

APPEAL NO. 081081
FILED SEPTEMBER 12, 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 (CCH) was held on June 30, 2008, in (City), Texas, with (hearing officer) presiding as hearing officer. The issues before the hearing officer were:

- (1) Has the appellant (claimant) reached maximum medical improvement (MMI), and if so, on what date?
- (2) If the claimant reached MMI, what is the impairment rating (IR)?
- (3) Does the claimant have disability resulting from an injury sustained on _____, for the period December 20, 2007, through the present? (Amended by agreement of the parties).

The hearing officer determined that: (1) the claimant reached MMI on February 27, 2008; (2) the claimant's IR is 0%; and (3) the claimant did not have disability at any time during the period beginning December 20, 2007, and continuing through the date of the CCH. The claimant appealed the hearing officer's MMI, IR and disability determinations. The claimant argues that she has not received the medical care for her compensable injury that she needs to reach MMI. The respondent (carrier) responded, urging affirmance.

DECISION

Reversed and remanded in part and reversed and rendered in part.

BACKGROUND INFORMATION

The parties stipulated that the claimant sustained a compensable injury on _____. In evidence is a Decision and Order dated December 19, 2007, in which the two issues in dispute were whether the claimant sustained a compensable repetitive trauma injury and whether the claimant had disability resulting from an injury sustained on _____. In that decision, the same hearing officer as in this case determined that the claimant sustained a compensable repetitive trauma injury, and had disability beginning September 26, 2007, through the date of the CCH, December 19, 2007. In that decision, the hearing officer states in the Background Information section that:

[(Dr. E)] had an EMG done, and has diagnosed recurrent ganglion of the left hand with bilateral carpal tunnel syndrome. He stated that her highly repetitive job duties likely aggravated this condition. The medical

evidence was convincing that Claimant sustained a repetitive trauma injury due to work duties.

The exact nature of the claimant's compensable injury was not defined. However, based on the hearing officer's discussion it is clear that he was persuaded that the compensable repetitive trauma injury included bilateral carpal tunnel syndrome. The Texas Department of Insurance, Division of Workers' Compensation's (Division) records show that the Decision and Order dated December 19, 2007, was not appealed and has become final. See 28 TEX. ADMIN. CODE § 142.16(f) (Rule 142.16(f)).

In this case, (Dr. S) was appointed as the designated doctor to determine MMI, IR, extent of injury and ability to return to work. Dr. S examined the claimant on February 27, 2008, and certified that the claimant reached MMI on that same date with 0% IR. Dr. S states in his narrative report dated February 27, 2008, that he failed to "find evidence of any sort of injury at work which would cause [the claimant] to continue to be symptomatic five months after stopping her work activities. What this clearly indicates is that the claimant's complaints, rather than a work-related condition, are a disease of life." Dr. S opined that the determination that the claimant sustained a compensable injury "is erroneous." In a response to a letter of clarification dated April 10, 2008, Dr. S states that "[w]hile the claimant may have had some aggravation of her underlying condition (carpal tunnel syndrome) at work, I find no evidence here of a compensable injury." Dr. S did not change his opinion regarding MMI and IR.

Subsequently a second designated doctor, (Dr. C), was appointed to determine the claimant's MMI and IR. Dr. C examined the claimant on May 15, 2008, and certified that the claimant reached MMI on that same date with 4% IR. Dr. C assigned a 4% whole person impairment for the right and left wrists (0% upper extremity (UE) impairment for the right wrist and 7% UE impairment for the left wrist) 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).

The hearing officer determined that "[t]he preponderance of the evidence does not support the MMI date or [IR] given by [Dr. C]." The hearing officer adopted the certification of MMI/IR by Dr. S. On appeal, the claimant states that she is not at MMI because she has not received adequate treatment for her compensable injury which includes "carpal tunnel syndrome, tenosynovitis, ganglion cyst, and strain/sprain" and references the reports of (Dr. W), the treating doctor, and (Dr. H), the doctor selected by the treating doctor acting in place of the treating doctor.

MMI/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. 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."

