

APPEAL NO. 111177
FILED OCTOBER 6, 2011

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 6, 2011. The hearing officer resolved the disputed issues by deciding that: (1) the compensable contusion of the abdomen/groin area with hernia repair surgery and a head concussion with brief loss of consciousness injury on (date of injury), and its effects, extend to the newly diagnosed incisional hernia of October 21, 2010; (2) the respondent (claimant) reached maximum medical improvement (MMI) on June 14, 2010; (3) the claimant's impairment rating (IR) is 15%; and (4) the claimant is entitled to supplemental income benefits (SIBs) for the first quarter from April 26, 2011, through July 25, 2011. The appellant (carrier) appeals the hearing officer's determinations on extent of injury, MMI, IR and SIBs entitlement. The claimant responded, urging affirmance.

DECISION

Affirmed in part and reversed and remanded in part.

The parties stipulated that: (1) the claimant sustained a compensable contusion of the abdomen/groin area with hernia repair surgery and a head concussion with brief loss of consciousness injury on (date of injury); (2) (Dr. C) was appointed as a designated doctor by the Texas Department of Insurance, Division of Workers' Compensation (Division) to determine MMI and IR; (3) Dr. C certified that the claimant reached MMI on June 14, 2010, with a 15% IR; (4) (Dr. F), a carrier-selected required medical examination (RME) doctor, certified that the claimant reached MMI on February 7, 2010, with a 9% IR; (5) the claimant did not commute any portion of the impairment income benefits; (6) the qualifying period for the first quarter of SIBs was from January 12, 2011, through April 12, 2011; (7) the quarter dates for the first quarter of SIBs are from April 26, 2011, through July 25, 2011; and (8) during the qualifying period for the first quarter of SIBs, the claimant was unemployed. We note that the hearing officer clarified during the recording of the CCH that the parties' stipulations regarding the quarter dates and the dates of the qualifying period for the first quarter were based on the certification of MMI/IR by Dr. C.

EXTENT OF INJURY

The hearing officer's determination that the compensable contusion of the abdomen/groin area with hernia repair surgery and a head concussion with brief loss of consciousness injury on (date of injury), and its effects extend to the newly diagnosed

incisional hernia of October 21, 2010, is supported by sufficient evidence and is affirmed.

MMI/IR

The hearing officer found that Dr. C's certification of MMI/IR "is not contrary to the preponderance of the evidence" and that "[t]he [IR] evaluation of [Dr. C] was performed in accordance with [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 carrier contends in its appeal that Dr. C's certification of MMI/IR cannot be adopted by the hearing officer because: (1) the designated doctor does not specifically explain his certified date of MMI, which is placed on the date of the certifying exam; and (2) Dr. C's IR is incorrect because he placed the claimant in Table 7 entitled "Classes of Hernia-related Impairment," page 10/247 of the AMA Guides, under Class 2 (10%-19% impairment of the whole person), without finding a palpable defect as required for assigning an impairment for a hernia.

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 record indicates that the designated doctor examined the claimant on June 14, 2010, and certified that the claimant reached MMI on that date with a 15% IR. In his narrative report dated that same date, Dr. C stated:

It is my opinion that [the claimant] has reached MMI and did so effective on this date: 06/14/2010.

The [claimant] is assigned a 15% whole person [IR] per the following:

Abdomen: 15% for umbilical and incisional hernia based on [C]lass 2, [T]able 7 on page 247 (Moderate abdominal pain and tenderness with frequent discomfort, precluding heavy lifting).

Head: 0% based on section 4.1 [The Central Nervous System-Cerebrum or Forebrain] on page 140.

In reviewing a “great weight” challenge, we must examine the entire record to determine if: (1) there is only “slight” evidence to support the finding; (2) the finding is so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust; or (3) the great weight and preponderance of the evidence supports its nonexistence. See Cain v. Bain, 709 S.W.2d 175 (Tex. 1986).

The claimant testified that Dr. C commented on a new hernia at the time of the designated doctor’s certifying exam. However, there is no documentation of any hernias other than the umbilical and incisional hernias that were surgically repaired in November of 2009, in Dr. C’s narrative report of June 14, 2010. The records indicate that a new incisional hernia was not diagnosed by any doctor until an October 21, 2010, examination by the claimant’s treating doctor, (Dr. H).

