APPEAL NO. 150378
MAY 8, 2015

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 September 2, 2014, with the record closing on January 20, 2015, in San Antonio, Texas, with [hearing officer} presiding as hearing officer. The hearing officer resolved the disputed issues by deciding that: (1) the compensable injury does not extend to aggravation of the L4-5 and L5-S1 herniated nucleus pulposus (HNP), left-sided L5 radiculopathy, and L4-5 and L5-S1 degenerative disc disease; (2) the appellant (claimant) reached maximum medical improvement (MMI) on August 11, 2011; (3) the claimant's impairment rating (IR) is zero percent; and (4) the claimant did not have disability from August 12, 2011, through June 1, 2013, as a result of the compensable injury of [date of injury].

The claimant appealed, disputing the hearing officer's determinations that the compensable injury does not extend to aggravation of the L5-S1 HNP, the claimant did not have disability for the period in dispute, the claimant reached MMI on August 11, 2011, and the claimant's IR is zero percent. The claimant contends that the evidence established that the compensable injury extends to L5-S1 HNP and that she reached MMI June 1, 2013, with a five percent IR. The claimant contends that the evidence established she had disability beginning August 12, 2011, through June 1, 2013. Respondent 2 (carrier) responded, urging affirmance of the disputed determinations. The appeal file does not contain a response from respondent 1 (subclaimant).

That portion of the hearing officer's determination that the compensable injury does not extend to aggravation of the L4-5 HNP, left-sided L5 radiculopathy, and L4-5 and L5-S1 degenerative disc disease was not appealed and has become final pursuant to Section 410.169.

DECISION

Affirmed in part and reversed and remanded in part.

The claimant testified she injured her back when a chair collapsed on its own support to a lower level as she sat down to meet with her supervisor. The parties stipulated that the claimant sustained a compensable injury in the form of a lumbar strain on [date of injury]. It was undisputed that the claimant had sustained injury to her back prior to [date of injury].

EXTENT OF INJURY

The hearing officer's determination that the compensable injury does not extend to aggravation of the L5-S1 HNP is supported by sufficient evidence and is affirmed.

DISABILITY

The hearing officer's determination that the claimant did not have disability from August 12, 2011, through June 1, 2013, as a result of the compensable injury is supported by sufficient evidence and is affirmed.

MMI

The hearing officer's determination that the claimant reached MMI on August 11, 2011, is supported by sufficient evidence and is affirmed.

IR

Section 408.125(c) provides that the report of the designated doctor shall have presumptive weight, and the Texas Department of Insurance, Division of Workers' Compensation (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.

(Dr. D), a carrier-selected required medical examination (RME) doctor examined the claimant on March 18, 2014, and certified that the claimant reached MMI on August 11, 2011, with a zero percent 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). Dr. D stated, in part, in his narrative report dated March 24, 2014, that he agreed with the designated doctor that the claimant would be currently classified in Diagnosis-Related Estimate (DRE) Lumbosacral Category II: Minor Impairment. Dr. D further stated that there was no evidence of unilateral atrophy above or below the knee, or loss of reflexes to allow the application of DRE Lumbosacral Category III: Radiculopathy. Dr. D noted that the claimant had a history of chronic back pain, radicular complaints, reduced range of spinal motion, history of lumbar fusion at L4-5, and was certified to have a five percent impairment from a prior workers' compensation injury that occurred prior to [date of injury]. Dr. D did not use differentiators to separate DRE Lumbosacral Category I from DRE Lumbosacral Category II because they were

documented to be present and therefore permanent in a prior workers' compensation injury. Dr. D stated that no additional impairment would be assigned as a result of the compensable injury and the claimant would have zero additional impairment based on the compensable injury of [date of injury].

It is clear from his narrative report that Dr. D took into consideration an IR from a prior workers' compensation injury to determine the claimant's IR for the [date of injury], compensable injury. We note the amount of contribution from a prior compensable injury was not in dispute and was not actually litigated by the parties. Because Dr. D applied an analysis of contribution in assigning an IR for the claimant it was error for the hearing officer to adopt the IR assigned by Dr. D. Accordingly, we reverse the hearing officer's determination that the claimant's IR is zero percent.

