APPEAL NO. 131085
FILED JUNE 27, 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 was held on April 3, 2013, in [City], Texas, with [hearing officer presiding as hearing officer. The hearing officer resolved the disputed issues by deciding that: (1) the appellant's (claimant) compensable injury of [date of injury], does not extend to herniated nucleus pulposes (HNPs) at the C5-6 and L4-5 levels at any time; (2) since February 13, 2012, the claimant's compensable injury of [date of injury], has continued to extend to sprains/strains of the left shoulder and lumbar spine; (3) the claimant reached maximum medical improvement (MMI) on May 4, 2011; (4) the claimant has a 12% whole body impairment rating (IR) as a result of her compensable injury of [date of injury]; and (5) the claimant has sustained no disability since May 5, 2012.

The claimant appealed the hearing officer's extent-of-injury determination adverse to her as well as the hearing officer's MMI, IR, and disability determinations. The respondent (self-insured) responded, urging affirmance. The hearing officer's determination that the claimant's compensable injury of [date of injury], has continued to extend to sprains/strains of the left shoulder and lumbar spine have not been appealed and have become final pursuant to Section 410.169.

DECISION

Affirmed in part and reversed and remanded in part.

The claimant testified that she worked as a bus attendant for the employer and that her job was to tie down and secure wheelchairs used by children riding the bus and to ensure the children were sitting in their seats. The claimant testified that she was injured on [date of injury], when one of the children on the bus pushed her, which resulted in the claimant falling against a window and onto the floor of the bus. Although the parties did not make a stipulation as to what the self-insured accepted as the compensable injury, a Request for Designated Doctor Examination (DWC-32) submitted by the self-insured on January 26, 2012, lists the injuries accepted as compensable by the self-insured as "soft tissue sprains of the cervical, lumbar, and left shoulder areas." It was undisputed that the compensable injury includes a cervical injury.

EXTENT OF INJURY AND DISABILITY

The hearing officer's determinations that the compensable injury of [date of injury], does not extend to HNPs at the C5-6 and L4-5 levels at any time, and that the

claimant has sustained no disability since May 5, 2012, are supported by sufficient evidence and are affirmed.

MMI AND IR

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) (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 determined that the claimant reached MMI on May 4, 2011, with a 12% IR per [Dr. T], the designated doctor appointed by the Division to determine in part the claimant's MMI and IR.

Dr. T initially examined the claimant on February 13, 2012, and in a Report of Medical Evaluation (DWC-69) dated that same date certified the claimant had not reached MMI as of that date but was expected to do so on or about April 13, 2012.

Dr. T next examined the claimant on June 4, 2012, and in a DWC-69 dated that same date certified the claimant reached clinical MMI on May 4, 2012, with a 12% IR. In an accompanying narrative report dated June 4, 2012, Dr. T noted that the accepted diagnoses were lumbar contusion, cervical contusion, and left shoulder contusion. Dr. T stated that extent of the claimant's injury is a neck sprain with herniated nucleus pulposus (HNP) cervical, back sprain with HNP lumbar, and a shoulder sprain with possible torn rotator cuff tear.

Regarding the claimant's date of MMI, Dr. T stated in his narrative that the claimant was found not to have reached MMI "for [the] disputed diagnoses" because the claimant: was booked for intrathecal corticosteroid for the lower back; would benefit from repeat MRIs of the neck and lower back; would benefit from physical therapy to teach her proper cervical posture; would benefit from a soft cervical collar and a cervical pillow; needs EMG and nerve conduction studies "of the hand;" and would benefit from a lumbar 5-inch belt and lumbar pillow to prevent slouching of the lumbar area.

However, Dr. T also stated that, considering the accepted injuries only, the claimant reached MMI on May 4, 2011. Dr. T noted "[t]he [Medical Disability Advisor, Workplace Guidelines for Disability Duration, excluding all sections and tables relating to rehabilitation published by the Reed Group, Ltd. (MDA)] allows 42 days maximum disability for the accepted injuries." Dr. T stated that "[a]ccording to the accepted medical standards, that date has been determined as May 4, 2011."

