

APPEAL NO. 080380
FILED MAY 8, 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 January 29, 2008. The issues before the hearing officer were:

- (1) Does the compensable injury of _____, extend to include reflex sympathetic dystrophy (RSD) of the lower right extremity, internal derangement of the right knee, depression and injuries to the right hip and lower back due to the diagnosed condition of altered gait resulting from the original injury?
- (2) Has the appellant (claimant) reached maximum medical improvement (MMI), and if so, on what date?
- (3) What is the claimant's impairment rating (IR)?

The hearing officer determined that: (1) the claimant's compensable injury of _____, includes complex regional pain syndrome (CRPS) or RSD of the lower right extremity and a reactive depression; (2) the claimant's compensable injury of _____, does not include internal derangement of the right knee and injuries to the right hip and lower back; and (3) the claimant reached MMI on July 5, 2003, with a 7% IR. The claimant appealed the hearing officer's MMI and IR determinations contending that the designated doctor did not rate the entire compensable injury. The respondent (carrier) responded, urging affirmance. The hearing officer's extent-of-injury determination was not appealed and has become final pursuant to Section 410.169.

DECISION

Reversed and remanded.

FACTUAL BACKGROUND

The parties stipulated that the claimant sustained a compensable (right knee) injury on _____, and that Dr. A is the designated doctor. An MRI of the right knee dated November 6, 2002, shows a complete chronic tear of the anterior cruciate ligament (ACL). The carrier states in its response that it "has accepted a right knee strain/sprain and ACL tear." An operative report dated January 4, 2003, states that the claimant underwent right knee surgery (ACL reconstruction). The designated doctor, Dr. A, examined the claimant on August 4, 2003, and certified that the claimant reached MMI on July 5, 2003, with a 7% IR for the right knee, using 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). Dr. A's narrative report dated August 4, 2003, states that the

claimant reached MMI on July 5, 2003 (six months after reconstructive right knee surgery).

In an unappealed finding of fact, the hearing officer determined that the compensable injury extends to include RSD or CRPS and reactive depression. In a report dated December 5, 2003, Dr. P diagnosed RSD, right lower extremity. In a report dated April 7, 2004, Dr. D diagnosed CRPS, right knee CRPS. A psychological evaluation report dated December 11, 2003, shows that the claimant was diagnosed with depression due to the compensable injury. The claimant contends on appeal that the RSD/CRPS and depression are conditions that were diagnosed after the designated doctor examined the claimant, but before the statutory date of MMI; therefore, the designated doctor did not rate the entire compensable injury. We note that the hearing officer states in the Background Information section of his decision that the Texas Department of Insurance, Division of Workers' Compensation (Division) determined that the claimant would have reached MMI by operation of law on October 21, 2004. However, statutory MMI under Section 401.011(30)(B) would be no earlier than October 27, 2004, if the eighth day of disability was (eighth day of disability). The evidence does reflect that the RSD or CRPS and depression were diagnosed after the designated doctor's evaluation of MMI and IR and before statutory MMI.

MMI AND IR

Section 401.011(30)(A) defines MMI 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 408.1225(c) provides that the report of the designated doctor has presumptive weight, and the Division shall base its determination of whether the employee has reached MMI on the report of the designated doctor unless the preponderance of the other medical evidence is to the contrary. 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 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. The preamble of Rule 130.1(c)(3) clarifies that the IR "must be based on the injured worker's condition as of the date of MMI." In response to public comment on Rule 130.1, the Division, in the preamble, noted that in the situations where the claimant reaches MMI clinically, rather than with the expiration of 104 weeks or the extended date in the event of spinal surgery, future changes in the injured worker's condition may cause the MMI date to change and 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." 29 Tex. Reg. 2332 (2004). See Appeals Panel Decision (APD) 040313-s, decided April 5, 2004.

With regard to MMI, the hearing officer determined that the claimant reached MMI on July 5, 2003, per the designated doctor's certification of MMI. As previously mentioned, Dr. A certified that the claimant reached MMI on July 5, 2003 (six months after the claimant had right knee surgery). The hearing officer states in the Background Information section of his decision that the probative medical evidence in the record shows that the RSD or CRPS was "an unforeseen result of the arthroscopic surgery, and is a result naturally flowing from the _____ injury." Subsequent progress reports dated from January 24, 2003, through July 14, 2003, from Dr. H (the orthopedic surgeon that performed the right knee surgery on the claimant) note that the claimant showed the following to the right knee: joint effusion; loss of motion knee; tightness on lateral mobility of her patella; paresthesia over the anterior cruciate; and hypersensitivity over the surgical scar. In a report dated December 9, 2003, Dr. M states that since the right knee surgery, the claimant has had problems and pain which "radiates down the leg with some burning sensation in the toes." Additionally, Dr. M recommended that the claimant undergo pain management treatment for her knee and that her condition would take time to get better "even with appropriate aggressive management." In a medical report dated April 7, 2004, Dr. D gives an impression of right knee CRPS and recommends right lumbar sympathetic block injections as treatment. In evidence are medical reports from Dr. D dated from April 2004 through October 2004, which show that the claimant received right lumbar sympathetic block injections and the claimant had relief of pain due to the treatment.

