APPEAL NO. 081290
FILED NOVEMBER 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 (CCH) was held on July 24, 2008. The issue reported out of the benefit review conference (BRC) was what is the date of maximum medical improvement (MMI). At the request of the respondent/cross-appellant (carrier) and over the appellant/cross-respondent's (claimant) objection, the hearing officer found good cause to add the following issue:

> Does the doctrine of issue preclusion/collateral estoppel bar [c]laimant from litigating the date of [MMI] at this [CCH]?

The hearing officer determined that the MMI date is February 15, 2007, and that the "doctrine of issue preclusion/collateral estoppel does not bar [c]laimant from litigating the date of [MMI] at this [CCH] because that issue has not previously been litigated and the issue concerning the correct impairment rating [(IR)] is currently pending final resolution upon appeal."

The claimant appeals the determination of the MMI date, contending that the present designated doctor, Dr. M, has never been asked his opinion on the date of MMI. The carrier, in its cross-appeal, appeals the hearing officer's determination on issue preclusion/collateral estoppel, contending that the claimant was barred from litigating the MMI issue at this CCH (held on July 24, 2008) because the MMI date had already been decided at a prior CCH. The carrier responded to the claimant's appeal, urging affirmance of the February 15, 2007, MMI date. The file does not contain a response from the claimant to the carrier's appeal.

DECISION

Affirmed in part and reversed and rendered in part.

BACKGROUND INFORMATION

The parties stipulated that the claimant sustained a compensable injury on _____. The medical evidence established that the claimant had cervical spinal surgery on November 3, 2005, and cervical fusion surgery on May 4, 2006. Dr. Mc, the first designated doctor, examined the claimant on February 15, 2007, and certified the claimant at MMI on that date with a 21% IR. Part of the 21% IR was based on Diagnosis-Related Estimate (DRE) Cervicothoracic Category III: Radiculopathy, pursuant to 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). Dr. Mc was sent a letter of clarification (LOC) asking Dr. Mc what the significant signs of radiculopathy were. Dr. Mc replied that he had used the range of motion model as a differentiator to place the claimant in

DRE Cervicothoracic Category III. A CCH was convened on August 7, 2007, to determine the IR.

MMI

The hearing officer's determination that the MMI date is February 15, 2007, is supported by sufficient evidence and is affirmed.

ISSUE PRECLUSION/COLLATERAL ESTOPPEL

A prior CCH was convened on August 7, 2007, with the record closing on June 12, 2008. The BRC report for that CCH indicated that a resolved issue was the date of MMI with the resolution being: "Parties agree that [c]laimant reached [MMI] on 2/15/07, as assessed by the designated doctor."[1] The unresolved issue was "[w]hat is the [IR]?" At the prior CCH the parties discussed the MMI date as follows:

> Carrier's attorney: Well, if you find that the [IR] is correct as the [c]laimant asserts per the report of the designated doctor, you will need an MMI date to attach that [IR] to. And I don't think there's any dispute with regard to the MMI date. I think there's only one, that I'm aware of.
>
> Unless you are doing something different, other than the designated doctor --
>
> Claimant's attorney: The only one that's been certified, that I'm aware of, yes.
>
> The hearing officer: Yeah. And I can't find an [IR] without a --
>
> Carrier's attorney: That's correct.
>
> The hearing officer: -- an MMI date and -- yeah, that will probably be an incidental finding that's included in there.
>
> Carrier's attorney: Do you like -- would you like the parties to stipulate the MMI date?
>
> The hearing officer: Oh, we can do that.
>
> Claimant's attorney: I prefer --

[1] Section 410.151(b) provides that an issue that was not raised at a BRC or that was resolved at a BRC may not be considered unless: (1) the parties consent; or (2) if the issue was not raised, the commissioner determines that good cause existed for not raising the issue at the conference.

The hearing officer: He may -- he may --

Claimant's attorney: I prefer he just find one -- and there's only going to be one that's going to be even talked about. So I prefer you make the finding rather than stipulate.

The hearing officer: Yeah, I'll just find it --

At the conclusion of the prior CCH, the hearing officer announced that he might have to write the designated doctor for clarification regarding the IR. After the prior CCH, the hearing officer wrote the designated doctor regarding the rating for radiculopathy. Dr. Mc responded but the hearing officer concluded that Dr. Mc was unwilling to follow 28 TEX. ADMIN. CODE § 130.1(c)(3) (Rule 130.1(c)(3)) and Dr. M was appointed the new (second) designated doctor to determine the IR as of the MMI date of February 15, 2007. Dr. M examined the claimant on October 1, 2007, indicating in his report that "[i]mpairment to be rated as of MMI date of Feb. 15, 2007." Dr. M certified clinical MMI on February 15, 2007, and initially assessed a 29% IR. After several LOCs Dr. M continued to certify the February 15, 2007, date of MMI but eventually assessed an 11% IR. Beginning in December 2007, the claimant began urging the hearing officer to ask Dr. M to independently certify the date claimant reached MMI rather than use the MMI date indicated by the Texas Department of Insurance, Division of Workers' Compensation. The claimant also filed a Request for Designated Doctor (DWC-32) on April 30, 2008. The hearing officer closed the record of the prior CCH on June 12, 2008. In the decision of June 13, 2008, following the prior CCH, the hearing officer noted that the disputed issue was the IR and made a finding that the new designated doctor, Dr. M, "opined that as of the February 15, 2007 clinical [MMI] date, [c]laimant's final [IR] was 11% and he executed a [Report of Medical Evaluation] DWC-69 certifying that rating." The hearing officer's conclusion of law and decision was that the claimant's IR is 11%. That decision was appealed to the Appeals Panel and the hearing officer's Decision and Order was allowed to become final on September 11, 2008.[2]

