

APPEAL NO. 032796
FILED DECEMBER 10, 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 January 31, 2003. The hearing officer determined that the appellant/cross-respondent (claimant) reached maximum medical improvement (MMI) on April 17, 2001; that her impairment rating (IR) is 9%; that the employer did not make a bona fide offer of employment (BFOE); and that the claimant's disability extended from September 26, 2000, through the date of the hearing. The claimant appealed the date of MMI and the IR, arguing that MMI should be October 5, 2002, the date of statutory MMI, and that a valid IR needs to be ascertained. The claimant urged affirmance of the disability determination and the lack of a BFOE. The respondent/cross-appellant (carrier) appealed, arguing that the hearing officer's disability determination from February 11, 2001, through the date of the hearing is so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust. The carrier argued that the employer's BFOE (part-time) to the claimant was not invalidated by the exclusion of the treating doctor's work-release report in the offer of employment. The carrier urged affirmance of the MMI date of April 17, 2001, and the IR of 9%. The carrier argued that it was error for the Texas Workers' Compensation Commission (Commission) on August 20, 2002, to ask the designated doctor whether he wanted to reevaluate his position regarding MMI and IR in view of the claimant undergoing spinal surgery on July 3, 2002. The carrier argued that the hearing officer was correct in completely ignoring the designated doctor's October 7, 2002, opinion that the claimant was not at MMI and would not be until August 8, 2003, because the designated doctor's amendment was not made for the proper purpose.

In Texas Workers' Compensation Commission Appeal No. 030484, decided April 16, 2003, we affirmed the hearing officer's determinations concerning a BFOE and the period of disability, but reversed the determinations concerning MMI and IR, and remanded the case for a determination of the correct MMI date and IR. We directed that the Commission-selected designated doctor be advised that the statutory date of MMI is October 5, 2002, and that the designated doctor be told to find the MMI date and determine the IR. The hearing officer corresponded with the designated doctor, and eventually received a Report of Medical Evaluation (TWCC-69) in which the designated doctor certified that the claimant reached MMI on April 17, 2001, with a 28% IR.

At the hearing on remand held on September 24, 2003, before the same hearing officer, the parties reentered the same stipulations as entered at the original hearing, specifically: that the claimant sustained a compensable injury on _____; that her period of disability began on September 26, 2000, and extended through at least February 11, 2001; and that the claimant reached the statutory date of MMI on October 5, 2002. The parties stipulated that Dr. G was the claimant's treating doctor during 2001 and 2002; that Dr. W was the carrier-selected doctor for a required medical

examination (RME); and that Dr. PW was the Commission-selected designated doctor in this case.

The hearing officer determined that the claimant reached MMI on April 17, 2001, as determined by the designated doctor. The hearing officer determined that the designated doctor made calculation errors in assessing the claimant's IR of 28%, and made corrections to those calculations, arriving at the determination that the claimant's correct IR is 15%.

The claimant appeals the determination of MMI and IR, asserting that the MMI date of April 17, 2001, is a typographical error, and that the correct date of MMI should be the statutory date, October 5, 2002. The claimant does not specify why she believes that the reduction of the IR to 15% is incorrect. The carrier responds, urging that the claimant reached MMI no later than April 17, 2001, and that the correct date of MMI is February 22, 2001. The carrier further argues that the claimant's correct IR is 7% or 9%, based on the evaluation of the claimant before she had surgery.

The carrier also appealed the hearing officer's determinations of MMI and IR, asserting similar positions to those described above in the response to the claimant's appeal. The claimant responded to the carrier's appeal.

DECISION

Reversed and rendered.

The factual background of this case was set forth in Appeal No. 030484 and will not be repeated here. Pursuant to our remand, Dr. PW again evaluated the claimant on June 24, 2003, but erroneously 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 fourth edition), rather than the Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association (AMA Guides third edition), certified the date of MMI as June 24, 2003 (a date past statutory MMI), and assigned an IR of 10%. These errors were pointed out by the hearing officer and Dr. PW again evaluated the claimant on August 14, 2003, using the AMA Guides third edition. In the TWCC-69 prepared after that evaluation, Dr. P certified the MMI date as April 17, 2001, and the IR as 29%, which he subsequently amended to 28%.

The first issue is the claimant's correct date of MMI. The claimant asserts that the designated doctor's MMI date of April 17, 2001, is "an evident clerical error." A similar argument was made to the hearing officer, and did not prevail. When we remanded this case, we gave the following specific instructions:

On remand, the hearing officer should advise Dr. PW that the statutory MMI date is October 5, 2002, and tell Dr. PW that he is to find the MMI date (which can be no later than the statutory date) and determine the IR.

We note that these instructions were not followed. The hearing officer's June 6, 2003, letter to Dr. PW (Hearing Officer's Exhibit No. 6) contains an abbreviated chronology of the case, including the fact that Dr. PW was advised that the claimant underwent spinal surgery in the summer of 2002, and was asked if that would change his mind about the claimant reaching MMI in April 2001. Dr. PW indicated that he would need to reevaluate the claimant. He did so on October 7, 2002, and advised the Commission that the claimant was not then at MMI. The hearing officer pointed out to Dr. PW that the Commission had failed to inform him that the claimant had reached MMI, "by the mandate of legislative statute." The hearing officer went on to tell Dr. PW:

The Commission needs to resolve and close the matter of an [IR], since her MMI date was set by law. As the Hearing Officer trying to finalize this case, I need to ask for an [IR] on [claimant].