In APD 071599-s, decided October 31, 2007, the medical evidence in the record established that the claimant continued to receive treatment for the compensable injury after the date of MMI certified by the designated doctor, and that the additional treatment did improve the claimant's condition. In that case, the Appeals Panel reversed the hearing officer's MMI determination because of the claimant's improved condition and rendered a new determination of a later MMI date. In the instant case, as in 071599-s, *supra*, the medical evidence, including progress notes, establishes that the lumbar sympathetic block injections improved the claimant's RSD/CRPS of the lower right extremity condition. The hearing officer erred in giving presumptive weight to the designated doctor's report. Accordingly, we reverse the hearing officer's MMI determination that the claimant reached MMI on July 5, 2003.

With regard to the IR, the hearing officer determined that the claimant's IR is 7%, as certified by the designated doctor. The hearing officer determined that RSD/CRPS of the lower right extremity and the depression are part of the compensable injury. The designated doctor did not consider the RSD/CRPS or depression in determining IR. The Appeals Panel has held that the doctor evaluating permanent impairment must consider the entire compensable injury. APD 043168, decided January 20, 2005. Given that the hearing officer determined that the RSD or CRPS of the lower right extremity and the depression are part of the compensable injury, and that the designated doctor did not consider the RSD/CRPS or depression in determining MMI and IR, the hearing officer erred in giving presumptive weight to the designated doctor's report. Accordingly, we reverse the hearing officer's determination that the claimant's IR is 7%.

Review of the record shows that there are two other certifications of MMI and IR. Dr. H examined the claimant on May 14, 2003, and certified that the claimant reached MMI on that same date with a 2% IR for the right lower extremity. Dr. H's report cannot be adopted because he did not consider the RSD/CRPS and depression in determining MMI and IR. Additionally, Dr. H's narrative report dated May 15, 2003, states that the AMA Guides, third edition,¹ rather than the AMA Guides, fourth edition was used to assign an IR. See Rule 130.1(c)(2) which establishes the appropriate edition of the AMA Guides that are to be used to determine the claimant's IR, and in this case, it is the AMA Guides fourth edition as identified in this decision. Therefore, Dr. H's certification of MMI/IR cannot be adopted because he did not rate the entire compensable injury, and he did not use the proper edition of the AMA Guides.

Dr. C examined the claimant on April 24, 2007, and certified that the claimant reached MMI on October 21, 2004, with a 31% IR for the right lower extremity. In a Report of Medical Evaluation (DWC-69) Dr. C checked the box indicating that the statutory date of MMI was October 21, 2004, however as explained previously the statutory date of MMI is October 27, 2004, if the eighth day of disability is (eighth day of disability). Even if we consider October 21, 2004, to be the date the claimant reached MMI (a date prior to the statutory date of MMI), Dr. C's report cannot be adopted because he did not rate the entire compensable injury. Dr. C did not consider or rate the claimant's depression. Therefore, Dr. C's certification of MMI/IR cannot be adopted because he did not rate the entire compensable injury.

Since the hearing officer's MMI and IR determinations have been reversed and there is no other certification of MMI/IR in evidence which we can adopt, we remand the MMI and IR issues back to the hearing officer.

The designated doctor in this case is Dr. A. The hearing officer is to determine whether Dr. A is still qualified and available to be the designated doctor, and if so, request that Dr. A determine when the claimant reached MMI and rate the compensable injury, which includes CRPS or RSD and depression, in accordance with the AMA Guides. The hearing officer is to provide the designated doctor's response to the parties and allow the parties an opportunity to respond and then make determinations regarding the MMI and IR. If Dr. A is no longer qualified and available to serve as the designated doctor then another designated doctor is to be appointed pursuant to Rule 126.7(h) to determine the claimant's MMI and IR, which includes CRPS or RSD and reactive depression.

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

¹ Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association.

662.003 of the Texas Government Code in the computation of the 15-day appeal and response periods. See APD 060721, decided June 12, 2006.

The true corporate name of the insurance carrier is **(self-insured)** and the name and address of its registered agent for service of process is

**EXECUTIVE DIRECTOR
(ADDRESS)
(CITY), TEXAS (ZIP CODE).**

Veronica L. Ruberto
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Margaret L. Turner
Appeals Judge