APPEAL NO. 070181
FILED MARCH 19, 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 was held on December 13, 2006. The hearing officer determined that the respondent's (claimant) compensable injury of _____, extends to depression; that the appellant (carrier) waived the right to contest compensability of the depression injury by not timely contesting compensability in accordance with Section 409.021; that the claimant reached maximum medical improvement (MMI) on April 13, 2006; and that the claimant has an impairment rating (IR) of 38%.

The carrier appealed the determinations on all four of the issues, contending that the compensable injury does not include depression; that the carrier had not waived the right to contest compensability of depression; that the 38% IR was incorrectly calculated and that the claimant reached MMI on June 5, 2004, with a 1% IR as certified by a designated doctor. The claimant responded, urging affirmance.

DECISION

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

The claimant was a project manager for the employer and tripped and fell on _____, injuring her neck, low back, left elbow and left shoulder. The parties stipulated that the claimant sustained a compensable injury on _____, and that the carrier received the first written notice of a claimed injury on April 12, 2004. The parties also stipulated that the carrier disputed the depression injury by filing a Notice of Disputed Issues and Refusal to Pay Benefits (PLN-11) with the Texas Department of Insurance, Division of Workers' Compensation (Division) on February 17, 2005.

The claimant was initially seen at the (clinic) on April 7, 2004, and was diagnosed with a cervical strain, lumbar strain and bilateral hand contusions. Subsequent medical notes and reports dated April 21 through April 28, 2004, continued the same diagnoses. Medical notes dated May 4 through June 3, 2004, added a diagnosis of an L4-5 annular fissure. The claimant was seen by Dr. B, the first designated doctor, on May 18, 2004, and in a Report of Medical Evaluation (DWC-69) and narrative of that date, Dr. B certified that the claimant was not at MMI. Dr. B recommended further testing, "conservative treatment and possible epidural steroid injection" and estimated that the claimant was expected to reach MMI on April 5, 2005.

The claimant continued to treat with the clinic and in an occupational therapy Functional Capacity Evaluation of June 7, 2004, the therapist noted that the claimant would be sent to Dr. C for evaluation. In a Psychological Services Note dated June 9, 2004, Dr. C, a Ed. D. psychologist, noted "symptoms that may represent psychological

difficulty," noted various symptoms including depression, and concluded that the claimant would benefit from a psychological clinic/diagnostic interview.

CARRIER WAIVER

Section 409.021(a), effective for a compensable injury that occurred on or after September 1, 2003, provides that no later than the 15th day after the date on which an insurance carrier receives written notice of an injury, the insurance carrier shall begin the payment of benefits as required or notify the Division and the claimant in writing of its refusal to pay benefits. Section 409.021(a-1) further provides that if an insurance carrier fails to comply with the 15th day requirement, the carrier does not waive its right to contest compensability but rather commits an administrative violation. Section 409.021(c) defines the waiver period. It provides that if an insurance carrier does not contest compensability of an injury on or before the 60th day after the date on which the insurance carrier is notified of the injury, the insurance carrier waives its right to contest compensability.

In Appeals Panel Decision (APD) 041738-s, decided September 8, 2004, the Appeals Panel established that when a carrier does not timely dispute the compensability of an injury, the compensable injury is defined by the information that could have been reasonably discovered by the carrier's investigation prior to the expiration of the waiver period. In this case the parties stipulated that the carrier received the first written notice of the claimed injury on April 12, 2004. The carrier asserts that the 60-day waiver period would have ended on June 11, 2004. The parties stipulated that the carrier disputed the depression injury with the Division on February 17, 2005. The hearing officer, in his Background Information comments that Dr. C, in his June 9, 2004, report mentions the claimant's depression and need for a psychological clinic/diagnostic interview. The hearing officer then finds that the carrier, through a reasonable investigation, could have determined within 60 days following April 12, 2004, that the depression was part of the claimed injury. We disagree. Dr. C's report was not dictated, transcribed and dated until June 9, 2004, which was the 58th day of the 60-day waiver period. As previously stated, the nature of the injury that becomes compensable by virtue of waiver is defined by the information that could have been reasonably discovered by the carrier's investigation prior to the expiration of the waiver period. We hold that the record regarding depression under the facts of this case, that was not generated until the 58th day of the waiver period, could not have been reasonably discovered by the carrier's investigation prior to the end of the waiver period. *See* APD 062601-s, decided February 21, 2007. We reverse the hearing officer's determinations that the carrier through a reasonable investigation could have determined that the depression was part of the claimed injury and that the carrier waived the right to contest compensability of the depression injury by not contesting compensability in accordance with Section 409.021. We render a new decision that the carrier has not waived the right to contest compensability of the depression injury by not contesting compensability in accordance with Section 409.021.

