

APPEAL NO. 031700
FILED AUGUST 18, 2003

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on May 29, 2003. The hearing officer determined that the respondent (claimant) had disability from May 24, 2002, to February 10, 2003, and that the claimant reached maximum medical improvement (MMI) on February 10, 2003, with a 13% impairment rating (IR) as assessed by the treating doctor because the designated doctor's reports were contrary to the great weight of other medical evidence.

The appellant (carrier) appeals the hearing officer's decision, emphasizing that the designated doctor's report has presumptive weight, requesting that the case be remanded for another designated doctor examination, and asserting that disability should end on the date the designated doctor assessed MMI. The file does not contain a response from the claimant.

DECISION

Affirmed in part and reversed and remanded in part.

Regarding the disability issue the parties appear to equate the date of MMI with the end of disability. See Section 401.011(30) for the definition of MMI and Section 401.011(16) for the definition of disability. Applying those definitions it should be obvious that disability can extend past the date of MMI (although the employee would not be entitled to temporary income benefits (TIBs) pursuant to Section 408.101) and conversely an injured employee may have returned to work (does not have disability) prior to the date of MMI. The hearing officer determined that the claimant had disability until February 10, 2003, when he was released to modified work. The carrier's dispute of the disability determination is based on the fact that the designated doctor certified MMI on January 11, 2003, which as explained above, only ends entitlement to TIBs and does not necessarily end disability. The hearing officer's determination on disability is affirmed as being supported by sufficient evidence.

The parties stipulated that the claimant sustained a compensable right shoulder injury on _____. A carrier-required medical examination doctor stated that the claimant was not at MMI in a report dated November 9, 2001. The claimant had right shoulder surgery on December 3, 2001. The claimant subsequently changed treating doctors to Dr. D in April 2002. Dr. D initially was of the opinion that no further surgery was indicated and Dr. H was appointed as the Texas Workers' Compensation Commission (Commission)-selected designated doctor. Dr. H, in a report dated May 23, 2002, certified MMI on that date and assessed a 5% IR. Dr. H based the 5% IR "on range of motion [ROM] studies, was 9% which then translates to 5% whole person. I believe that none of the other criteria for impairment was appropriate at this time." Dr. H did not include the ROM studies with his report and stated that the claimant "has

significant pain on the studies, so much so that I was unable to perform external and internal rotation of the shoulder.” Dr. H used 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).

Meanwhile, based on additional testing, Dr. D changed his opinion on the need for additional surgery and recommended additional surgery for persistent impingement of the right shoulder. Dr. D performed the second right shoulder surgery on July 11, 2002. By letter, dated October 3, 2002, the designated doctor was sent the operative reports of the July 2002 surgery and a report from Dr. D, by a Commission benefit review officer (BRO) and asked if that changed his opinion of the MMI date and IR. Dr. H replied that the “MMI is based on the injury, not the surgical response” and declined to change either the MMI or 5% IR. After one or more benefit review conferences another Commission BRO, by letter dated April 23, 2003, again wrote the designated doctor, defining MMI, instructing the doctor that he must incorporate all the medical information even if “he does not agree with the need for surgery that has been approved and performed” and inquiring whether the claimant’s shoulder is better or worse since the May 23, 2002, examination. Dr. H responded that based on the records he could not tell whether the claimant’s shoulder was “better, worse, or the same” and since “a redo surgery in the right shoulder” has been performed he is extending the date of MMI six months and would expect the claimant to reasonably have reached MMI on January 11, 2003. No reexamination was conducted.

Dr. D, in a report dated February 11, 2003, certified MMI on February 10, 2003, with a 13% IR based on loss of ROM using the 4th edition AMA Guides. Dr. D gave detailed measurements and calculations on how he arrived at the 13% IR using the combined values table.

The hearing officer commented that Dr. D’s report “is clear and credible,” “constitutes the great weight of the medical evidence which is contrary to [Dr. H’s] reports” and that the date of MMI “appears only to be a difference of opinion.” (The carrier argues that if MMI is only a difference of opinion the designated doctor’s opinion has presumptive weight and should prevail.)

Sections 408.122(c) and 408.125(e) provide that for a claim for workers’ compensation benefits based on a compensable injury that occurs before June 17, 2001, the report of the designated doctor has presumptive weight, and the Commission shall base its determination of whether the employee has reached MMI and the IR on that report unless the great weight of the other medical evidence is to the contrary. Tex. W.C. Comm’n, 28 TEX. ADMIN. CODE § 130.6(i) (Rule 130.6(i)) provides that the designated doctor’s response to a Commission request for clarification is considered to have presumptive weight. We further note that whenever a hearing officer rejects a designated doctor’s report the hearing officer should “clearly detail the evidence relevant to his or her consideration.” Texas Workers’ Compensation Commission Appeal No. 030091-s, decided March 5, 2003. We believe that the hearing officer, in

this case, has failed to do so. The hearing officer only recites that the great weight of the medical evidence is contrary to Dr. H's report without specifying how that is so. In fact, regarding the MMI date the hearing officer even comments it only amounts to a difference of opinion, which certainly is not the great weight of other medical evidence.

Nonetheless, we are troubled by Dr. H's lack of detail on how he calculated the 5% IR, and his seemingly arbitrary revision of the MMI date. (We are not suggesting that subsequent shoulder surgery under the AMA Guides will automatically increase or even change the IR.) Consequently we reverse the hearing officer's determinations on the MMI date and IR because she failed to detail how the great weight of other medical evidence was contrary to the designated doctor's report and remand the case for the claimant to be examined or reexamined by a designated doctor to determine the MMI date and IR. The designated doctor is to include figures and calculations on ROM impairment.

The hearing officer's decision on the disability issue is affirmed and the hearing officer's decision on the MMI date and IR is reversed and remanded for the claimant to be examined or reexamined by a designated doctor for an assessment of MMI and IR.

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 Commission's Division of Hearings, 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 Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

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

**CORPORATION SERVICE COMPANY
800 BRAZOS
AUSTIN, TEXAS 78701.**

Thomas A. Knapp
Appeals Judge

CONCUR:

Judy L. S. Barnes
Appeals Judge

Elaine M. Chaney
Appeals Judge