The hearing officer determined that the preponderance of the evidence did not support Dr. C's certification of MMI/IR and adopted Dr. S's certification of MMI/IR. The hearing officer states in the Background Information section of his decision that:

[Dr. C] has rated 4% loss of motion of the left wrist which [Dr. E] reported by history as existing since the 1980s prior left hand surgery by [(Dr. L)]. The loss of motion was not shown to be related to the strain/sprain aggravation injury in this case. While [Dr. C] is found to have been properly appointed as successor designated doctor due to questions raised by [Dr. S's] report, it appears that no change in Claimant's condition occurred between the date certified by [Dr. S] and the date of [Dr. C's] examination, so that the MMI date of February 28, 2008 [sic should be February 27, 2008] certified by [Dr. S] is correct. Likewise, it appears that [Dr. C] has rated a pre-existing condition and that [Dr. S] has correctly rated Claimant's impairment due to the resolved strain/sprain aggravation injury at 0% as of the MMI date.

Dr. S in his narrative report dated February 27, 2008, states that he found "no evidence of a work-related injury;" that "[f]or the purposes of discussion, I will use the date of my evaluation today as her MMI date, although, again this is just a formality since, again, with no work injury it is impossible to discuss [MMI];" and that there is no reason to rate the claimant's conditions "since they are not work-related and would not factor into the claimant's [IR]."

In Appeals Panel Decision (APD) 043168, decided January 20, 2005, the designated doctor refused to rate the compensable thoracic injury because he did not believe it was part of the compensable injury. In that case, the Appeals Panel stated "when a designated doctor refuses to provide an IR for the compensable injury (whether the IR be zero or a significant percentage) based on the designated doctor's opinion that the claimant does not have a compensable injury and to determine MMI based on the entire compensable injury, one of the remedies is to appoint another designated doctor." (*Citing* APD 982402, decided November 23, 1998; and APD 001733, decided September 13, 2000.) The Appeals Panel held that the designated doctor is required to

rate the entire compensable injury. See APD 043168. The evidence establishes that Dr. S did not consider the compensable repetitive trauma injury in determining MMI and IR. Because Dr. S did not determine MMI as defined in Section 401.011(30)(A) and he did not rate the compensable repetitive trauma injury, we reverse the hearing officer's determination that the claimant reached MMI on February 27, 2008, with a 0% IR.

The hearing officer's finding that "[t]he preponderance of the evidence does not support the MMI date or [IR] given by [Dr. C]" was based on the hearing officer's misunderstanding that the compensable injury was only a "resolved strain/sprain aggravation injury" and that it did not include bilateral carpal tunnel syndrome. As previously mentioned, the prior Decision and Order of December 19, 2007, established that the hearing officer was persuaded that the compensable repetitive trauma injury included bilateral carpal tunnel syndrome. In evidence is a medical report dated October 10, 2007, from Dr. E in which he concludes that the claimant's carpal tunnel syndrome was aggravated by the repetitive nature of her work.

In evidence is a Report of Medical Evaluation (DWC-69) dated March 14, 2008, from Dr. H (the doctor selected by the treating doctor acting in place of the treating doctor) in which he certified that the claimant is not at MMI. In his narrative report, Dr. H stated that the claimant needed to be re-evaluated by the hand specialist that ordered the EMG and nerve conduction study which was performed on October 12, 2007. Dr. H further noted that the claimant has had only a few sessions of physical medicine and has not had surgery for carpal tunnel syndrome. In a medical report dated June 24, 2008, Dr. H noted that the claimant had been referred to an "orthopedist." In a medical report dated June 24, 2008, Dr. W, the treating doctor, stated that the claimant has been unable to be evaluated by an orthopedic surgeon because of the carrier's denial.

Also in evidence is a DWC-69 dated May 15, 2008, from Dr. C, the second designated doctor, in which he certified that the claimant was at MMI on that same date with a 4% IR. Dr. C certified MMI/IR based on his examination of the claimant and review of the medical records. The DWC-69 from Dr. C lists as diagnoses codes "842.0"¹ (sprain/strain) and "354.0"² (carpal tunnel syndrome). Dr. C assigned a 4% IR for the claimant's compensable injury. The hearing officer found that Dr. C was correctly appointed by the Division as successor designated doctor and that his certification of May 15, 2008, is entitled to presumptive weight. This finding was not appealed.

Given that we have reversed the hearing officer's MMI and IR determinations that the claimant reached MMI on February 27, 2008, with a 0% IR, and there is a certification from Dr. C that the claimant reached MMI on May 15, 2008, with a 4% IR, as well as a DWC-69 dated March 14, 2008, from Dr. H that the claimant has not reached MMI, we remand the MMI and IR issues to the hearing officer. On remand, the hearing officer is to determine whether the claimant reached MMI, and if so, what is the claimant's IR.

