

APPEAL NO. 081185  
FILED SEPTEMBER 29, 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 July 21, 2008. The hearing officer resolved the disputed issues by deciding that: (1) the appellant's (claimant) compensable cervical sprain/strain and left shoulder sprain/strain injury of \_\_\_\_\_, does not include cervical radiculopathy, left upper extremity tendonopathy, left shoulder impingement syndrome, and partial rotator cuff tear of the left shoulder; (2) the claimant reached maximum medical improvement (MMI) on May 16, 2006; and (3) the claimant's impairment rating (IR) is 0%. The claimant appealed, disputing the extent of injury, MMI and IR determinations. Additionally, the claimant contends that the hearing officer erred by not adding the issue of whether the first valid certification of MMI and IR became final pursuant to Section 408.123(e). The respondent (self-insured) responded, urging affirmance of the IR and extent-of-injury determinations.

**DECISION**

Affirmed in part and reversed and rendered in part.

The parties stipulated that the claimant sustained a compensable injury on \_\_\_\_\_. The claimant testified that he was carrying a pipe up a hill and injured his neck and left shoulder. The exact nature of his neck and left shoulder injury was in dispute. A 90-day MMI/IR finality issue was not certified as an issue in the Benefit Review Conference (BRC) Report. There was no evidence that a response to the BRC report was made by the claimant, and the claimant's written request to add the issue five days before the second setting of the CCH was not timely made. Section 410.151(b) and 28 TEX. ADMIN. CODE § 142.7 (Rule 142.7). The hearing officer did not abuse his discretion by not adding a 90-day MMI/IR finality issue for resolution at the CCH.

**EXTENT OF INJURY**

The hearing officer's determination that the claimant's compensable cervical sprain/strain and left shoulder sprain/strain injury of \_\_\_\_\_, does not include cervical radiculopathy, left upper extremity tendonopathy, left shoulder impingement syndrome, and partial rotator cuff tear of the left shoulder is supported by sufficient evidence and is affirmed.

**MMI/IR**

Section 408.1225(c) provides that the report of the designated doctor has presumptive weight, and the Texas Department of Insurance, Division of Workers' Compensation (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 parties stipulated in part that Dr. B was appointed as designated doctor to evaluate the claimant to determine the date of MMI and IR. Dr. B first examined the claimant on June 23, 2006, and found the claimant not to be at MMI, noting that a complete physical examination was not performed because of significant pain and "preference by [the claimant] to not go through a full physical examination." Dr. B examined the claimant again on March 8, 2007, and again opined that the claimant was not yet at MMI. Dr. B completed a physical examination but noted that there were no imaging studies or reports available for his review. On December 18, 2007, Dr. B examined the claimant for a third time. Dr. B certified that the claimant reached MMI on March 8, 2007, with a 0% IR. Dr. B noted that the MRI for the cervical spine and MR arthrogram of the left shoulder are relatively unremarkable for age and body habitus. Dr. B stated the claimant appears to "volitionally withhold movement" of his left shoulder which is inconsistent with informal observation as well as lack of atrophy. Dr. B went on to state that there is no rotator cuff tear and neck findings are consistent with degenerative changes. Dr. B certified the claimant to be at MMI the date of his previous examination (March 8, 2007), explaining that sufficient records were not available at that time to have certified the claimant was at MMI. Dr. B assessed impairment for both the left shoulder and the cervical spine at 0%, 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).

There is also a certification of MMI/IR from Dr. G, a referral doctor acting in place of the treating doctor. Dr. G examined the claimant on November 8, 2007, and certified the claimant reached MMI on September 16, 2007, with a 24% IR. He assessed a 10% whole person impairment for the left shoulder based on range of motion measurements and assessed a 15% whole person impairment for the cervical spine for radiculopathy, placing the claimant in Diagnosis-Related Estimate Cervicothoracic Category III: Radiculopathy based on his examination and a positive EMG. As previously noted, the hearing officer's determination that the claimant's compensable injury does not include cervical radiculopathy was affirmed.

A third certification of MMI/IR was also in evidence from the carrier-selected required medical examination doctor, Dr. O, who examined the claimant in May 2008. Dr. O certified that the claimant reached MMI on March 8, 2007, with a 0%. Dr. O noted

in his narrative report that the claimant had exaggerated pain responses and that physical examination demonstrated non-physiological findings and symptom magnification.

The hearing officer found that Dr. B's, the designated doctor's, assigned IR and MMI date are supported by a preponderance of the evidence, and that finding is not against the great weight and preponderance of the evidence. However, the May 16, 2006, date of MMI determined by the hearing officer does not correspond with the MMI date certified by Dr. B. Both parties agree that there is not a certification of MMI on May 16, 2006, in evidence. The MMI date certified by Dr. B is March 8, 2007. Accordingly, the hearing officer's determination that the claimant reached MMI on May 16, 2006, is reversed and a new decision rendered that the claimant reached MMI on March 8, 2007. We affirm the hearing officer's determination that the claimant's IR is 0%.

### **SUMMARY**

We affirm the hearing officer's determination that the claimant's compensable cervical sprain/strain and left shoulder sprain/strain injury of \_\_\_\_\_, does not include cervical radiculopathy, left upper extremity tendonopathy, left shoulder impingement syndrome, and partial rotator cuff tear of the left shoulder. We affirm the hearing officer's determination that the claimant's IR is 0%.

We reverse the hearing officer's determination that the claimant reached MMI on May 16, 2006, and render a new decision that the claimant reached MMI on March 8, 2007.

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

**HR FINANCE DIRECTOR  
(ADDRESS)  
(CITY), TEXAS (ZIP CODE).**

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Margaret L. Turner  
Appeals Judge

CONCUR:

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Thomas A. Knapp  
Appeals Judge

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Veronica L. Ruberto  
Appeals Judge