APPEAL NO. 131784
FILED SEPTEMBER 23, 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 June 27, 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 extends to lumbar strain/sprain; (2) the appellant (claimant) reached maximum medical improvement (MMI) on July 1, 2011; and (3) the claimant's impairment rating (IR) is zero percent. The claimant appealed all of the hearing officer's determinations. The claimant contends that the hearing officer erred in denying his motion for continuance to fully develop the extent-of-injury issue. The claimant further contends that the July 1, 2011, date of MMI and zero percent IR fails to rate the entire compensable injury. The respondent (carrier) responds, urging affirmance. The hearing officer's determination that the compensable injury extends to lumbar strain/sprain has not been appealed and has therefore become final pursuant to Section 410.169.

DECISION

Reversed and remanded.

The parties stipulated that the claimant sustained a compensable injury on [date of injury]. The claimant, a truck driver for the employer, testified that he was injured when he tried to prevent a pallet of freight he was turning from jamming against the wall of a truck.

BACKGROUND INFORMATION

The claimant sustained a compensable injury on [date of injury]. On October 8, 2012, the carrier submitted a Request for Designated Doctor Examination (DWC-32) for a designated doctor to address MMI, IR, disability, and return to work. In Box 37, which requests the party submitting the DWC-32 to list all injuries determined to be compensable by the Texas Department of Insurance, Division of Workers' Compensation (Division) or accepted as compensable by the carrier, the carrier listed the following conditions: "[l]umbar strain, lumbar disc herniation, right leg neuropathy." The Division appointed [Dr. L] to opine on MMI, IR, disability, and return to work, but not extent of injury.

Dr. L examined the claimant on November 28, 2012, and in a Report of Medical Evaluation (DWC-69) and narrative report certified that the claimant reached clinical MMI on July 1, 2011, with a zero percent IR. In his narrative report Dr. L stated that the

claimant was seen at the request of the Division to "determine [IR], [MMI], **extent of injury** [emphasis added], and return to work." Dr. L diagnosed the claimant with a lumbar sprain/strain. Dr. L stated that:

The peer review dated [July 25, 2012], notes the [claimant] had preexisting diabetes as well as chronic degenerative disease of the lumbar spine which will wax and wane and that treatment related to the injury should have been completed within 10 weeks with which this examiner agrees. Also as noted in the peer review . . . the peroneal neuropathy which developed almost a year after the injury is unrelated to it.

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Based on reasonable medical probability, the incident giving rise to the compensable injury is lumbar sprain/strain causing low back. Based on reasonable medical probability, the right leg foot drop and chronic changes in the lumbar spine are not a direct result of the incident. . . . The [claimant] also denies injury to the right leg in the work incident, nor is there other evidence that the right leg was injured at that time.

Dr. L placed the claimant in Diagnosis-Related Estimate Lumbosacral Category I: Complaints or Symptoms for zero percent IR. Dr. L also opined on disability and return to work. As previously noted, Dr. L was not specifically asked or appointed to opine on extent of injury.

At the benefit review conference (BRC) held on April 25, 2013, the claimant requested Dr. L be sent a letter of clarification (LOC) to notify Dr. L that Box 37 of the DWC-32 indicated he should have considered and rated the conditions of lumbar disc herniation and right leg neuropathy in addition to the lumbar strain; however, the claimant's request was denied. The issues certified out of the BRC were only MMI and IR.

On April 30, 2013, five days after the conclusion of the BRC, the carrier issued the first Notice of Disputed Issue(s) and Refusal to Pay Benefits (PLN-11). In this PLN-11 the carrier stated the compensable injury "is limited to a lumbar sprain/strain only per the events of [date of injury]. [The] [c]arrier specifically disputes any diagnosis of a lumbar disc herniation, radiculopathy, drop foot or right leg neuropathy as part of a pre-existing and degenerative condition."

At the CCH held on June 27, 2013, the claimant identified an extent-of-injury issue and requested a continuance to fully develop this issue. The hearing officer added the issue as "[w]hat is [the] [c]laimant's extent of injury" but denied the claimant's request for continuance. The hearing officer found in Finding of Fact No. 5 that "[the] [c]laimant's herniated lumbar disc, right lumbar radiculopathy, and acute right peroneal

neuropathy at the fibular head did not arise out of or naturally flow from the compensable injury and were not worsened, enhanced, or accelerated by the compensable injury." The hearing officer determined that the compensable injury extends to lumbar strain/sprain, which as previously noted, has not been appealed and has become final.

