APPEAL NO. 131782
FILED SEPTEMBER 19, 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 April 1, 2013, in (Docket No. 1), in [City], Texas, with [hearing officer] presiding as hearing officer. The respondent (claimant) did not appear at the April 1, 2013, CCH. A 10-day show cause letter for his failure to appear was sent to the claimant, and the claimant responded. At a CCH held on June 26, 2013, the parties requested that Docket No.1 and (Docket 2) be consolidated. With regard to Docket No. 1, the issue in dispute was whether the compensable injury of [date of injury], extends to lumbar spine moderate to severe neural foraminal stenosis, L2-3 broad 4-5 mm disc protrusion, L3-4 broad 5 mm disc protrusion, L4-5 broad 5-6 mm disc protrusion, L5-S1 5 mm disc protrusion, and lumbar radiculopathy. With regard to Docket No. 2, the issue in dispute was the claimant's impairment rating (IR). A consolidated CCH was held on June 26, 2013, in [City], Texas, with [hearing officer] presiding as hearing officer. In an unappealed finding, the hearing officer found that the claimant had good cause for his failure to appear at the CCH on April 1, 2013.

The hearing officer resolved the disputed issues by deciding that: (1) the compensable injury of [date of injury], extends to lumbar spine moderate to severe neural foraminal stenosis, L2-3 broad 4-5 mm disc protrusion, L3-4 broad 5 mm disc protrusion, L4-5 broad 5-6 mm disc protrusion, L5-S1 5 mm disc protrusion, and lumbar radiculopathy; and (2) the claimant's IR is five percent. The appellant (carrier) appealed the hearing officer's extent of injury and IR determinations. On appeal, the carrier contends that there is insufficient expert medical evidence to support the hearing officer's extent-of-injury determination. Further, the carrier contends that the certification adopted by the hearing officer does not rate the entire compensable injury, which includes a cervical strain/sprain. The claimant responded, urging affirmance of the disputed determinations.

DECISION

Reformed in part, affirmed in part, reversed and rendered in part, and reversed and remanded in part.

The claimant testified that he sustained cervical and lumbar injuries in a motor vehicle accident on [date of injury]. The claimant testified that he was driving an 18-wheeler during a snowstorm and when he came to a stop he was struck from behind by another 18-wheeler. The parties stipulated that on [date of injury], the claimant sustained a compensable injury that included at least lumbar and cervical strain/sprains.

OMITTED STIPULATIONS

We note that the hearing officer's decision omitted stipulations made by the parties at the CCH on June 26, 2013. The following stipulations as stated in the record were entered by the parties at the CCH on June 26, 2013:

Findings of Fact Nos. 1.

E. The Texas Department of Insurance, Division of Workers' Compensation (Division) selected [Dr. B] as the designated doctor on the issues of maximum medical improvement (MMI) and IR.

F. The designated doctor certified that the claimant reached MMI on October 15, 2012, with a zero percent IR.

G. The claimant reached MMI on October 15, 2012, as certified by Dr. B, the Division appointed designated doctor, and [Dr. M], the treating doctor referral.

We reform the hearing officer's decision and order by adding Findings of Fact Nos. 1.E, 1.F, and 1.G to the hearing officer's decision.

EXTENT OF INJURY

That portion of the hearing officer's determination that the compensable injury of [date of injury], extends to L2-3 broad 4-5 mm disc protrusion, L3-4 broad 5 mm disc protrusion, L4-5 broad 5-6 mm disc protrusion, L5-S1 5 mm disc protrusion, and lumbar radiculopathy is supported by sufficient evidence and is affirmed.

That portion of the hearing officer's determination that the compensable injury of [date of injury], extends to lumbar spine moderate to severe neural foraminal stenosis is so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust. In this case, the condition of "lumbar spine moderate to severe neural foraminal stenosis" is a condition that requires expert evidence to establish a causal connection with the compensable injury. *See* City of Laredo v. Garza, 293 S.W.3d 625 (Tex. App.-San Antonio 2009, no pet.) citing Guevara v. Ferrer, 247 S.W.3d 662 (Tex. 2007).

In evidence is an MRI of the lumbar spine dated April 12, 2012, that shows an impression of stenosis at L3-4, L4-5, and neural foraminal narrowing at L2-3, L3-4, L4-5 and L5-S1. At the CCH, the claimant relied on [Dr. G] undated medical report to establish causation between the compensable injury and extent-of-injury conditions in dispute. In the Background Information section of the decision the hearing officer states

that “[i]n addition to the clinical and diagnostic findings, [the] [c]laimant relies on a causation letter . . . from [Dr. G]” and that causation letter “provides an explanation and rationale for his opinion” that the compensable injury caused the extent-of-injury conditions in dispute. However, Dr. G does not specifically reference in that letter the condition of lumbar spine moderate to severe neural foraminal stenosis. Furthermore, in Appeals Panel Decision (APD) 120041, decided March 12, 2012, the Appeals Panel stated “[w]hile the claimed conditions are all mentioned in various reports and diagnostic studies, there is insufficient medical evidence linking the claimed conditions to the compensable injury or explaining how the mechanism of the injury caused the claimed conditions.”