In the meantime another BRC was convened on June 3, 2008, with the only issue being the date of MMI. The claimant's position at that BRC was that he was not at MMI and the carrier's position was "that the parties stipulated to the first MMI date at a previously held CCH." Over the claimant's objection the issue of whether the doctrine of issue preclusion/collateral estoppel bars the claimant from litigating the date of MMI at the present CCH was added. The hearing officer determined in the current decision that the doctrine of issue preclusion/collateral estoppel does not bar the claimant from litigating the date of MMI at this CCH.

In Appeals Panel Decision (APD) 061381-s, decided August 16, 2006, the doctrines of issue preclusion and collateral estoppel were discussed, although in regard to a completely different factual situation. In that case, the Appeals Panel cited APD 961010, decided July 10, 1996, as stating:

[2] Section 410.169 provides in part that a decision of a hearing officer is binding during the pendency of an appeal to the Appeals Panel.

> Collateral estoppel, frequently referred to as issue preclusion, bars relitigation of any ultimate issue of fact actually litigated and essential to the judgment in a prior suit, regardless of whether the second suit is based on the same cause of action. Wilhite v. Adams, 640 S.W.2d 875 (Tex. 1982). A party seeking to invoke this doctrine must establish that the facts sought to be litigated in the second action were fully and fairly litigated in the prior action; that those facts were essential to the judgment in the first action; and that the parties were cast as adversaries in the first action. Benson v. Wanda Petroleum Company, 468 S.W.2d 316 (Tex. 1971). In other words, there must be identity of parties and issues between the two proceedings.

APD 061381-s, *supra*, also referenced Barr v. Resolution Trust Corp., 837 S.W.2d 627 (Tex. 1992), where the Texas Supreme Court noted that, broadly speaking, res judicata is the generic term for a group of related concepts concerning the conclusive effects given final judgments, and that within this general doctrine, there are two principal categories: (1) claim preclusion (also known as res judicata); and (2) issue preclusion (also known as collateral estoppel). The Texas Supreme Court further noted that res judicata, or claims preclusion, prevents the relitigation of a claim or cause of action that has been finally adjudicated, as well as related matters that, with the use of diligence, should have been litigated in the prior suit, and that issue preclusion, or collateral estoppel, prevents relitigation of particular issues already resolved in a prior suit (emphasis added). In Barr, the Supreme Court reaffirmed the "transactional" approach to res judicata, stating that a subsequent suit will be barred if it arises out of the same subject matter of a previous suit and which through the exercise of due diligence, could have been litigated in a prior suit. The doctrine of res judicata has been applied to administrative action that has been characterized by the courts as adjudicatory, judicial, or quasi-judicial. Bryant v. L.H. Moore Canning Co., 509 S.W.2d 432 (Tex. Civ. App.-Corpus Christi, 1974), cert. denied 419 U.S. 845.

Section 408.123(a) and Rule 130.1(b)(2) provide that MMI must be certified before an IR is assigned. The BRC report for the prior 2007 CCH indicated that the parties resolved the MMI issue and agreed that the claimant reached MMI on February 15, 2007, as assessed by the designated doctor. There was no response to that BRC report and the discussion between the attorneys and the hearing officer at the August 7, 2007, CCH did not indicate a dispute of the date of MMI.[3] The fact that a second designated doctor was appointed does not, in this case, negate the resolved issue of a February 15, 2007, date of MMI, and as previously noted, certification of an MMI date is essential before an IR can be assigned. The exercise of due diligence required that the MMI date be certified, or in this case, agreed upon based on a doctor's certification, before the issue of the IR could be properly addressed in the prior CCH.

The hearing officer erred in determining that the doctrine of issue preclusion/collateral estoppel, as discussed, does not bar the claimant from litigating the date of MMI after the IR had been determined. We reverse the hearing officer's

[3] No testimony was presented at the August 7, 2007, CCH.

determination that the doctrine of issue preclusion/collateral estoppel does not bar the claimant from litigating the date of MMI at this CCH and we render a new decision that the doctrine of issue preclusion/collateral estoppel does bar the claimant from litigating the date of MMI at this CCH.

SUMMARY

We affirm the hearing officer's determination that the MMI date is February 15, 2007. We reverse the hearing officer's determination that the doctrine of issue preclusion/collateral estoppel does not bar the claimant from litigating the date of MMI at this CCH and we render a new decision that the doctrine of issue preclusion/collateral estoppel does bar the claimant from litigating the date of MMI at this CCH.

The true corporate name of the insurance carrier is **TRAVELERS CASUALTY & SURETY COMPANY** and the name and address of its registered agent for service of process is

CORPORATION SERVICE COMPANY
D/B/A CSC-LAWYERS INCORPORATING SERVICE COMPANY
701 BRAZOS STREET, SUITE 1050
AUSTIN, TEXAS 78701.

_____
Thomas A. Knapp
Appeals Judge

CONCUR:

_____
Veronica L. Ruberto
Appeals Judge

_____
Margaret L. Turner
Appeals Judge