

APPEAL NO. 071988
FILED JANUARY 3, 2008

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 October 11, 2007. The hearing officer decided that the appellant (claimant) reached maximum medical improvement (MMI) on May 22, 2007, with a 9% impairment rating (IR). The claimant appealed the hearing officer's IR determination, contending that the 9% IR was "not based on the claimant's condition on the stipulated MMI date" and that the treating doctor's certification of MMI on May 22, 2007, with a 36% IR should be adopted. The respondent (carrier) responded, urging affirmance of the 9% IR and that the 36% IR assessed by the treating doctor was invalid.

DECISION

Reversed and remanded.

The parties stipulated that: (1) on _____, the claimant sustained a compensable injury; (2) Dr. Mc was appointed as the designated doctor; and (3) the claimant reached MMI on May 22, 2007, as "certified" by Dr. Mc (the designated doctor) and Dr. M (the treating doctor). The sole issue in dispute is the claimant's IR. It is undisputed that the compensable injury includes the cervical spine, right knee, and dysphagia.

The designated doctor, Dr. Mc, examined the claimant on September 14, 2006, and in a Report of Medical Evaluation (DWC-69) dated October 16, 2006, certified that the claimant reached MMI on September 14, 2006, with a 9% IR. Dr. Mc 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) to assign the IR. Dr. Mc assigned 5% impairment for the cervical spine under Diagnosis-Related Estimate Cervicothoracic Category II: Minor Impairment and 4% impairment for loss of motion of the right knee under Table 41. In evidence is a "Deposition On Written Question to [Dr. Mc]" in which Dr. Mc is asked whether he concurs with the treating doctor that the claimant reached MMI on May 22, 2007. Dr. Mc's undated handwritten response states: "I agree on date of MMI." As previously stated, the parties stipulated that the claimant reached MMI on May 22, 2007, as "certified" by Dr. Mc and Dr. M.¹

IR

Section 408.125(c) provides that the report of the designated doctor shall have presumptive weight, and the Texas Department of Insurance, Division of Workers'

¹ There is no DWC-69 from Dr. Mc certifying an MMI date of May 22, 2007. The parties' stipulation that Dr. Mc "certified" an MMI date of May 22, 2007, is based on Dr. Mc's response to the MMI question in the written deposition.

Compensation (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 chosen by the Division, the Division shall adopt the IR of one of the other doctors. 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.

In Appeals Panel Decision (APD) 040313-s, decided April 5, 2004, the Appeals Panel wrote that the preamble to Rule 130.1(c) at 29 Tex. Reg. 2332 (2004) stated in a response to a comment that “[i]n the event the MMI date is changed due to a post-MMI change in the injured employee's conditions, there should be a re-evaluation of the IR as of the new MMI date.” The preamble also noted that in the event the MMI date is changed, the IR would have to be based on the injured employee's condition as of the changed MMI date. See also APD 010297-s, decided March 29, 2001 (the amended certification of a later date of MMI was done without a medical examination in violation of Rule 130.1(b)(4)(B)). In the instant case, the parties agree, through their stipulation, that Dr. Mc changed the MMI date from September 14, 2006, to a later date of MMI of May 22, 2007. The change to the later date of MMI was made without reexamining the claimant. The evidence establishes that Dr. Mc did not assign an IR based on the claimant's condition as of the changed later date of MMI of May 22, 2007. Dr. Mc assigned a 9% IR based on the date of examination of September 14, 2006. Accordingly, the hearing officer erred in determining that Dr. Mc's assigned 9% IR is supported by a preponderance of the evidence because the 9% IR was not based on the claimant's condition as of the stipulated date of MMI of May 22, 2007. We reverse the hearing officer determination that the claimant's IR is 9%.

Review of the record reflects that there are two certifications of MMI/IR in evidence by the treating doctor, Dr. M. The treating doctor examined the claimant on September 18, 2007. In one DWC-69, Dr. M certified that the claimant reached MMI on May 22, 2007, with a 36% IR using the AMA Guides (for the cervical spine, right knee, and dysphagia). In a second DWC-69, Dr. M certified that the claimant reached MMI on May 22, 2007, with a 28% IR using the AMA Guides (for the cervical spine and right knee). The evidence reflects that both IRs from Dr. M were based in part on his understanding that the claimant had spinal surgery at the C5-6 and C6-7 levels for the compensable injury, however the operative report of December 20, 2005, reflects that the claimant had spinal surgery only at the C5-6 level and therefore neither of Dr. M's IRs can be adopted.

There is another DWC-69 certification of MMI/IR from Dr. S, who has treated the claimant's knee injury, in which he certified that the claimant reached MMI on February 13, 2007, with a 7% IR. This certification cannot be adopted because the IR is not based on the stipulated date of MMI of May 22, 2007. Since there is no certification of MMI/IR that can be adopted we remand the IR issue to the hearing officer in accordance with this decision.

SUMMARY

We reverse the hearing officer's determination that the claimant's IR is 9% and we remand the IR issue to the hearing officer. On remand, the hearing officer is to determine whether Dr. Mc is still qualified and available to be the designated doctor, and if so, Dr. Mc is to determine the claimant's IR as of the stipulated May 22, 2007, MMI date. In the event the designated doctor is no longer qualified to act in that capacity, the record would need to be held open for the appointment of another designated doctor and for a determination on the claimant's IR. To determine the IR, the designated doctor should reexamine the claimant to assess the IR for the compensable injury. The designated doctor should then assign an IR for the claimant in accordance with the AMA Guides based on the claimant's condition as of the May 22, 2007, MMI date considering the medical records and certifying examination, and provide the certification of MMI and assigned IR on a DWC-69. The hearing officer is to provide the designated doctor's assessment of the claimant's IR to the parties and allow the parties an opportunity to respond, and then make a determination regarding the IR issue.

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 **LIBERTY MUTUAL INSURANCE COMPANY** and the name and address of its registered agent for service of process is

**CORPORATION SERVICE COMPANY
701 BRAZOS STREET, SUITE 1050
AUSTIN, TEXAS 78701.**

Veronica L. Ruberto
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Margaret L. Turner
Appeals Judge