APPEAL NO. 132839
FILED JANUARY 30, 2014

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 October 24, 2013, in [City], Texas, with [hearing officer] presiding as hearing officer. The hearing officer resolved the disputed issues by deciding that: (1) the respondent (claimant) reached maximum medical improvement (MMI) on September 10, 2013; and (2) the claimant's impairment rating (IR) is 11%. The appellant (carrier) appeals the hearing officer's determinations of MMI and IR, contending that the certification by [Dr. R], a doctor selected by the treating doctor to act in his place, which was adopted by the hearing officer rated a noncompensable condition. The claimant responded, urging affirmance of the disputed determinations.

DECISION

Reversed and remanded.

The parties stipulated that the claimant sustained a compensable injury on [date of injury], at least in the form of a hernia and abdominal pain.

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 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)(3) (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.

In this case, the issues before the hearing officer are MMI and IR. Extent to the compensable injury to the lumbar spine was raised and discussed at the CCH.

However there was no agreement between the parties as to whether the compensable injury includes the lumbar spine. There are five certifications of MMI/IR in evidence.

[Dr. S], the first designated doctor appointed to determine MMI and IR, examined the claimant on September 17, 2012, and determined that the claimant had not yet reached MMI. Dr. S diagnosed a ventral hernia as the compensable injury.

[Dr. St], a required medical examination (RME) doctor, examined the claimant on January 21, 2013, and certified that the claimant reached MMI on December 15, 2012, with a 5% IR. Dr. St diagnosed and rated a ventral abdominal hernia.

[Dr. P], the second designated doctor appointed to determine MMI and IR, examined the claimant on March 8, 2013, and certified that the claimant reached MMI on December 5, 2012, with a 6% IR. Dr. P diagnosed and rated a ventral hernia and a lumbar spine strain.

[Dr. M], a doctor selected by the treating doctor to act in his place, examined the claimant on June 11, 2013, and determined that the claimant had not yet reached MMI. Dr. M diagnosed and considered a ventral abdominal hernia and a lumbar spine sprain/strain.

Dr. R, a doctor selected by the treating doctor to act in his place, examined the claimant on October 1, 2013, and certified that the claimant reached MMI on September 10, 2013, with an 11% IR. Dr. R diagnosed and rated a ventral abdominal hernia and a lumbar spine sprain/strain.

The hearing officer noted that the designated doctor's choice of MMI date was prior to the claimant undergoing physical therapy and work hardening, and therefore, the certification is contrary to the preponderance of the evidence. The hearing officer adopted the certification of MMI and IR of Dr. R and rejected the certification by the RME, in part, because she stated in her discussion that the claimant "submitted evidence that he had claimed injury to his abdominal as well as a lumbar strain prior to January 25, 2012," and the RME failed to give a rating for the lumbar injury.

The Appeals Panel holds that when there is a dispute over the extent of injury, that issue is a threshold issue that must be resolved before the issues of MMI and IR can be resolved and the resolution of the MMI and IR issues will flow from the resolution of the extent-of-injury issue.

In APD 002675, decided December 21, 2000, the sole issue before the hearing officer was IR. There were multiple certifications of MMI and IR in which differing body parts were rated as the compensable injury. There was no prior Division determination

of the extent of the compensable injury or agreement by the parties. In that case, the Appeals Panel held that while a designated doctor appointed to determine MMI and IR can state an opinion whether a certain condition is or is not part of the injury, the doctor's opinion on extent of injury is not entitled to presumptive weight and ultimately it is the Division (the hearing officer) that determines what should and should not be rated. The Appeals Panel reversed the hearing officer's decision on IR and remanded the case for the hearing officer to first determine the extent of injury and then for the designated doctor to be advised what the extent of the injury was and to be requested to rate only the compensable injury as determined by the hearing officer. The Appeals Panel further held that whenever the issue is IR, by necessity the extent of injury is subsumed in that issue.

With the issues of MMI and IR before her and with the certifications of MMI and IR in evidence differing as to the extent of the compensable injury, we reverse the hearing officer's determination that the claimant reached MMI on September 10, 2013, with an 11% IR, and remand the issues of MMI and IR for further action consistent with this decision.

There was no stipulation by the parties as to the extent of the compensable injury to the lumbar spine. Although the hearing officer made statements in her Background Information section of her decision that the claimant "submitted evidence that he had claimed injury to his abdominal as well as a lumbar strain prior to January 25, 2012," the hearing officer erred in failing to add the issue of the extent of the compensable injury to a lumbar sprain/strain and to make any finding of fact and conclusion of law regarding the extent of the compensable injury to this condition. As previously discussed, whenever extent of injury is in dispute and the issue is IR, by necessity the extent of injury is subsumed in that issue. Accordingly, we remand the case to the hearing officer for the hearing officer to determine whether the compensable injury extends to a lumbar sprain/strain.

REMAND INSTRUCTIONS

On remand, the hearing officer is to add the issue of the extent of the compensable injury to a lumbar sprain/strain and make a decision regarding the compensability of this condition which is consistent and is supported by the evidence.

Dr. P is the designated doctor in this case. On remand, the hearing officer is to determine whether Dr. P is still qualified and available to be the designated doctor. If Dr. P 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.

After the hearing officer makes an extent-of-injury determination on the condition of a lumbar sprain/strain, the hearing officer is to advise the designated doctor of his extent-of-injury determination. Also, the hearing officer is to advise the designated doctor that the compensable injury of [date of injury], includes a hernia and abdominal pain, as stipulated by the parties.

The hearing officer is to request the designated doctor to give an opinion on the claimant's MMI and IR by rating 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 and IR certification and are to be allowed an opportunity to respond. The hearing officer is then to make a determination on MMI, IR, and extent of injury 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.

Cristina Beceiro
Appeals Judge

CONCUR:

Carisa Space-Beam
Appeals Judge

Margaret L. Turner
Appeals Judge