

APPEAL NO. 062061
FILED DECEMBER 14, 2006

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 1, 2006. The hearing officer resolved the disputed issues by deciding: (1) that the compensable injury of _____, includes a herniation at C5-6 with radiculopathy expressed as bilateral numbness of the hands and a post-concussion syndrome consisting of vertigo and dizziness; (2) that the compensable injury of _____, does not extend to include temporal mandibular joint (TMJ) dysfunction, hearing loss or bilateral tinnitus, a brain or cranium injury, or depression; (3) that the date of maximum medical improvement (MMI) is May 15, 2004; (4) that the respondent's (claimant) impairment rating (IR) is five percent; (5) that the claimant is not entitled to first or second quarter supplemental income benefits (SIBs); and (6) that the appellant (carrier) accepted but did not waive the right to dispute the compensability of a cervical C5-6 herniation injury. The carrier appealed, arguing that the hearing officer exceeded his authority in determining that the compensable injury extended to include upper extremity radiculopathy and post-concussion syndrome because those conditions were not part of the disputed extent-of-injury issue at the CCH nor did the parties agree that such conditions should be added. The carrier also appeals the determination of MMI, arguing that the certification of MMI by the designated doctor was not limited to only the compensable injury. The appeal file does not contain a response from the claimant. The following determinations were not appealed and have become final pursuant to Section 410.169: (1) the claimant's compensable injury did not extend to include TMJ dysfunction, hearing loss or bilateral tinnitus, a brain or cranium injury or depression; (2) the carrier accepted but did not waive the right to dispute the compensability of a cervical C5-6 herniation injury; and (3) the claimant is not entitled to first or second quarter SIBs.

DECISION

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

It was undisputed that the claimant sustained a compensable injury on _____. The claimant testified that he received an electrical shock when installing lights. The electrical current entered his body through his right thumb, went through his neck and exited his left arm, causing a second degree burn injury to his left arm. The claimant was standing on a ladder when he was shocked and fell 10 feet to the ground.

EXTENT OF INJURY

The parties amended the extent-of-injury issue at the CCH and agreed that the disputed extent of injury was: Does the claimant's compensable injury of _____,

extend to include the cervical spine (herniation at C5-6), the brain and cranium, vertigo, numbness in both hands, TMJ dysfunction, dizziness, mental depression, and bilateral hearing loss/tinnitus? The hearing officer determined that “the claimant’s compensable injury of _____, includes herniation at C5-6 with radiculopathy expressed as bilateral numbness of the hands and a post-concussion syndrome consisting of vertigo and dizziness.” The carrier contends that the hearing officer exceeded his authority by finding the compensable injury extends to include radiculopathy and post-concussion syndrome because those conditions were not in dispute at the CCH. We agree.

We hold that the hearing officer exceeded the scope of the issue before him in making determinations regarding radiculopathy and post-concussion syndrome. We reverse the hearing officer’s determination that the compensable injury extends to include radiculopathy and post-concussion syndrome and render a new decision that radiculopathy and post-concussion syndrome were not disputed issues before the hearing officer, nor were they actually litigated, and therefore we strike that portion of Finding of Fact No. 4, Conclusion of Law No. 4, and the decision portion of the hearing officer’s decision and order that refers to radiculopathy and post-concussion syndrome.

There is sufficient evidence to support the hearing officer’s determination that the compensable injury extends to include bilateral numbness of the hands, vertigo, and dizziness.

MMI DATE

The hearing officer found that the date of statutory MMI is May 15, 2004. This finding was not appealed. The carrier contended that the certification of the designated doctor was not limited to only the compensable injury and therefore was invalid. The carrier contends that the compensable injury was limited to a herniated disc and electrical burns. However, we have affirmed the hearing officer’s determination that the compensable injury extends to include bilateral numbness of the hands, vertigo and dizziness. The carrier contends that the designated doctor considered other non-compensable conditions (psychological conditions) in making a determination of the claimant’s MMI. We do not agree.

The designated doctor provided alternative ratings, and when he considered only the claimant’s electrical burn to his left forearm the designated doctor still certified MMI on May 17, 2004, with a zero percent. It is clear the designated doctor intended for the MMI date he certified to be the date of statutory MMI because he noted in his narrative report that the claimant reached statutory MMI on May 17, 2004. We recognize that the designated doctor certified MMI on May 17, 2004, a date which is after the date found by the hearing officer to be statutory MMI (May 15, 2004). However, Section 401.011(30) defines MMI as the earlier of: (A) 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; (B) the expiration of 104 weeks from the date on which income benefits begin to accrue; or (C) the date determined as provided by Section 408.104. See Appeals Panel Decision 992062, decided November

3, 1999. There is sufficient evidence to support the hearing officer's determination of MMI of May 15, 2004.

IR

The carrier in its appeal under the heading "ISSUE THREE," argues that the designated doctor's "certification of MMI as of May 17, 2004, (statutory MMI was actually May 15, 2004) was not limited to only the compensable injury. Therefore, it was invalid. Did the hearing officer err in adopting an invalid [IR]?" We construe this to also be an appeal of the IR. Further, 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. As noted above, we have affirmed the hearing officer's determination that the compensable injury extends to include bilateral numbness of the hands, vertigo and dizziness. The hearing officer's determination that the IR is five percent is reversed and remanded back to the hearing officer for further consideration and development of the evidence. The hearing officer should instruct the designated doctor to assess an IR as of the MMI date based on the entire compensable injury, specifying the conditions that are included in the compensable injury. Both parties should be allowed an opportunity to respond to the amended certification and rating provided in reply by the designated doctor. If the designated doctor is no longer qualified or is unwilling to provide the certification and rating as requested, then another designated doctor should be appointed.

We reverse the hearing officer's determination that the compensable injury extends to include radiculopathy and post-concussion syndrome and render a new decision that radiculopathy and post-concussion syndrome were not disputed issues before the hearing officer and therefore we strike that portion of Finding of Fact No. 4, Conclusion of Law No. 4, and the decision portion of the hearing officer's decision and order that refers to radiculopathy and post-concussion syndrome.

We reverse the IR determination and remand back to the hearing officer for further consideration and development of the evidence consistent with this decision.

We affirm the hearing officer's determination that the compensable injury extends to include bilateral numbness of the hands, vertigo, and dizziness.

We affirm the hearing officer's determination that the date of MMI is May 15, 2004.

The true corporate name of the insurance carrier is **AMERICAN CASUALTY COMPANY OF READING, PENNSYLVANIA** and the name and address of its registered agent for service of process is

**CT CORPORATION SYSTEM
350 NORTH ST. PAUL STREET
DALLAS, TEXAS 75201.**

Margaret L. Turner
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Veronica L. Ruberto
Appeals Judge