APPEAL NO. 170041
FILED FEBRUARY 27, 2017

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 November 28, 2016, in (city), Texas, with (hearing officer) presiding as hearing officer. The hearing officer resolved the disputed issues by determining that the Date of injury, compensable injury does not extend to a lumbar sprain/strain, fibromyalgia and sacroiliac dysfunction syndrome; that the appellant (claimant) reached maximum medical improvement (MMI) on August 13, 2014; that the impairment rating (IR) of zero percent; and that the claimant did not have disability beginning on August 13, 2014, and continuing through the date of the CCH.

The claimant appealed contending that the hearing officer's determinations are contrary to the preponderance of the evidence.

The respondent (self-insured) responded, urging affirmance.

DECISION

Affirmed in part and reversed and remanded in part.

The parties stipulated that the claimant sustained a compensable injury on Date of injury; that the self-insured has accepted as compensable cervical and right shoulder sprains/strains; that (Dr. H), appointed by the Texas Department of Insurance, Division of Workers' Compensation (Division) as designated doctor certified that the claimant reached MMI on January 29, 2016, with an IR of six percent; that (Dr. G), the carrier-selected doctor certified that the claimant reached MMI on August 13, 2014, with an IR of zero percent; and that (Dr. S), a referral of the treating doctor, certified that the claimant reached MMI on August 13, 2014, with an IR of zero percent.

We note that in Finding of Fact No. 1. E., the hearing officer stated:

> E. The Division-selected designated doctor, [Dr. H] certified that [the] [c]laimant reached [MMI] on August 13, 2014, with an [IR] of [six percent], and in the alternative, that [the] [c]laimant has not yet reached [MMI].

A review of the record reveals, as noted above, that the parties, in fact, stipulated that Dr. H certified that the claimant reached MMI on January 29, 2016. Accordingly, Finding of Fact No. 1. E. is reformed as follows to reflect the true stipulation of the parties:

E. The Division-selected designated doctor, [Dr. H] certified that [the] [c]laimant reached [MMI] on January 29, 2016, with an [IR] of [six percent], and in the alternative, that [the] [c]laimant has not yet reached [MMI].

The claimant testified that she was injured while sweeping the center aisle of her school bus when the bus was struck from behind by another vehicle.

## EXTENT OF INJURY

The hearing officer's determination that the compensable injury of Date of injury, does not extend to a lumbar sprain/strain, fibromyalgia and sacroiliac dysfunction syndrome is supported by sufficient evidence and is affirmed.

## DISABILITY

The hearing officer's determination that the claimant did not have disability beginning on August 13, 2014, 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 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.

Dr. H, the designated doctor, examined the claimant on January 29, 2016, and certified that she attained MMI on that date, noting that the claimant had reached a clinical plateau and that her symptoms had remained essentially unchanged since the doctor's previous examination in August 2015. Dr. H assigned an IR of six percent comprised of one percent range of motion loss of the right shoulder and five percent for

the cervical sprain/strain pursuant to Diagnosis-Related Estimate (DRE) Cervicothoracic Category II of 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).

The hearing officer declined to adopt the certification of MMI and assigned IR from Dr. H, determining that the preponderance of the other medical evidence in the case was contrary to such certification.

There are three other certifications of MMI/IR in evidence. The treating doctor's referral, Dr. S certified on September 8, 2014, that the claimant reached MMI on August 13, 2014, and assigned an IR of zero percent. The initial carrier-selected required medical examination (RME) doctor, Dr. Capello (Dr. C), also certified, on May 7, 2015, that the claimant reached MMI on August 13, 2014, with an IR of zero percent. Finally, the second carrier-selected RME doctor, Dr. G also certified, on November 18, 2015, that the claimant reached MMI on August 13, 2014, with an IR of zero percent.

As noted above, Section 408.125(c) provides 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** (emphasis added) of the other doctors. Although determining that the claimant's MMI date is August 13, 2014, and the IR is zero percent, the hearing officer failed to specify which of the other doctor's certifications of MMI/IR she was adopting and, instead, found that the preponderance of the evidence supported the opinions of Drs. S, C and G. Although the reports from Drs. S, C and G each certify the same MMI date and assign the same IR, the hearing officer erred in failing to adopt the certification of MMI/IR of one of these doctors after determining that the certification of MMI/IR of the designated doctor was contrary to the preponderance of the evidence. Accordingly, we reverse the hearing officer's decision that the claimant reached MMI on August 13, 2014, with a zero percent IR and remand the issues of MMI and IR to the hearing officer for further action consistent with this decision.

## SUMMARY

We affirm the hearing officer's determination that the compensable injury of Date of injury, does not extend to a lumbar sprain/strain, fibromyalgia and sacroiliac dysfunction syndrome.

We affirm the hearing officer's determination that the claimant did not have disability beginning on August 13, 2014, and continuing through the date of the CCH.

We reverse the hearing officer's determination that the claimant reached MMI on August 13, 2014, with a zero percent IR and remand the issue of MMI/IR to the hearing officer for further action consistent with this decision.

## REMAND INSTRUCTIONS

On remand, the hearing officer is to specify which certification of MMI/IR she is adopting and make a determination on MMI/R consistent with the evidence and this decision. No new evidentiary hearing on remand is necessary.

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 **DEL VALLE INDEPENDENT SCHOOL DISTRICT c/o TEXAS ASSOCIATION OF SCHOOL BOARDS (a self-insured governmental entity)** and the name and address of its registered agent for service of process is

**DR. KELLY CROOK**
**5301 ROSS ROAD**
**DEL VALLE, TEXAS 78617**.

K. Eugene Kraft
Appeals Judge

CONCUR:

Carisa Space-Beam
Appeals Judge

Margaret L. Turner
Appeals Judge