Under the facts of this case, Dr. G’s causation does not establish by expert evidence that lumbar spine moderate to severe neural foraminal stenosis is related to the compensable injury within a reasonable degree of medical probability. In reviewing the record, we note that none of the medical reports in evidence provide any explanation of causation for how the lumbar spine moderate to severe neural foraminal stenosis was caused by the claimant’s work injury of [date of injury]. We reverse that portion of the hearing officer’s determination that the compensable injury of [date of injury], extends to lumbar spine moderate to severe neural foraminal stenosis and we render a new decision that the compensable injury of [date of injury], does not extend to lumbar spine moderate to severe neural foraminal stenosis.

IR

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. *See* 28 TEX. ADMIN. CODE § 130.1(c)(3) (Rule 130.1(c)(3)).

In this case, there are two certifications of MMI/IR in evidence, one from Dr. B, the designated doctor, and one from Dr. M, the referral treating doctor. As previously mentioned, the parties stipulated that the claimant reached MMI on October 15, 2012, in accordance with the findings of Dr. B and Dr. M. In the Background Information section of the decision, the hearing officer correctly stated that Dr. B’s certification of MMI/IR cannot be adopted because he did not rate the entire compensable injury, which includes L2-3 broad 4-5 mm disc protrusion, L3-4 broad 5 mm disc protrusion, L4-5 broad 5-6 mm disc protrusion, L5-S1 5 mm disc protrusion, and lumbar radiculopathy determined by the hearing officer, and affirmed to be part of the compensable injury. *See* APD 130943, decided June 13, 2013; APD 110267, decided April 19, 2011.

The hearing officer adopted Dr. M's certification that the claimant reached MMI on October 15, 2012, with a five percent IR. As previously mentioned, the parties stipulated that the compensable injury includes a cervical strain/sprain. In the Background Information section of the decision, the hearing officer states that the "cervical condition has resolved" and "[n]o purpose would be served by sending [Dr. M] a letter of clarification regarding the absence of a rating for the resolved cervical strain/sprain that the [designated doctor] rated at [zero percent]." Dr. M examined the claimant on January 14, 2013, and assessed an impairment for the lumbar spine, however, he did not assess an impairment for the cervical spine. Dr. M's report does not specify that the claimant's cervical sprain/strain has resolved. Dr. M did not consider the cervical spine when he assessed an impairment for the compensable injury. Dr. M's certification of MMI/IR cannot be adopted. *See* APD 130943, *supra*; and APD 110267, *supra*.

As there are no certifications of MMI and IR, with a date of MMI of October 15, 2012, in evidence that can be adopted, we remand the IR issue back to the hearing officer for further action consistent with this decision.

SUMMARY

We reform the hearing officer's decision and order by adding Findings of Fact Nos. 1.E, 1.F, and 1.G to the hearing officer's decision.

We affirm that portion of the hearing officer's determination that the compensable injury of [date of injury], extends to L2-3 broad 4-5 mm disc protrusion, L3-4 broad 5 mm disc protrusion, L4-5 broad 5-6 mm disc protrusion, L5-S1 5 mm disc protrusion, and lumbar radiculopathy.

We reverse that portion of the hearing officer's decision that the compensable injury of [date of injury], extends to lumbar spine moderate to severe neural foraminal stenosis and we render a new decision that the compensable injury of [date of injury], does not extend to lumbar spine moderate to severe neural foraminal stenosis.

We reverse the hearing officer's determination that the claimant's IR is five percent and we remand the IR issue to the hearing officer for further action consistent with this decision.

REMAND INSTRUCTIONS

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

The hearing officer is to advise the designated doctor that the claimant reached MMI on October 15, 2012, as stipulated by the parties. The hearing officer is to advise the designated doctor that the compensable injury of [date of injury], includes a cervical sprain/strain, lumbar sprain/strain, L2-3 broad 4-5 mm disc protrusion, L3-4 broad 5 mm disc protrusion, L4-5 broad 5-6 mm disc protrusion, L5-S1 5 mm disc protrusion and lumbar radiculopathy. The hearing officer is also to advise the designated doctor that the compensable injury of [date of injury], does not extend to lumbar spine moderate to severe neural foraminal stenosis. The hearing officer is to request that the designated doctor rate the entire compensable injury of [date of 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) (AMA Guides) based on the claimant's condition as of the stipulated MMI date, October 15, 2012, considering the claimant's medical record and the certifying examination. The AMA Guides indicate that to find radiculopathy, doctors must look to see if there is a loss of relevant reflexes or unilateral atrophy with greater than a two centimeter decrease in circumference compared with the unaffected side. *See* APD 030091-s, decided March 5, 2003.

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 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 **OLD REPUBLIC 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.

Veronica L. Ruberto
Appeals Judge

CONCUR:

Carisa Space-Beam
Appeals Judge

Margaret L. Turner
Appeals Judge