APPEAL NO. 160325
FILED MAY 3, 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 January 13, 2016, with the record closing on February 1, 2016, in Houston, Texas, with (hearing officer) presiding as hearing officer. The hearing officer resolved the disputed issues by deciding that: (1) the (date of injury), compensable injury does not extend to cervical reversal of the normal cervical lordosis, 1 mm annular bulge/protrusion at C3-4, 3 mm bulge/protrusion annular tear at C4-5, "2 mm annular bulge/protrusion at L4-5, and posterior annular tear within the foramen;" (2) the first certification of maximum medical improvement (MMI) and impairment rating (IR) assigned by [1] (Dr. L) on March 11, 2015, did become final under Section 408.123 and 28 TEX. ADMIN. CODE § 130.12 (Rule 130.12); (3) the respondent (claimant) reached MMI on March 2, 2015; and the claimant's IR is 15%.

The appellant (self-insured) appeals the hearing officer's determinations of finality, MMI and IR. The self-insured also appeals a stipulation noting the hearing officer included a condition that was not in the stipulation of the parties. The self-insured argues that Dr. L made a significant error in applying the appropriate American Medical Association guidelines or in calculating the IR so an exception to finality applies. The self-insured additionally argues that there was insufficient evidence of delivery by verifiable means which would prevent a determination of finality. The appeal file does not contain a response from the claimant.

The hearing officer's determination that the compensable injury does not extend to cervical reversal of the normal cervical lordosis, a 1 mm annular bulge/protrusion at C3-4, a 3 mm bulge/protrusion annular tear at C4-5, "lumbar L4-5, 2 mm annular bulge/protrusion and posterior annular tear within the foramen" was not appealed and has become final pursuant to Section 410.169.

DECISION

Reformed in part, reversed and rendered in part, and reversed and remanded in part.

The parties stipulated that the claimant sustained a compensable injury on (date of injury). A review of the record reflects that the parties stipulated that the claimant sustained a compensable injury in the form of at least a lumbar sprain and cervical sprain. The hearing officer incorrectly stated the stipulation of the parties in her decision

[1] We note that the hearing officer incorrectly identified the doctor as (Dr. Li) in the decision portion of her decision and order instead of the correct name of the doctor, Dr. L.

and order. The hearing officer incorrectly reflected the stipulation in Finding of Fact No.1.D. as follows: "On (date of injury), [the] [c]laimant sustained a compensable injury in the form of at least a low back sprain, cervical strain and left lower arm contusion." We reform Finding of Fact No. 1.D. to conform to the actual stipulation of the parties as follows: On (date of injury), the claimant sustained a compensable injury in the form of at least a lumbar sprain and cervical sprain. The claimant testified she was injured when she fell down the steps of the bus while exiting the bus.

FINALITY

Section 408.123(e) provides that except as otherwise provided by Section 408.123, an employee's first valid certification of MMI and first valid assignment of an IR is final if the certification or assignment is not disputed before the 91st day after the date written notification of the certification or assignment is provided to the employee and the carrier by verifiable means. Rule 130.12(b) provides, in part, that the first MMI/IR certification must be disputed within 90 days of delivery of written notice through verifiable means; that the notice must contain a copy of a valid Report of Medical Evaluation (DWC-69), as described in Rule 130.12(c); and that the 90-day period begins on the day after the written notice is delivered to the party wishing to dispute a certification of MMI or an IR assignment, or both. Rule 130.12(b)(1) provides, in part, that the first certification of MMI or assigned IR may be disputed by requesting and setting a benefit review conference under Rule 141.1 or by requesting the appointment of a designated doctor, if one has not been appointed. The hearing officer found that the self-insured did not dispute Dr. L's IR within 90 days after the date the rating was provided. That finding is supported by sufficient evidence.

Section 408.123(f) provides, in part, that an employee's first certification of MMI or assignment of an IR may be disputed after the period described in Subsection (e) if: (1) compelling medical evidence exists of: (A) a significant error by the certifying doctor in applying the appropriate American Medical Association guidelines or in calculating the [IR]. The self-insured argues on appeal that Dr. L inappropriately assessed impairment for the lumbar spine because neither the loss of relevant reflexes nor measureable atrophy were documented anywhere in the claimant's medical records.

Dr. L examined the claimant on March 3, 2015, and certified that the claimant reached MMI on March 2, 2015, and assigned a 15% 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. L assessed 5% impairment for the cervical spine based on Cervicothoracic Diagnosis-Related Estimate (DRE) Category II: Minor Impairment and 10% impairment for the lumbar spine based on DRE Category III:

Radiculopathy for the lumbar spine. Dr. L noted the following when discussing impairment for the lumbar spine: [u]pon review of the medical records and physical examination, the [claimant] shows evidence of lumbosacral injury with clinical findings of an antalgic gait, marked lumbar pain and tenderness, and range of motion impairment, weakness in the dorsiflexors of the foot and right great toe, and sensory impairment over the right L5 distribution." In his physical examination findings, Dr. L noted that patellar and Achilles reflexes are 2+ bilaterally, equal and normal. The physical examination findings did not document measurements which would relate to atrophy. Dr. L did note weakness and sensory deficits.

