

APPEAL NO. 132028
FILED OCTOBER 14, 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 July 22, 2013, in [City], Texas, with [hearing officer] presiding as hearing officer. The four disputed issues certified out of the benefit review conference (BRC) held on March 7, 2013, were: (1) Does the compensable injury of [date of injury], extend to an aggravation of lumbar stenosis at L3-4 and L4-5, multilevel spondylosis, lumbar radiculopathy, lumbar disc disease at L5-S1, lumbar herniated disc displacement, and lumbar radiculitis?; (2) Has the appellant (claimant) reached maximum medical improvement (MMI), and if so, on what date?; (3) If the claimant has reached MMI, what is the impairment rating (IR)?; and (4) Did the claimant have disability resulting from the compensable injury, for the period of May 26, 2012, through the present?

With regard to the extent-of-injury issue, the hearing officer determined that the claimant's compensable injury of [date of injury], does not extend to an aggravation of lumbar stenosis at L3-4 and L4-5, multilevel spondylosis, lumbar radiculopathy, L5-S1 disc disease, lumbar herniated disc displacement, and lumbar radiculitis.

With regard to the MMI, IR, and disability issues, at the CCH held on July 22, 2013, the parties agreed on the record that: (1) the claimant reached MMI on May 25, 2012, per the designated doctor's certification; (2) the claimant's IR is 10%, per the designated doctor's certification; and (3) the disability issue would not be heard at that time. The hearing officer includes a footnote in her decision stating that the parties agreed on the issues of MMI, IR, and disability. The hearing officer failed to make any findings of fact or conclusions of law in her decision regarding the MMI, IR, and disability issues as agreed to by the parties at the CCH.

The claimant appeals the hearing officer's determinations that were adverse to him. Also, the claimant contends that the hearing officer failed to make determinations on the issues of MMI, IR, and disability. The respondent (self-insured) responded, urging affirmance. The self-insured does not address the claimant's specific points of contention on appeal regarding the parties' agreement on the issues of MMI, IR, and disability.

DECISION

Reversed and remanded.

The claimant, a maintenance worker, testified that he slipped and fell backwards as he was opening a manhole which resulted in him injuring his back on [date of injury].

The Texas Department of Insurance, Division of Workers' Compensation (Division) appointed [Dr. J-C] to opine on the issues of MMI, IR, and extent of injury. Dr. J-C examined the claimant on May 25, 2012, and in a Report of Medical Evaluation (DWC-69) certified that the claimant reached MMI on May 25, 2012, with a 10% IR 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). In her narrative report dated June 4, 2012, Dr. J-C diagnosed the claimant with a lumbosacral strain and contusion, lumbar radiculopathy, and contusion of the buttocks. Dr. J-C assessed a 10% IR based on Table 72, page 3/110 of the AMA Guides, Diagnosis-Related Estimate Lumbosacral Category III: Radiculopathy, for lumbar radiculopathy.

EXTENT OF INJURY, MMI, AND IR

28 TEX. ADMIN. CODE § 147.4(c) (Rule 147.4(c)) provides that an oral agreement reached during a CCH and preserved in the record is effective and binding on the date made. But even where the parties make an agreement on the record at a CCH, a hearing officer may not permit an agreement to be made that is contrary to the 1989 Act and the rules. See Appeals Panel Decision (APD) 020394, decided April 10, 2002.

The Appeals Panel has held that the resolution of a dispute over an IR cannot proceed unless the "threshold" issue of extent of injury is resolved either by the parties or by the hearing officer. See APD 090639, decided July 3, 2009. The issues of extent of injury, MMI, IR, and disability were properly before the hearing officer. At the CCH, the parties stated that they were in agreement with the designated doctor's certification of MMI/IR; however, they were disputing the extent of the compensable injury. With regard to the extent-of-injury issue, the hearing officer determined, in part, that the claimant's compensable injury does not extend to lumbar radiculopathy. However, the hearing officer permitted an agreement by the parties that the claimant's IR is 10% per the designated doctor. As previously mentioned, the designated doctor assessed a 10% IR for lumbar radiculopathy, a condition the hearing officer determined not to be part of the compensable injury.