¹ Dr. C's narrative report dated May 15, 2008, lists diagnosis code 842.00 as a wrist sprain/strain.

² Dr. H's medical report dated January 19, 2008, lists diagnosis code 354.0 as carpal tunnel syndrome.

DISABILITY

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.” The hearing officer states in the Background Information section of the decision that “[t]he evidence indicates that [Drs. E, S and C] all agree that at most, [c]laimant sustained a minor aggravation injury of pre-existing conditions which include carpal tunnel syndrome, tenosynovitis, and ganglion cyst. These doctors do not support continuing disability in this case due to the injury, although they indicate that [c]laimant’s diseases of life may be keeping her off work.” In APD 002967, decided February 12, 2001, the Appeals Panel cited Peterson v. Continental Casualty Company, 997 S.W.2d 893 (Tex. App.-Houston [1st Dist.] 1999, no pet.), in which the court held that the aggravation of a preexisting condition is a compensable injury for purposes of the 1989 Act. See *a/so* Cooper v. St. Paul Fire & Marine Insurance Company, 985 S.W.2d 614 (Tex. App.-Amarillo 1999, no pet.) also cited in APD 002967.

The medical reports from Dr. E and Dr. S both state that there was an aggravation of the claimant’s carpal tunnel syndrome. Dr. E states in a medical report dated October 10, 2007, that the claimant’s bilateral carpal tunnel syndrome “seems to have been aggravated by the repetitive nature of her work and certainly I think that this has contributed to her recent symptoms although much of what she has may be considered disease of life. I believe it is aggravated by the repetition she has described at work and thereby would be, in my opinion, considered work related.” Dr. S states in a letter of clarification dated April 10, 2008, that “[w]hile the claimant may have had some aggravation of her underlying condition (carpal tunnel syndrome) at work, I find no evidence here of a compensable injury.” Although Dr. S does not believe the claimant has a compensable injury, the medical reports of Dr. E and Dr. S agree that the claimant has carpal tunnel syndrome which was aggravated at work.

Based on the hearing officer’s discussion that the medical reports indicate that claimant’s “disease of life” may be keeping her off work, the hearing officer was persuaded that bilateral carpal tunnel syndrome has kept her off work. Bilateral carpal tunnel syndrome is included in the compensable repetitive trauma injury under the December 19, 2007, Decision and Order and subsequent medical records as discussed above. As previously noted Dr. S did not believe the claimant had a compensable injury. Dr. S states in his narrative report dated February 27, 2008, that the claimant can work full duty without restrictions due to her “alleged compensable injuries.” However, he opined that the claimant was restricted from work due to her carpal tunnel syndrome and UE tendonitis, concluding that any restrictions are due to diseases of life.

In evidence is a medical report dated January 19, 2008, from Dr. H (the doctor selected by the treating doctor acting in place of the treating doctor) which states that the claimant is currently unable to work. A Work Status Report (DWC-73) dated February 5, 2008, from Dr. W, the treating doctor, shows that the claimant was taken off work from February 5, 2008, through March 5, 2008, because the claimant’s

compensable injury prevented her from returning to work. Additionally, medical reports dated March 14, 2008, and June 24, 2008, from Dr. H state that the claimant "is currently unable to work" and "no light duty is available" due to the claimant's injury. The hearing officer's determination on disability is against the great weight and preponderance of the evidence. The medical evidence establishes that the claimant was unable to work due to her compensable repetitive trauma injury. Accordingly, we reverse the hearing officer's determination that the claimant did not have disability at any time during the period beginning December 20, 2007, and continuing through the date of the CCH and render a new decision that the claimant had disability beginning December 20, 2007, and continuing through the date of the CCH.

SUMMARY

We reverse the hearing officer's determinations that the claimant reached MMI on February 27, 2008, with a 0% IR, and remand the MMI and IR issues to the hearing officer. We reverse the hearing officer's determination that the claimant did not have disability at any time during the period beginning December 20, 2007, and continuing through the date of the CCH and render a new decision claimant had disability beginning December 20, 2007, and continuing through the date of the CCH.

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 060721, decided June 12, 2006.

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

**LEO F. MALO
12222 MERIT DRIVE, SUITE 700
DALLAS, TEXAS 75251.**

Veronica L. Ruberto
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Margaret L. Turner
Appeals Judge