APPEAL NO. 180781
FILED MAY 29, 2018

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 February 26, 2018, in (city), Texas, with (administrative law judge) presiding as the administrative law judge (ALJ). With regard to the disputed issues, the ALJ determined that: (1) the compensable injury of (date of injury), does not extend to lumbar disc protrusions at L2-3, L4-5 or L5-S1; (2) the compensable injury of (date of injury), extends to aggravation of lumbar disc protrusions at L2-3, L4-5 and L5-S1; (3) the appellant/cross-respondent (claimant) reached maximum medical improvement (MMI) on February 8, 2017; and (4) the claimant's impairment rating (IR) is zero percent.

The claimant appealed the ALJ's MMI, IR and extent-of-injury determinations that were adverse to her. The respondent/cross-appellant (self-insured) responded to the claimant's appeal. The self-insured cross-appealed the ALJ's MMI, IR and extent-of-injury determinations; however, the cross-appeal was not timely and was not considered. The claimant responded to the self-insured's untimely cross-appeal.

The ALJ's determination that the compensable injury of (date of injury), extends to aggravation of lumbar disc protrusions at L2-3, L4-5 and L5-S1 was not timely appealed and has become final pursuant to Section 410.169.

DECISION

Affirmed in part, reformed in part, and reversed and rendered in part.

The claimant testified that she sustained an injury when she lifted a heavy mat at work on (date of injury). The parties stipulated, in part, that the claimant sustained a compensable injury in the form of a lumbar sprain and sciatica on (date of injury); and that the Texas Department of Insurance, Division of Workers' Compensation (Division) appointed (Dr. H) as the designated doctor to address MMI, IR and extent of injury. Also, the parties stipulated that the date of statutory MMI is November 8, 2017.

EVIDENCE ADMITTED

At the CCH ALJ Exhibits 1 through 3 were admitted into evidence. However, the decision incorrectly reflects that ALJ Exhibits 1 and 2 were admitted. We reform the ALJ's decision to show that ALJ Exhibits 1 through 3 were admitted to reflect the correct exhibits offered and admitted into evidence at the CCH by the ALJ.

SELF-INSURED'S UNTIMELY CROSS-APPEAL

Division records indicate that the decision of the ALJ was placed in the carrier Austin representative's box for the self-insured on Friday, March 2, 2018. Pursuant to 28 TEX. ADMIN. CODE § 102.5(d) (Rule 102.5(d)), unless the great weight of the evidence indicates otherwise, the self-insured is deemed to have received the ALJ's decision the first working day after the decision was placed in the carrier's Austin representative's box. Therefore, the self-insured's deemed date of receipt of the ALJ's decision is March 5, 2018, because that was the first working day after the date the ALJ's decision was placed in the carrier's Austin representative's box. We note that the self-insured states in its appeal that the deemed date of receipt was March 7, 2018.

With the deemed date of receipt of the ALJ's decision on March 5, 2018, in accordance with Section 410.202, excluding Saturdays and Sundays, and holidays listed in Government Code Section 662.003, the self-insured's appeal had to be filed or mailed no later than Monday, March 26, 2018.

The self-insured's appeal dated March 26, 2018, was received by the Division on March 29, 2018. The self-insured mailed the appeal via United States Postal Service (USPS) certified mail, return receipt requested (CMRRR). The envelope has attached to it a USPS CMRRR label and three USPS postage stamps; however, the envelope does not show a postmark date. The appeal file does not contain another copy of the self-insured's appeal sent to the Division by any other method, such as facsimile transmission. An appeal to be timely had to be mailed or filed by March 26, 2018. The self-insured's appeal was not timely mailed or filed and was not considered for appellate review.

EXTENT OF INJURY

At issue was whether the compensable injury of (date of injury), extends to lumbar disc protrusions at L2-3, L4-5 and L5-S1 and/or aggravation of lumbar disc protrusions at L2-3, L4-5 and L5-S1. The ALJ determined that the compensable injury did not extend to the disputed conditions; however, the compensable injury did extend to aggravation of the disputed conditions. The ALJ's extent-of-injury determinations are internally inconsistent because a determination that the compensable injury extends to an aggravation of a pre-existing condition of lumbar disc protrusions at L2-3, L4-5 and L5-S1 is a determination that the compensable injury extends to the underlying pre-existing condition of lumbar disc protrusions at L2-3, L4-5 and L5-S1 as a matter of law. See Appeals Panel Decision (APD) 100718, decided August 9, 2010. The Appeals Panel has held that "an aggravation of a pre-existing condition is an injury in its own right." *See* APD 94428, decided May 26, 1994, and APD 100718. The aggravation of a pre-existing condition is a compensable injury for purposes of the Act. *See Peterson v. Continental Casualty Company*, 997 S.W.2d 893 (Tex. App.-Houston [1st Dist.] 1999,

no pet.); *Cooper v. St. Paul Fire & Marine Insurance Company*, 985 S.W.2d 614 (Tex. App.-Amarillo 1999, no pet.).

Given that the ALJ's determination that the compensable injury of (date of injury), extends to an aggravation of the lumbar disc protrusions at L2-3, L4-5 and L5-S1 has become final pursuant to Section 410.169, and that an aggravation of a pre-existing condition is a compensable injury, we reverse the ALJ's determination that the compensable injury of (date of injury), does not extend to lumbar disc protrusions at L2-3, L4-5 and L5-S1, and we render a new decision that the compensable injury of (date of injury), extends to lumbar disc protrusions at L2-3, L4-5 and L5-S1.

MMI AND IR

The designated doctor, Dr. H, examined the claimant on June 30, 2017, and certified that the claimant reached MMI on February 8, 2017, 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. H assigned a zero percent IR placing the claimant in Diagnosis-Related Estimate Lumbosacral Category I: Complaints or Symptoms for the compensable lumbar injuries, which include the lumbar sprain, sciatica, and disc protrusions at L2-3, L4-5 and L5-S1. The ALJ's determinations that the claimant reached MMI on February 8, 2017, and the claimant's IR is zero percent are supported by sufficient evidence and are affirmed.

SUMMARY

We reverse the ALJ's determination that the compensable injury of (date of injury), does not extend to lumbar disc protrusions at L2-3, L4-5 and L5-S1, and we render a new decision that the compensable injury of (date of injury), extends to lumbar disc protrusions at L2-3, L4-5 and L5-S1.

We affirm the ALJ's determination that the claimant reached MMI on February 8, 2017.

We affirm the ALJ's determination that the claimant's IR is zero percent.

We reform the ALJ's decision to show that ALJ Exhibits 1 through 3 were admitted to reflect the correct exhibits offered and admitted into evidence at the CCH by the ALJ.

The true corporate name of the insurance carrier is **NORTHSIDE INDEPENDENT SCHOOL DISTRICT (a self-insured governmental entity)** and the name and address of its registered agent for service of process is

DR. BRIAN T. WOODS, SUPERINTENDENT
5900 EVERS ROAD
SAN ANTONIO, TEXAS 78238.

Veronica L. Ruberto
Appeals Judge

CONCUR:

Carisa Space-Beam
Appeals Judge

Margaret L. Turner
Appeals Judge