We agree with the carrier that Dr. C’s certification of MMI/IR cannot be adopted by the hearing officer given that we have affirmed the hearing officer’s decision that the newly diagnosed incisional hernia of October 21, 2010, is part of the compensable injury of (date of injury). Dr. C does not certify an MMI date or assign an IR based on the entire compensable injury. We further note that a rating under Table 7, Classes 1 through 3, requires a finding of a palpable defect in the supporting structure of the abdominal wall, which must be documented in the narrative report of the certifying doctor. See Appeals Panel Decision (APD) 072253-s, decided March 3, 2008. The hearing officer’s findings that Dr. C’s IR was performed in accordance with the AMA Guides and that Dr. C’s certification of MMI/IR is not contrary to the preponderance of the evidence is so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust. We reverse the hearing officer’s determination that the claimant reached MMI on June 14, 2010, with a 15% IR.

There is one other certification of MMI/IR in evidence. Dr. F, the carrier-selected RME doctor, examined the claimant on February 3, 2011, and certified that the claimant reached MMI on February 7, 2010, with a 9% IR. In his narrative report dated February 3, 2011, Dr. F notes the umbilical and incisional hernias surgically repaired in November of 2009, as well as a new incisional hernia. However, when addressing the date of MMI, Dr. F states:

The [claimant] was placed at MMI on the date he was seen by the designated doctor for no apparent reason. He had incisional hernia and umbilical hernia repair towards the end of November 2009 without any reported complications, and based on the records, could be regarded as having reached [MMI] within six to eight weeks thereafter. This would place him at MMI on February 7, 2010. No specific active treatment has occurred since then.

Given that we have affirmed the hearing officer's extent-of-injury determination, the RME's certification of MMI/IR cannot be adopted because the certified MMI date does not consider the newly diagnosed hernia of October 21, 2010. We remand the issues of MMI and IR to the hearing officer for actions consistent with this decision.

FIRST QUARTER SIBS

Since there has not yet been a determination regarding the claimant's IR, we reverse the hearing officer's SIBs determination on the first quarter and we remand this issue to the hearing officer to determine SIBs entitlement for the first quarter after a determination has been made regarding the claimant's IR.

REMAND INSTRUCTIONS

Dr. C is the designated doctor. On remand, the hearing officer is to determine if Dr. C is still qualified and available to be the designated doctor, and if so, the hearing officer is to advise the designated doctor that it has been administratively determined that the compensable contusion of the abdomen/groin area with hernia repair surgery and a head concussion with brief loss of consciousness injury on (date of injury), and its effects extend to the newly diagnosed incisional hernia of October 21, 2010. The designated doctor is then to be requested to give an opinion on MMI (which cannot be after the statutory MMI date) and IR of the entire compensable injury. If Dr. C is no longer qualified or available to serve as the designated doctor, another designated doctor is to be appointed to determine MMI and IR for the compensable injury. The parties are to be provided with the hearing officer's letter to the designated doctor, the designated doctor's response, and are to be allowed an opportunity to present evidence and respond.

SUMMARY

We affirm the hearing officer's determination that the compensable contusion of the abdomen/groin area with hernia repair surgery and a head concussion with brief loss of consciousness injury on (date of injury), and its effects extend to the newly diagnosed incisional hernia of October 21, 2010.

We reverse the hearing officer's determination that the claimant reached MMI on June 14, 2010, with a 15% IR and remand the issues of MMI and IR to the hearing officer for actions consistent with this decision.

We reverse the hearing officer's determination that the claimant is entitled to SIBs for the first quarter from April 26, 2011, through July 25, 2011, and remand this issue to the hearing officer to determine SIBs entitlement for the first quarter after a determination has been made regarding the claimant's IR.

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

**RON O. WRIGHT, PRESIDENT
6210 EAST HIGHWAY 290
AUSTIN, TEXAS 78723.**

Cynthia A. Brown
Appeals Judge

CONCUR:

Thomas A. Knpp
Appeals Judge

Margaret L. Turner
Appeals Judge