

APPEAL NO. 070139
FILED MARCH 29, 2007

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 December 14, 2006. The hearing officer determined that: 1) the appellant (claimant) reached maximum medical improvement (MMI) on November 21, 2003; 2) the claimant's impairment rating (IR) is 10%; 3) the first certification of MMI and assigned IR of Dr. DG became final pursuant to Section 408.123; and 4) the claimant had disability beginning _____, and ending November 21, 2003.

The claimant appealed all the issues, including the disability issue, citing evidence in the record of disability after the November 21, 2003, ending date found by the hearing officer. The respondent (carrier) responded, generally urging affirmance and contending that disability does not exist past the November 21, 2003, MMI date and that it was up to the hearing officer "to believe disability exists or does not exist."

DECISION

Affirmed in part and reversed and remanded in part.

The parties stipulated that: 1) on _____, the claimant sustained a compensable right shoulder torn rotator cuff injury; and 2) the first certification of MMI was from the treating doctor, Dr. DG, who found the claimant at MMI on November 21, 2003, with a 10% IR.

**FINALITY OF THE FIRST CERTIFICATION OF MMI AND IR OF DR. DG
AND MMI AND IR**

The finality of the first certification of MMI and assigned IR of Dr. DG pursuant to Section 408.123 is supported by sufficient evidence and is affirmed. In that we are affirming the hearing officer's determination that Dr. DG's first certification of MMI and IR became final, the hearing officer's determinations that the claimant reached MMI on November 21, 2003, with a 10% IR are also affirmed.

DISABILITY

The hearing officer found that the claimant had disability from _____ (the date of injury) to November 21, 2003, the date that Dr. DG certified the claimant at MMI. The claimant appeals that determination contending "no evidence supports the Nov. 21, 2003 ending date" of disability. Disability and MMI are different concepts, although both may impact on the payment of temporary income benefits (TIBs). Appeals Panel Decision (APD) 033305, decided January 27, 2004. Section 401.011(16) defines disability as the inability because of a compensable injury to obtain and retain employment at wages equivalent to the pre-injury wage. MMI is, in pertinent part,

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)(A)). Section 408.101 provides that an employee is entitled to TIBs if the employee has a disability and has not attained MMI.

The hearing officer found that the claimant's disability ended on November 21, 2003. Dr. DG, in his report dated October 6, 2003, states that he believes nothing further needs to be done for the claimant "other than a therapeutic program and anti-inflammatories." In a Work Status Report (DWC-73) dated November 7, 2003, Dr. DG takes the claimant off work due to his rotator cuff repair from November 7, 2003, through December 3, 2003. An evaluation, also dated November 7, 2003, checks "No work." A report dated February 23, 2004, from Dr. DG, notes that the claimant "remains off work due to being unable to use his upper extremity." Similarly, reports dated May 11, 2004, and May 25, 2004, from Dr. DG note the claimant remains unable to work. In a note dated August 18, 2004, Dr. DG notes the claimant is doing reasonably well and releases the claimant to be seen "on an as needed basis." The claimant testified that he has been unable to work, and has not worked, since the date of injury. The carrier, in its response to the claimant's appeal, states that "[w]hile disability may continue to exist beyond the date of MMI, Impairment Income Benefits ('IIBs') are not owed." (Emphasis in the original). We believe the carrier meant TIBs rather than IIBs and to the extent carrier contends that disability can continue after MMI but TIBs are not owed, we agree. However, the carrier seems to subsequently argue that because the claimant was found to be at MMI pursuant to Section 408.123 and 28 TEX. ADMIN.CODE § 130.12 (Rule 130.12), "disability does not exist." We disagree. Medical documentation in the form of DWC-73s and reports from Dr. DG as well as the claimant's testimony all indicate that the claimant was unable to work because of his compensable injury for a period of time after November 21, 2003. The fact that further material recovery from or lasting improvement to the compensable injury could no longer reasonably be anticipated does not necessarily mean the claimant did not have disability, as defined by Section 401.011(16), after the date of MMI.

We reverse the hearing officer's determination that the claimant's disability ended November 21, 2003, as not being supported by the evidence and remand the case for an ending date of disability that is supported by the evidence. However, we note that pursuant to Section 408.101(a), the claimant will not be entitled to TIBs after the date of MMI, November 21, 2003.

SUMMARY

We affirm the hearing officer's determinations that the claimant reached MMI on November 21, 2003, that the claimant's IR is 10%, and that the first certification of MMI and assigned IR of Dr. DG became final pursuant to Section 408.123. We reverse the hearing officer's decision that the claimant's disability ended on November 21, 2003, as not being supported by the evidence and remand the case for a determination on an ending date of disability that is supported by the evidence.

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 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.

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

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

Thomas A. Knapp
Appeals Judge

CONCUR:

Cynthia A. Brown
Appeals Judge

Margaret L. Turner
Appeals Judge