Furthermore, as previously mentioned, the hearing officer included a footnote in her decision that the parties agreed on the disputed issues of MMI and IR. However, the hearing officer failed to make any findings of fact or conclusions of law in her decision regarding the MMI and IR issues. Rule 142.16(a)(2) provides in part that a decision shall include findings of fact and conclusions of law. In APD 131684, decided September 13, 2013, an extent-of-injury issue was before the hearing officer. The hearing officer included a footnote in her decision stating that a partial rotator cuff tear

was reported out of the BRC, and that the self-insured acknowledged on the record at the CCH that the partial rotator cuff tear was accepted as part of the compensable injury. However, there was no stipulation on the record that the self-insured had accepted a partial rotator cuff tear as part of the compensable injury. The Appeals Panel stated that without either a stipulation or findings of fact, conclusions of law, or a decision, the compensability of a partial rotator cuff tear, which was a condition properly before the hearing officer, was never decided. The Appeals Panel reversed that portion of the hearing officer's extent-of-injury determination as incomplete and remanded the issue of whether the compensable injury extended to a partial rotator cuff tear to the hearing officer for a determination. In this case, the hearing officer failed to make findings of fact, conclusions of law, or a decision with regard to the issues of MMI and IR, therefore, her decision is incomplete as to the issues of MMI and IR.

With regard to the disability issue, the parties agreed to not litigate the disability issue; however, the parties did not agree to withdraw the disability issue. Although, the hearing officer mentions the disability issue in a footnote by stating that the parties' agreement "obviated the need to consider any question of disability," the hearing officer failed to make findings of fact, conclusions of law, or decision on the disability issue. See Rule 142.16(a)(2).

In this case, the hearing officer erred in permitting an oral agreement on the issues MMI and IR when the extent-of-injury issue had not been resolved, and we note that the hearing officer's determination on the extent-of-injury issue is in conflict with the IR agreed to by the parties because the IR included a condition determined by the hearing officer not to be part of the compensable injury. Also, the hearing officer failed to address and make any findings of fact or conclusions of law in her decision on the issues of MMI, IR, and disability as stated in the BRC report. Accordingly, we reverse the hearing officer's extent of injury, MMI, IR, and disability determinations and we remand the issues of extent of injury, MMI, IR and disability to the hearing officer.

SUMMARY

We reverse the hearing officer's determination that the claimant's compensable injury of [date of injury], does not extend to an aggravation of lumbar stenosis at L3-4 and L4-5, multilevel spondylosis, lumbar radiculopathy, L5-S1 disc disease, lumbar herniated disc displacement, and lumbar radiculitis, and we remand to the hearing officer to determine whether the claimant's compensable injury of [date of injury], extends to an aggravation of lumbar stenosis at L3-4 and L4-5, multilevel spondylosis, lumbar radiculopathy, L5-S1 disc disease, lumbar herniated disc displacement, and lumbar radiculitis, to make a determination consistent with this decision.

We reverse the hearing officer's decision as incomplete as to the issues of MMI, IR, and disability, and we remand the issues of MMI, IR, and disability to the hearing officer, to make a determination consistent with this decision.

REMAND INSTRUCTIONS

Dr. J-C is the designated doctor in this case. On remand, the hearing officer is to determine whether Dr. J-C is still qualified and available to be the designated doctor. If Dr. J-C is no longer qualified or available to serve as the designated doctor, then another designated doctor is to be appointed to opine on the issues of MMI and IR for the [date of injury], compensable injury.

On remand the hearing officer is to either request a stipulation from the parties or make a determination what conditions are included in the claimant's compensable injury of [date of injury]. The hearing officer is to make findings of fact, conclusions of law, and a decision on the issues reported out of the BRC: (1) Does the compensable injury of [date of injury], extend to an aggravation of lumbar stenosis at L3-4 and L4-5, multilevel spondylosis, lumbar radiculopathy, lumbar disc disease at L5-S1, lumbar herniated disc displacement, and lumbar radiculitis?; (2) Has the claimant reached MMI, and if so, on what date?; (3) If the claimant has reached MMI, what is the IR?; and (4) Did the claimant have disability resulting from the compensable injury, for the period of May 26, 2012, through the present? Based on the hearing officer's determination regarding the extent of the compensable injury of [date of injury], the hearing officer is then to determine whether a certification of MMI and IR that rates the entire compensable injury is in evidence or whether a new certification of MMI and IR by the designated doctor is necessary. If a new certification of MMI and IR is necessary, the hearing officer is to inform the designated doctor what conditions are part of the compensable injury of [date of injury], depending upon the hearing officer's extent-of-injury determination.

The parties are to be provided with the hearing officer's letter to the designated doctor, the designated doctor's response, and to be allowed an opportunity to respond. The hearing officer is to make determinations which are supported by the evidence 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 APD 060721, decided June 12, 2006.

The true corporate name of the insurance carrier is **(a self-insured governmental entity)** and the name and address of its registered agent for service of process is

**CITY SECRETARY
[ADDRESS]
[CITY], TEXAS [ZIP CODE].**

Veronica L. Ruberto
Appeals Judge

CONCUR:

Carisa Space-Beam
Appeals Judge

Margaret L. Turner
Appeals Judge