The AMA Guides and Appeals Panel decisions specify that to receive a rating for radiculopathy the claimant must have significant signs of radiculopathy, such as loss of relevant reflexes, or measured unilateral atrophy of 2 cm or more above or below the knee, compared to measurements on the contralateral side at the same location. The atrophy or loss of relevant reflex must be spine-injury-related for radiculopathy to be rated. *See* Appeals Panel Decision (APD) 072220-s, decided February 5, 2008. Dr. L assessed a rating for radiculopathy but did not document significant signs of radiculopathy or note significant signs of radiculopathy in the medical records he reviewed.

Accordingly, we hold that in this case there is compelling medical evidence of a significant error by Dr. L in calculating the claimant's IR pursuant to Section 408.123(f)(1)(A). We reverse the hearing officer's determination that the first MMI/IR certification from Dr. L on March 11, 2015, became final under Section 408.123 and Rule 130.12, and we render a new decision that the first MMI/IR certification from Dr. L on March 11, 2015, did not become final under Section 408.123 and Rule 130.12.

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. 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 based her determinations of MMI and IR on the finality determination which has been reversed.

For reasons discussed above, the designated doctor, Dr. L's certification of MMI and assigned IR cannot be adopted. There are two other certifications in evidence. (Dr. H), the carrier-selected required medical examination doctor examined the claimant on August 12, 2015, and certified that the claimant reached MMI on May 21, 2013, and assigned a 0% IR using the AMA Guides. Dr. H placed the claimant in Cervicothoracic DRE Category I: Complaints or Symptoms assessing 0% impairment for the cervical spine and Lumbosacral DRE Category I: Complaints or Symptoms assessing 0% impairment for the lumbar spine.

We note that the decision and order incorrectly lists that Claimant's Exhibits C-1 through C-8 were admitted into evidence without objection. However, a review of the record reflects that the claimant offered Exhibit 9 at the CCH on January 13, 2016, and it was also admitted into evidence without objection. We reform the hearing officer's decision to reflect that Claimant's Exhibits C-1 through C-9 were admitted. Exhibit 9 was an alternative certification of MMI/IR from (Dr. B). A referral doctor acting in place of the treating doctor, Dr. B examined the claimant on January 7, 2016, and certified that the claimant reached MMI on March 2, 2015, and assigned a 10% IR using the AMA Guides. Dr. B placed the claimant in Cervicothoracic DRE Category II: Minor Impairment assessing 5% for the cervical spine and Lumbosacral DRE Category II: Minor Impairment assessing 5% for the lumbar spine.

Since there is more than one certification of MMI/IR in evidence, we do not consider it appropriate to simply render a decision regarding the claimant's MMI date and IR. Consequently, we reverse the hearing officer's determination that the claimant reached MMI on March 2, 2015, and the claimant's IR is 15% and remand the issues of MMI and IR to the hearing officer to make a determination of those issues consistent with this decision.

SUMMARY

We reform Finding of Fact No. 1.D. to conform to the actual stipulation of the parties as follows: On (date of injury), the claimant sustained a compensable injury in the form of at least a lumbar sprain and cervical sprain.

We reform the hearing officer's decision to reflect that Claimant's Exhibits C-1 through C-9 were admitted.

We reverse the hearing officer's determination that the first MMI/IR certification from Dr. L on March 11, 2015, became final under Section 408.123 and Rule 130.12, and we render a new decision that the first MMI/IR certification from Dr. L on March 11, 2015, did not become final under Section 408.123 and Rule 130.12.

We reverse the hearing officer's determination that the claimant reached MMI on March 2, 2015, and the claimant's IR is 15% and remand the issues of MMI and IR to the hearing officer.

REMAND INSTRUCTIONS

The certification of MMI can be no later than the statutory date of MMI. The IR should rate the entire compensable injury. The hearing officer is to make a determination of MMI and IR that is supported by the evidence and is 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 **HOUSTON INDEPENDENT SCHOOL DISTRICT (a self-insured governmental entity)** and the name and address of its registered agent for service of process is

DR. TERRY GREIR, SUPERINTENDENT
4400 WEST 18TH STREET
HOUSTON, TX 77092.

Margaret L. Turner
Appeals Judge

CONCUR:

K. Eugene Kraft
Appeals Judge

Carisa Space-Beam
Appeals Judge