EXTENT OF INJURY

The evidence supports the hearing officer's decision that the compensable injury of _____, includes depression.

THE MMI AND IR

As noted, the first designated doctor, Dr. B, found the claimant not at MMI on May 18, 2004, and estimated an expected MMI date in April 2005. Dr. K, a second designated doctor, was appointed and in a DWC-69 and report of an examination performed on August 13, 2004, certified the claimant was not at MMI and estimated an expected MMI date of March 1, 2005. Meanwhile the claimant was referred to Dr. W. Several epidural steroid injections (ESI) of the lumbar spine were performed between September 2004 and May 2006, with only temporary relief. The claimant was also referred to Dr. D who performed a left cubital tunnel transposition on September 22, 2004. The claimant testified, and a note from Dr. D supported, that she was improved from the September 22, 2004, surgery. On December 2, 2004, the claimant was admitted to the hospital with "intractable" back pain. A computed tomography of the lumbar spine had an impression of bulging intervertebral disks at L4-5 and L5-S1. The claimant was released from the hospital on December 4, 2004, and prescribed pain medication.

On December 7, 2004, the claimant was seen by a third designated doctor, Dr. S, who in a DWC-69 and narrative report dated December 7, 2004, certified clinical MMI on June 5, 2004, with a 1% IR due to left elbow loss of flexion and extension. Dr. S noted in his December 7, 2004, narrative report that the loss of range of motion in the claimant's left elbow "is secondary to the surgery that was performed [on September 22, 2004] rather than the occupational incident, which I believe was not the cause of this problem." Dr. S assessed a 0% impairment for the cervicothoracic and lumbosacral spine. We note that Dr. S's certification of a June 5, 2004, MMI date is a date prior to the second designated doctor's certification that the claimant was not at MMI, as of August 13, 2004, and that Dr. S's June 5, 2004, MMI date was prior to the claimant's surgery in September 2004 and prior to some of her ESI's. However, most importantly, 28 TEX. ADMIN. CODE § 130.1(c)(3) (Rule 130.1(c)(3)) requires the assignment of an IR based on the injured employee's condition as of the MMI date. Dr. S's 1% IR is based on the claimant's September 22, 2004, elbow surgery, which is well after the certified June 5, 2004, MMI date. We hold that Dr. S's report is contrary to the preponderance of the other medical evidence and that it is contrary to Rule 130.1(c)(3).

The claimant was referred to Dr. W, a doctor selected by the treating doctor to act in place of the treating doctor, to perform an evaluation. Dr. W, in a DWC-69 dated September 21, 2006, certified statutory MMI on that date with a 35% IR. In two other DWC-69s and narratives, also dated September 21, 2006 (alternative ratings with and without depression) Dr. W certified statutory MMI on April 13, 2006, with a 35% IR excluding depression and a 38% IR including depression. 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) was used in assessing all the IRs. Dr. W arrived at his

alternative IRs by assessing a 5% impairment for Diagnostic Related Estimate (DRE) Cervicothoracic Category II: Minor impairment; 10% impairment for DRE Lumbosacral Category III: Radiculopathy; impairment for left elbow loss of motion; an impairment "due to right [sic?] shoulder loss of motion;" crepitus of the left shoulder; and loss of strength and sensory defect of the little finger. Dr. W writes:

> Combined value excluding the left shoulder is 24% UE [upper extremity] is 14% whole person (WP) combined with 15% spine[.] Including the left shoulder impairment 39% UE is 23% WP combined with 15% spine[.]