There are four other certifications of IR in evidence. (Dr. W), the first designated doctor initially examined the claimant on September 4, 2012, and certified the claimant was not at MMI. However, Dr. W, based his opinion that the claimant was not at MMI on the condition of L5-S1 HNP. As previously noted, the hearing officer's determination that the compensable injury does not extend to aggravation of the L5-S1 HNP has been affirmed. Additionally, the hearing officer's determination that the claimant reached MMI on August 11, 2011, has been affirmed.

Dr. W subsequently examined the claimant on June 14, 2013, and certified that the claimant reached MMI on March 1, 2013, with a five percent IR, placing the claimant in DRE Lumbosacral Category II. Dr. W listed a herniated lumbar disc at L5-S1 as a diagnosis. Because it has been determined that the compensable injury does not extend to aggravation of the L5-S1 HNP and that the MMI date is August 11, 2011, Dr. W's certification cannot be adopted.

(Dr. F) was subsequently appointed designated doctor and examined the claimant on October 1, 2014, and certified that the claimant reached MMI on September 14, 2012, with a five percent IR. Dr. F rated a lumbar strain, placing the claimant in DRE Lumbosacral Category II. However, the hearing officer's determination that the claimant reached MMI on August 11, 2011, has been affirmed so Dr. F's certification cannot be adopted.

(Dr. L), a referral doctor acting in place of the treating doctor, examined the claimant on January 6, 2014, and certified that the claimant reached MMI on June 1, 2013, with a five percent IR. Dr. L noted the following under impression: status post L5-S1 interbody fusion; status post L4-5 interbody fusion lateral fusion instrumentation; and transfer lesion at L3-4. Dr. L noted the EMG did not support the diagnosis of an ongoing radiculopathy and that the claimant did not have significant atrophy and there is no evidence of loss of motion segment integrity noted at the L5-S1 level. Dr. L placed

the claimant in DRE Lumbosacral Category II. The hearing officer's determination that the claimant reached MMI on August 11, 2011, has been affirmed so Dr. L's certification cannot be adopted.

There is no other certification in evidence. Accordingly, we remand the issue of IR to the hearing officer for further action consistent with this decision.

SUMMARY

We affirm the hearing officer's determination that the compensable injury does not extend to aggravation of the L5-S1 HNP.

We affirm the hearing officer's determination that the claimant did not have disability from August 12, 2011, through June 1, 2013.

We affirm the hearing officer's determination that the claimant reached MMI on August 11, 2011.

We reverse the hearing officer's determination that the claimant's IR is zero percent and remand the issue of IR to the hearing officer.

REMAND INSTRUCTIONS

Dr. F is the designated doctor appointed by the Division for the purpose of IR. The hearing officer is to determine whether Dr. F is still qualified and available to be the designated doctor for IR. If Dr. F is no longer qualified or available to serve as the designated doctor, then another designated doctor is to be appointed pursuant to Rule 127.5(c) to determine the IR. The hearing officer is to inform the designated doctor that the compensable injury of [date of injury], extends to a lumbar strain as previously stipulated to by the parties but does not include aggravation of the L4-5 and L5-S1 HNP, left-sided L5 radiculopathy, and L4-5 and L5-S1 degenerative disc disease. The hearing officer is to inform the designated doctor that it has been determined that the claimant reached MMI on August 11, 2011, and the designated doctor should rate the entire compensable injury based on the injured employee's condition as of the MMI date considering the medical record and the certifying examination.

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 a determination which is supported by the evidence 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* Appeals Panel Decision 060721, decided June 12, 2006.

The true corporate name of the insurance carrier is **ARCH INSURANCE COMPANY** and the name and address of its registered agent for service of process is

CT CORPORATION SYSTEM
1999 BRYAN STREET, SUITE 900
DALLAS, TEXAS 75201.

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Margaret L. Turner
Appeals Judge

CONCUR:

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Veronica L. Ruberto
Appeals Judge

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Carisa Space-Beam
Appeals Judge