The claimant contends that the hearing officer erred in denying his request for a continuance. Rulings on continuances are reviewed under an abuse-of-discretion standard and the Appeals Panel will not disturb the hearing officer's ruling on a continuance absent an abuse of discretion. Hernandez v. Hernandez, 611 S.W.2d 732 (Tex. Civ. App.-San Antonio 1981, no writ).

The carrier indicated in the DWC-32 filed on October 8, 2012, that the conditions determined to be compensable by the Division or accepted as compensable by the carrier at that time were lumbar strain, lumbar disc herniation, and right leg neuropathy. The carrier did not put the claimant on notice that it was disputing the conditions of lumbar disc herniation and right leg neuropathy until it filed the April 30, 2013, PLN-11, five days after the April 25, 2013, BRC had concluded. When questioned by the hearing officer regarding his request for continuance, the claimant stated that he had attempted to obtain an opinion from his treating doctor regarding the extent of injury after receiving the carrier's April 30, 2013, PLN-11 but the claimant's treating doctor would not examine him without the carrier's approval. We note that the claimant also stated at the CCH that he had not attempted to contact another doctor, nor had he submitted a DWC-32 for a designated doctor to opine on an extent-of-injury issue. However, under the facts of this case, where the carrier filed a dispute after the conclusion of a BRC and prior to a CCH of conditions previously considered to be a part of the compensable injury and the issue of extent is raised for the first time at the CCH, we hold that the hearing officer abused her discretion in denying the claimant's request for a continuance to further develop the extent-of-injury dispute.

As previously mentioned, the extent-of-injury issue was worded as "[w]hat is [the] [c]laimant's extent of injury?" The hearing officer made the following findings of fact:

Finding of Fact No. 3: [the] [c]laimant has been diagnosed with lumbar strain/sprain, herniated lumbar disc, right lumbar radiculopathy, and acute right peroneal neuropathy at the fibular head.

Finding of Fact No. 5: [the] [c]laimant's herniated lumbar disc, right lumbar radiculopathy, and acute right peroneal neuropathy at the fibular head did not arise out of or naturally flow from the compensable injury and were not worsened, enhanced or accelerated by the compensable injury.

Although the extent-of-injury issue was phrased broadly, the hearing officer made findings of fact regarding specific conditions. We therefore remand the issue of whether the compensable injury of [date of injury], extends to herniated lumbar disc, right lumbar radiculopathy, and acute right peroneal neuropathy at the fibular head to the hearing officer for further action consistent with this decision. Additionally, because we have remanded the extent-of-injury issue, we also reverse the hearing officer's determinations that the claimant reached MMI on July 1, 2011, with a zero percent IR, and we remand the issues of MMI and IR to the hearing officer for further action consistent with this decision.

REMAND INSTRUCTIONS

Dr. L is the designated doctor in this case. On remand, the hearing officer is to determine whether Dr. L is still qualified and available to be the designated doctor. If Dr. L is no longer qualified or available to serve as the designated doctor, then another designated doctor is to be appointed to determine extent of injury and the claimant's MMI and IR for the [date of injury], compensable injury.

The hearing officer is to ask the parties to stipulate to the date of statutory MMI or to make a finding regarding the date of statutory MMI. The hearing officer is to notify the designated doctor the date of statutory MMI, and to request the designated doctor to give an opinion on the extent of the [date of injury], injury, which includes lumbar strain/sprain as administratively determined. The hearing officer is also to request the designated doctor to give an opinion on the claimant's date of MMI, which cannot be after the date of statutory MMI, and rate the entire [date of injury], 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). The hearing officer is to request the designated doctor to give alternative MMI/IR certifications to consider the administratively determined lumbar strain/sprain as well as the disputed extent-of-injury conditions of herniated lumbar disc, right lumbar radiculopathy, and acute right peroneal neuropathy at the fibular head.

The parties are to be provided with the designated doctor's extent-of-injury opinion and the new MMI/IR certifications and are to be allowed an opportunity to provide further evidence. The hearing officer is then to make a determination on extent of injury, 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* Appeals Panel Decision 060721, decided June 12, 2006.

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

DAVID SARGENT
901 MAIN STREET, SUITE 5200
DALLAS, TEXAS 75202.

Carisa Space-Beam
Appeals Judge

CONCUR:

Veronica L. Ruberto
Appeals Judge

Margaret L. Turner
Appeals Judge