Dr. W assesses another 5% impairment for mental behaviors disorder class 2 (the depression) to arrive at 38% IR. The carrier appeals virtually all of the elements of Dr. W's assessment.

Dr. W assessed a 10% impairment for DRE Lumbosacral Category III: Radiculopathy. The description and verification of DRE Lumbosacral Category III: Radiculopathy states:

> "The patient has significant signs of radiculopathy, such as loss of relevant reflex(es) or measured unilateral atrophy of greater than 2 cm above or below the knee, compared to measurements on the contralateral side at the same location. The impairment may be verified by electrodiagnostic findings. *See* Table 71, p.109, differentiators 2, 3 and 4."

Although Dr. W has a clinical impression of left lumbar radiculopathy and some of the reports state that EMG/NCV testing indicates left L4 radiculopathy, Dr. W does not indicate any loss of relevant reflexes or atrophy of the lower extremities to support a finding of radiculopathy. In APD 030091-s, decided March 5, 2003, the Appeals Panel held that "the AMA Guides indicate that to find Radiculopathy, doctors must look to see if there is a loss of relevant reflexes or unilateral atrophy with greater than a two centimeter decrease in circumference compared with the unaffected side." That decision goes on to state that the findings of neurologic impairment may be verified by electrodiagnostic studies, but that the AMA Guides do not state that electrodiagnostic studies, showing nerve root irritation, without loss of relevant reflexes or atrophy, constitutes undeniable evidence of radiculopathy. *See also* APD 050729-s, decided May 23, 2005, and APD 051824, decided September 19, 2005. In this case the medical records do not show atrophy or loss of relevant reflexes and Dr. W points to no significant signs of radiculopathy, as described in the AMA Guides, for his assessment of a 10% impairment for DRE Lumbosacral Category III: Radiculopathy. Dr. W's assessment of a 10% impairment for DRE Lumbosacral Category III: Radiculopathy cannot be adopted because it does not comply with the AMA Guides. We reverse the hearing officer's determination that Dr. W's rating was made in accordance with the AMA Guides and was supported by a preponderance of the evidence. We also reverse the hearing officer's determination that the claimant's IR is 38% as not being supported by the evidence.

The date of MMI was a separate issue and the hearing officer's determination that the claimant reached MMI on April 13, 2006, is supported by a preponderance of the evidence and is affirmed. 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, the Division shall adopt the IR of one of the other doctors. In that we have reversed the hearing officer's determination that the claimant's IR is 38% and there is no other certification of IR which can be adopted, we remand the case back to the hearing officer for the claimant to be examined by a designated doctor who is to assess an IR for the current compensable injury based on the claimant's condition as of the April 13, 2006, MMI date considering the medical records and the certifying examination. *See* Rule 130.1(c)(3).

SUMMARY

We affirm the hearing officer's determinations that the compensable injury of _____, extends to include depression and that the claimant reached MMI on April 13, 2006. We reverse the hearing officer's determination that the carrier waived the right to contest compensability of the depression injury by not timely contesting the diagnosis of depression in accordance with Section 409.021 and render a new decision that the carrier has not waived the right to contest compensability of depression in accordance with Section 409.021. We reverse the hearing officer's determination that the claimant's IR is 38% and remand the case for the claimant to be examined by a designated doctor to assign an IR for the compensable injury based on the claimant's condition as of the April 13, 2006, MMI date, considering the medical records and certifying examination. The parties are to be given an opportunity to respond to the designated doctor's report.

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. *See* APD 92642, decided January 20, 1993.

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

RUSSELL RAY OLIVER, PRESIDENT
6210 HIGHWAY 290 EAST
AUSTIN, TEXAS 78723.

_____
Thomas A. Knapp
Appeals Judge

CONCUR:

_____
Cynthia A. Brown
Appeals Judge

_____
Margaret L. Turner
Appeals Judge