the letter dated April 20, 2012, the treating doctor also opined that the claimant was not at MMI but discusses only the conditions that were at issue in the August 8, 2012, CCH.

Because there is no certification of MMI/IR in evidence that can be adopted, we remand the issues of MMI and IR to the hearing officer for further action consistent with this decision.

REMAND INSTRUCTIONS

The hearing officer is to make a finding on the date of statutory MMI or have the parties agree or stipulate to the date of statutory MMI. The hearing officer is to advise the designated doctor what the date of statutory MMI is.

Dr. W is the designated doctor in this case. On remand, the hearing officer is to determine whether Dr. W is still qualified and available to be the designated doctor. If Dr. W is no longer qualified or available to serve as the designated doctor, then another designated doctor is to be appointed to determine the claimant's MMI and 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], includes the accepted conditions of chest wall contusion, rib strain, lumbar strain with aggravation of pre-existing degenerative lumbar changes, and left knee strain as well as the conditions found to be part of the compensable injury in the August 8, 2012, CCH, L4-5 and L5-S1 disc protrusions, L5-S1 radiculopathy, and mild to moderate joint effusion of the left knee. Further, the hearing officer is to advise the designated doctor that it has also been administratively determined that the compensable injury of [date of injury], does not include a disc bulge at T12-L1 and a disc protrusion at L3-4.

The certification of MMI can be no later than the statutory date of MMI. The certification of MMI should be 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 considering the physical examination and the claimant's medical records and not based solely on the date the MDA states the claimant could return to work.

The assignment of an IR is required to be based on the claimant's condition as of the MMI date considering the medical records and the certifying examination and according to the rating criteria of the AMA Guides and the provisions of Rule 130.1(c)(3). The parties are to be allowed an opportunity to respond. The hearing officer is to determine the issues of 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* APD 060721, decided June 12, 2006.

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

CORPORATION SERVICE COMPANY
211 EAST 7TH STREET, SUITE 620
AUSTIN, TEXAS 78701-3218.

Margaret L. Turner
Appeals Judge

CONCUR:

Veronica L. Ruberto
Appeals Judge

Carisa Space-Beam
Appeals Judge