Dr. T assigned a 12% IR by combining a 3% upper extremity impairment based on range of motion measurements of the claimant's left shoulder (which converts to a 2% whole person impairment) with a 5% impairment for the claimant's cervical spine using Diagnosis-Related Estimate (DRE) Cervicothoracic Category II: Minor Impairment, and a 5% impairment for the claimant's lumbar spine using DRE Lumbosacral Category II: Minor Impairment.

Dr. T's certification that the claimant reached MMI on May 4, 2011, with a 12% IR cannot be adopted. The Appeals Panel has previously held that the MDA cannot be used alone, without considering the claimant's physical examination and medical records, in determining a claimant's date of MMI. *See* Appeals Panel Decision (APD) 130191, decided March 13, 2013, and APD 130187, decided March 18, 2013. As Dr. T based his date of MMI on the MDA without considering the claimant's physical examination and medical records, his MMI/IR certification cannot be adopted. Accordingly, we reverse the hearing officer's determination that the claimant reached MMI on May 4, 2011, with a 12% IR.

There are two other MMI/IR certifications in evidence. The first is Dr. T's alternate June 4, 2012, certification that the claimant has not reached MMI based on diagnoses of a neck sprain with HNP cervical, back sprain with HNP lumbar, and a shoulder sprain with possible torn rotator cuff tear. Nothing in evidence established that the compensable injury includes a possible torn rotator cuff tear, nor did the parties litigate this condition at the hearing. As previously noted, the hearing officer's determination that the compensable injury of [date of injury], does not extend to HNPs at the C5-6 and L4-5 levels at any time has been affirmed. Dr. T's certification that the claimant has not reached MMI is based on conditions not considered part of the compensable injury, and as such it cannot be adopted. *See* APD 110463, decided June 13, 2011; and APD 101567, decided December 20, 2010.

The second MMI/IR certification in evidence is from [Dr. O], a doctor selected by the treating doctor to act in place of the treating doctor. In a DWC-69 dated March 30, 2012, Dr. O indicates that he examined the claimant on that same date, and certified that the claimant reached clinical MMI on May 3, 2011, with a 0% IR. However, there is no narrative report from Dr. O attached to his DWC-69. Rule 130.1(d)(1) states that a

certification of MMI and assignment of an IR requires completion, signing and submission of the DWC-69 and a narrative report. The evidence does not contain a narrative report signed by Dr. O; therefore, his MMI/IR certification cannot be adopted.

Since there are no other MMI/IR certifications 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.

SUMMARY

We affirm the hearing officer's determination that the compensable injury of [date of injury], does not extend to HNPs at the C5-6 and L4-5 levels at any time.

We affirm the hearing officer's determination that the claimant has sustained no disability since May 5, 2012.

We reverse the hearing officer's determinations that the claimant reached MMI on May 4, 2011, and that the claimant has a 12% IR as a result of her compensable injury of [date of injury], and we remand the issues of MMI and IR to the hearing officer for action consistent with this decision.

REMAND INSTRUCTIONS

Dr. T is the designated doctor in this case. On remand, the hearing officer is to determine whether Dr. T is still qualified and available to be the designated doctor. If Dr. T 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 [date of injury], compensable injury.

The hearing officer is to advise the designated doctor that the compensable injury of [date of injury], includes sprains/strains of the left shoulder and lumbar spine as administratively determined and a cervical injury as accepted by the self-insured. The hearing officer is also to advise the designated doctor that the [date of injury], compensable injury does not extend to HNPs at the C5-6 and L4-5 levels at any time. The hearing officer is to request the designated doctor to give an opinion on the claimant's MMI and rate the entire compensable injury in accordance with 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) considering the medical record and the certifying examination.

The parties are to be provided with the designated doctor's new MMI/IR certification and are to be allowed an opportunity to respond. The hearing officer is then to make a determination on 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 **KLEIN INDEPENDENT SCHOOL DISTRICT (a self-insured governmental entity)** and the name and address of its registered agent for service of process is

DR. JAMES W. CAIN
7200 SPRING CYPRESS ROAD
KLEIN, TEXAS 77379.

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Carisa Space-Beam
Appeals Judge

CONCUR:

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Veronica L. Ruberto
Appeals Judge

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Margaret L. Turner
Appeals Judge