

APPEAL NO. 201479
FILED DECEMBER 11, 2020

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 September 15, 2020, in (city) Texas, with (administrative law judge) presiding as the administrative law judge (ALJ) (ALJ2). The ALJ resolved the disputed issues by deciding that: (1) the compensable injury extends to a lumbar sprain, lumbosacral radiculopathy, degenerative changes at L4-5 and L5-S1, and disc protrusions at L4-5 and L5-S1; (2) the respondent (claimant) reached maximum medical improvement (MMI) on October 30, 2019; (3) the claimant's impairment rating (IR) is 10 percent; and (4) the claimant did not have disability resulting from the compensable injury of (date of injury), beginning November 7, 2019, and continuing through the date of the CCH. The appellant (carrier) appeals the ALJ's determinations of MMI, IR, and the extent of the compensable injury. The appeal file does not contain a response from the claimant. The ALJ's determination that the claimant did not have disability beginning November 7, 2019, and continuing through the date of the CCH was not appealed and has become final pursuant to Section 410.169.

DECISION

Reversed and remanded.

The parties stipulated at the September 15, 2020, CCH that the claimant sustained a compensable injury on (date of injury), in the form of at least a lumbar strain and that the Texas Department of Insurance, Division of Workers' Compensation (Division) appointed (Dr. P) as designated doctor to opine on the issues of MMI, IR, and extent of injury. The claimant testified he was injured on (date of injury), when the vehicle he was driving hit a bump in the road, causing him to lose control. The claimant testified that the truck he was driving then flipped, landing on the driver's side.

On February 5, 2020, the parties appeared for a CCH, with (ALJ1) presiding as the ALJ. However, the record reflects that at that setting the parties agreed not to go forward at the CCH but rather agreed that a Presiding Officer's Directive (POD) would be sent to Dr. P for a re-examination of the claimant. Dr. P was to provide an opinion on the issues of extent of injury, MMI, and IR. (ALJ1) noted that Dr. P had previously given an opinion on the compensability of the conditions of degenerative changes at L4-5 and L5-S1 but was to be specifically asked to give an opinion on the compensability of the following conditions: lumbar sprain, L4-5 disc protrusion, L5-S1 disc protrusion, and lumbosacral radiculopathy. The ALJ at the February 5, 2020, setting then noted that Dr. P would be asked for certifications of MMI and IR for the accepted and disputed

conditions and for accepted conditions plus the conditions Dr. P opined were compensable.

The CCH was then reset to allow time for Dr. P to respond to the POD. A second CCH was held on September 15, 2020, with (ALJ2) presiding.

Section 408.0041 provides, in part, that at the request of the carrier, injured employee, or on the commissioner's own order, the commissioner may order a designated doctor examination to resolve any question about the claimant's MMI, IR, and extent of injury. 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 on the MMI date considering the medical record and the certifying examination.

The 1989 Act makes clear that a designated doctor's MMI and IR is given presumptive weight when the designated doctor has been appointed to determine MMI and IR, and that the Division shall base the claimant's MMI and IR on the designated doctor's report unless the preponderance of the other medical evidence contradicts the designated doctor's report.

There is a certification dated January 29, 2020, from Dr. P in evidence that certifies that the claimant reached MMI on October 30, 2019, with a 10 percent IR. However, that certification is based on an examination that took place on January 29, 2020, and considered and rated the conditions of lumbosacral sprain/strain, L4-5 and L5-S1 disc protrusions, and lumbosacral radiculopathy. In evidence is a report from Dr. P dated June 12, 2019, in which Dr. P opined that the compensable injury extends to degenerative changes of the disc at L4-5 and L5-S1. Dr. P provides alternative certifications of MMI and IR with that report.

Section 410.203(a)(1) requires the Appeals Panel to consider the record developed at the CCH. However, neither the POD issued by (ALJ1) nor the response from Dr. P was admitted into evidence at the CCH held on September 15, 2020. (ALJ2) specifically references a March 4, 2020, report from Dr. P in his discussion of the evidence and based his determinations regarding MMI and IR on that report.

It is clear from the record that a POD was issued for a re-examination of the claimant by Dr. P and that Dr. P re-examined the claimant and issued an opinion dated March 4, 2020, on the extent of injury, MMI, and IR for the claimant's compensable injury. Neither the POD nor the March 4, 2020, opinion from Dr. P is in evidence. Accordingly, we reverse the (ALJ2)'s determinations that the compensable injury extends to a lumbar sprain, lumbosacral radiculopathy, degenerative changes at L4-5 and L5-S1, and disc protrusions at L4-5 and L5-S1; the claimant reached MMI on October 30, 2019, and the claimant's IR is 10 percent and remand the issues of extent of injury, MMI, and IR to the (ALJ2) for further action consistent with this decision.

SUMMARY

We reverse the (ALJ2)'s determination that the compensable injury extends to a lumbar sprain, lumbosacral radiculopathy, degenerative changes at L4-5 and L5-S1, and disc protrusions at L4-5 and L5-S1 and remand the extent-of-injury issue to the ALJ.

We reverse the (ALJ2)'s determination that the claimant reached MMI on October 30, 2019, and remand the MMI issue to the ALJ.

We reverse the (ALJ2)'s determination that the claimant's IR is 10 percent and remand the IR issue to the ALJ.

REMAND INSTRUCTIONS

On remand the (ALJ2) is to admit the POD resulting from the February 5, 2020, CCH setting and Dr. P's March 4, 2020, narrative report and certification of MMI and IR. The parties are to be provided with Dr. P's March 4, 2020, report and allowed an opportunity to respond. The (ALJ2) is then to make a determination on extent of injury, MMI, and 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 (ALJ2), 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 **NEW HAMPSHIRE INSURANCE COMPANY** and the name and address of its registered agent for service of process is

**CORPORATION SERVICE COMPANY
211 EAST 7TH STREET, SUITE 620
AUSTIN, TEXAS 78701-3218.**

Margaret L. Turner
Appeals Judge

CONCUR:

Cristina Beceiro
Appeals Judge

Carisa Space-Beam
Appeals Judge