Dr. PW again examined the claimant, and responded with a TWCC-69 dated June 24, 2003, certifying "clinical" MMI on June 24, 2003, with an IR of 10%. As noted above, Dr. PW erroneously used the AMA Guides fourth edition, prompting the hearing officer to write another letter to Dr. PW on July 11, 2003, telling him (again) to use the AMA Guides third edition to determine the claimant's IR, but making no mention of the MMI date. The next TWCC-69 from Dr. PW, dated July 31, 2003, and labeled "Amended," reflects an MMI date of April 17, 2001, and an IR of 29%, and includes a Figure 79 Lumbar Range of Motion (ROM) chart, dated "07-28-03." The last TWCC-69 provided by Dr. PW is labeled "8-14-03 clarification," reflects an MMI date of April 17, 2001, and an IR of 28%, and includes a Figure 79 ROM chart, dated "8-14-03."

Since our remand instructions were not followed, we are left with confusion concerning the MMI date. While Dr. PW variously stated the claimant was at MMI on April 17, 2001, not at MMI in October 2002, and at MMI on June 24, 2003, we are at a loss to understand why his latest reports revert to the April 17, 2001, MMI date, because there is absolutely no explanation given with regard to that date. Although the hearing officer states in the Statement of the Evidence that "[t]he designated doctor issued his August 2003 TWCC-69 to show that he still considered April 17, 2001 to be the MMI date, forsaking his June 2003 MMI date," we find no support in the record for that conclusory statement. Had the hearing officer been as specific in his instructions to the designated doctor as we were when we initially remanded, this confusion would not exist. The date of MMI is defined 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 401.011(30). In view of the claimant's surgery in July 2002 for the compensable injury, we are unable to accept April 17, 2001, as the correct MMI date in this case, and conclude that the determination regarding MMI is so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

Under the circumstances of this case, a date subsequent to the surgery that the claimant had for the compensable injury is appropriate and legally correct. Because of our inability to remand a second time (Section 410.203(c)), the Appeals Panel reverses and renders a new decision that the claimant's date of MMI is October 5, 2002, the stipulated statutory MMI date. Section 401.011(30)(B).

As to the IR, the hearing officer noted that Dr. PW made calculation errors when evaluating the claimant's loss of ROM. The hearing officer "corrected" those errors, reducing the IR from 28% to 15%, and concluding that the great weight of the other medical evidence is not contrary to the recalculated IR of 15%. In the past, the Appeals Panel has approved a **simple mathematical correction** of a designated doctor's report to reflect the correct use of the AMA Guides. See, e.g., Texas Workers' Compensation Commission Appeal No. 950616, decided May 24, 1995. See also Texas Workers' Compensation Commission Appeal No. 950558, decided May 24, 1995. In this case, we consider whether the hearing officer accurately characterized his amendment of Dr. PW's report as a "ministerial function of doing the arithmetic." We hold that the hearing officer erred in determining that the claimant has a 15% whole body IR. We believe that the extensive mathematical calculations done in this case resulted in the hearing officer substituting his own judgment and rating in adjusting the designated doctor's IR. In addition, the report of Dr. T, the second RME doctor, dated September 4, 2003, is replete with examples of how and why the designated doctor's calculation of IR was incorrect. In view of the hearing officer's finding that the designated doctor made significant errors in calculating the IR, the corroboration of that finding in the RME doctor's report, and our conclusion that the hearing officer was attempting to do far more than make simple mathematical corrections, we must reverse the hearing officer's decision that he was merely "doing the arithmetic." We conclude that the RME doctor's report which certifies an IR of 18% constitutes the great weight of the medical evidence contrary to the IR contained in Dr. PW's report. Accordingly, we reverse the hearing officer's decision which purports to accept the "recalculated and modified" report of the designated doctor. The hearing officer correctly notes that the RME doctor's report certifying an 18% IR is "[t]he only other valid IR to reflect the required spinal surgery." In accordance with Section 408.125(e), we adopt the IR set forth in that report.

We reverse the decision that the date of MMI is April 17, 2001, and render a new decision that the date of MMI is October 5, 2002. We reverse the decision that the correct IR is 15% and render a new decision that the correct IR is 18%.

The true corporate name of the insurance carrier is **TEXAS PROPERTY & CASUALTY INSURANCE GUARANTY ASSOCIATION** for **Reliance National Indemnity Company, an impaired carrier** and the name and address of its registered agent for service of process is

**MARVIN KELLY, EXECUTIVE DIRECTOR
9120 BURNET ROAD
AUSTIN, TEXAS 78758.**

Michael B. McShane
Appeals Panel
Manager/Judge

CONCUR:

Chris Cowan
Appeals Judge

Thomas A. Knapp
Appeals Judge