APPEAL NO. 160057
FILED MARCH 10, 2016

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 December 16, 2015, in Houston, Texas, with (hearing officer) presiding as hearing officer. The hearing officer resolved the disputed issues by deciding that: (1) the compensable injury of (date of injury), does not extend to disc bulges at L4-5 and L5-S1; (2) the respondent (claimant) has not yet reached maximum medical improvement (MMI) and therefore no impairment rating (IR) is assigned; and (3) the claimant had disability beginning on January 24, 2015, and continuing through the date of the CCH.

The appellant (carrier) appealed the hearing officer's determination that the claimant has not yet reached MMI and therefore no IR is assigned, as well as the hearing officer's disability determination, contending that the hearing officer committed legal error in making those determinations. The claimant responded, urging affirmance of those determinations.

The hearing officer's determination that the compensable injury of (date of injury), does not extend to disc bulges at L4-5 and L5-S1 was not appealed and has become final pursuant to Section 410.169.

DECISION

Affirmed in part and reversed and rendered in part.

The parties stipulated that on (date of injury), the claimant sustained a compensable injury at least in the form of a lumbar sprain/strain. The claimant testified that he heard a disc in his back pop when a wooden pallet on which he was standing broke.

**DISABILITY**

The hearing officer's determination that the claimant had disability beginning on January 24, 2015, and continuing through the date of the CCH is supported by sufficient evidence and is affirmed.

**MMI/IR**

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.

The hearing officer determined that the claimant has not yet reached MMI and therefore no IR is assigned as certified by (Dr. K), a doctor acting in place of the treating doctor. Dr. K examined the claimant on April 23, 2015, and certified in alternate Reports of Medical Evaluation (DWC-69) that the claimant had not reached MMI but was expected to do so on July 23, 2015. Dr. K's first MMI/IR certification is based on a lumbar sprain/strain, and the second MMI/IR certification is based on a lumbar sprain/strain, disc bulges at L4-5 and L5-S1, and the SI joint.

In an attached narrative report Dr. K gave the following rationale for his MMI opinion regarding the lumbar sprain/strain:

> . . . it is my impression that [the claimant] most likely would benefit from an SI injection on the left. Also, he could possibly benefit from a repeat L4-5 injection.
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> If [the claimant] doesn't benefit from the injections then in my opinion he is obviously at MMI. . . .

Although Dr. K noted in his narrative report that his first DWC-69 is based on a lumbar sprain/strain, Dr. K makes clear that he believes the claimant had not reached MMI for either a lumbar sprain/strain or the SI joint on the left and disc bulges at L4-5 and L5-S1 because he would benefit from injections to the SI joint on the left, as well as an injection at L4-5. However, the parties neither stipulated to nor actually litigated an SI joint condition, and the hearing officer's determination that the compensable injury does not extend to disc bulges at L4-5 and L5-S1 has not been appealed and has become final. There was no evidence establishing that the recommended injections are

treatment for the lumbar sprain/strain. Although Dr. K stated that his first MMI/IR certification that the claimant has not reached MMI is based on a lumbar sprain/strain, Dr. K opines that the claimant has not reached MMI based on recommended injections for conditions that have not been determined to be part of the compensable injury. Dr. K's second MMI/IR certification that the claimant has not reached MMI considers conditions that have not been determined to be part of the compensable injury. Accordingly, we reverse the hearing officer's determinations that the claimant has not yet reached MMI and therefore no IR is assigned.

There are two other MMI/IR certifications in evidence, which are from (Dr. B), the designated doctor appointed by the Division. Dr. B examined the claimant on January 23, 2015, and provided alternate DWC-69s dated January 30, 2015.

In the first DWC-69 Dr. B considered and rated the lumbar sprain/strain and disc bulges at L4-5. Because this certification considers and rates the noncompensable disc bulges at L4-5 it cannot be adopted.

The hearing officer found in Finding of Fact No. 5 that Dr. B's MMI/IR certifications are contrary to the preponderance of the other medical evidence, and explained in the Discussion section that she chose not to adopt Dr. B's MMI/IR certification ". . . because additional treatment is recommended for the [c]laimant . . . there is anticipated significant improvement for the compensable injury." However, the additional treatment recommended by Dr. K are injections to the SI joint on the left and at L4-5. Because that treatment is for noncompensable conditions, Finding of Fact No. 5 as it pertains to Dr. B's MMI/IR certification for the lumbar sprain/strain is not supported by the evidence.

Dr. B's second MMI/IR certification certified that the claimant reached MMI on January 23, 2015, with a five 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). Dr. B makes clear in his narrative report that he based this MMI/IR certification on the lumbar sprain/strain. Dr. B's second MMI/IR certification that the claimant reached MMI on January 23, 2015, with a five percent IR considers and rates the compensable injury and is supported by the evidence. Accordingly, we render a new decision that the claimant reached MMI on January 23, 2015, with a five percent IR.

## SUMMARY

We affirm the hearing officer's determination that the claimant had disability beginning on January 24, 2015, and continuing through the date of the CCH.

We reverse the hearing officer's determinations that the claimant has not yet reached MMI and therefore no IR is assigned, and we render a new decision that the claimant reached MMI on January 23, 2015, with a five percent IR.

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

**RICHARD GERGASKO, PRESIDENT**
**6210 HIGHWAY 290 EAST**
**AUSTIN, TEXAS 78723**.

Carisa Space-Beam
Appeals Judge

CONCUR:

K. Eugene Kraft
Appeals Judge

Margaret L. Turner
Appeals Judge