

APPEAL NO. 111393
FILED NOVEMBER 23, 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 August 23, 2011. The hearing officer resolved the disputed issues by deciding that: (1) the compensable injury of (date of injury), extends to complex regional pain syndrome/reflex sympathetic dystrophy (CRPS/RSD); (2) the first certification of maximum medical improvement (MMI) and assigned impairment rating (IR) from (Dr. M) on March 10, 2010, did not become final under Section 408.123; (3) the respondent (claimant) has not reached MMI; and (4) an IR is premature at this time. The appellant (carrier) appeals the hearing officer's determinations that the first certification of Dr. M did not become final, the claimant has not reached MMI and an IR is premature at this time. The claimant responded, urging affirmance. The hearing officer's determination that the compensable injury extends to CRPS/RSD was not appealed and has become final pursuant to Section 410.169. The parties resolved the extent-of-injury issue by stipulation at the CCH.

DECISION

Affirmed.

Pursuant to Section 410.203(b)(3) the Appeals Panel is permitted to write an affirmance of the decision of a hearing officer in a case described in Section 410.204. Section 410.204(a) provides that the Appeals Panel may only issue a written decision in a case in which the panel affirms the decision of a hearing officer if the case: (1) is a case of first impression; (2) involves a recent change in law; or (3) involves errors at the CCH that require correction but do not affect the outcome of the hearing.

A written decision was issued in this case to clarify that a hearing officer can determine that the claimant is not at MMI in the absence of a Report of Medical Evaluation (DWC-69) when the only DWC-69 in evidence certifying a date specific for MMI is contrary to the preponderance of the other medical evidence.

BACKGROUND INFORMATION

The parties stipulated that: (1) the claimant sustained a compensable injury on (date of injury); (2) the claimant's compensable injury includes CRPS/RSD; (3) the Texas Department of Insurance, Division of Workers' Compensation (Division) appointed Dr. M as the designated doctor to determine the claimant's MMI/IR; (4) the MMI/IR certification of Dr. M was the first valid certification of MMI/IR; (5) the claimant

received notice of the MMI/IR certification of Dr. M by verifiable means on March 29, 2010; (6) the claimant first disputed Dr. M's MMI/IR certification on July 13, 2010, which was not within 90 days of her receipt of notice of the rating by verifiable means; and (7) the claimant will reach statutory MMI on August 30, 2011.

The claimant testified that she cut her left little finger on a conveyor belt on the date of injury. In evidence is an operative report dated August 28, 2009, which noted the claimant sustained injury to the left little finger with an open displaced fracture of the distal phalanx, complex laceration of the nailbed and laceration of the flexor digitorum profundus tendon. The operative report additionally noted that the claimant required repair to reestablish the function of the finger. The claimant was assessed as having RSD in a medical record dated November 16, 2009. The claimant had trigger point injections and physical therapy but continued to have severe pain.

FINALITY UNDER SECTION 408.123

Section 408.123(e) provides that except as otherwise provided by Section 408.123, an employee's first valid certification of MMI and first valid assignment of an IR is final if the certification or assignment is not disputed before the 91st day after the date written notification of the certification or assignment is provided to the employee and the carrier by verifiable means. Section 408.123(f) provides in pertinent part that an employee's first certification of MMI or assignment of an IR may be disputed after the period described by Subsection (e) if: (1) compelling medical evidence exists of: "(C) improper or inadequate treatment of the injury before the date of the certification or assignment that would render the certification or assignment invalid." Section 408.123(f)(1)(C) provides by its express terms that improper or inadequate treatment giving rise to the exception must take place before the date of the certification or assignment that would render the certification or assignment invalid. See Appeals Panel Decision 052666-s, decided February 1, 2006.

The claimant was examined by Dr. M on March 10, 2010, and Dr. M certified the claimant reached MMI on that date with a 4% IR, 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). Dr. M assessed impairment for loss of range of motion and sensation of the claimant's left little finger. Dr. M noted that the claimant's sensation to pinprick and light touch was negative bilaterally. Dr. M did not identify in his report the nerve or the grade of severity of the deficit or pain he assessed in arriving at the impairment assigned for sensory loss. Dr. M noted in his report that muscle strength of the elbow, forearm, wrist, and hand was unable to be evaluated due to pain in the left arm.

In a medical record dated March 3, 2010, prior to the claimant's examination by the designated doctor, Dr. Holubec (Dr. H) a referral doctor, noted that it is medically necessary for the claimant to have a stellate ganglion block. Dr. H opined that the claimant would need a series of blocks. A medical record dated April 12, 2010, notes that the claimant had a cervical stellate ganglion block three weeks ago and that her pain was much relieved by the injection. Various other medical records in evidence reflect the claimant had other stellate ganglion block injections and that she continued to experience improvement. A referral doctor noted on April 19, 2010, that the claimant was not at MMI and wanted to schedule her for another block. The same referral doctor noted on May 10, 2010, the claimant "has really made [dramatic] progress with these blocks." On August 11, 2010, the referral doctor noted the claimant has continued to improve every time with a block and recommended an additional block. The doctor noted the blocks have affected a change in the claimant's lifestyle and she is doing better taking care of herself. On September 8, 2010, the referral doctor noted that a spinal cord stimulator trial is indicated for the claimant. The hearing officer found that at the time of Dr. M's certification of MMI the claimant had not received adequate treatment for her injury (including the CRPS/RSD stipulated to by the parties) and was persuaded that there was compelling medical evidence that the claimant received inadequate treatment prior to the certification of MMI/IR by Dr. M.

The hearing officer determined that the first certification of MMI and assigned IR by Dr. M on March 10, 2010, did not become final under Section 408.123 because there was compelling medical evidence of inadequate treatment of the injury before the date of Dr. M's certification of MMI/IR. See Section 408.123(f)(1)(C). The hearing officer's determination on the issue of finality of the first certification of MMI/IR by Dr. M on March 10, 2010, is supported by sufficient evidence and is affirmed.

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. 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 hearing officer found that "[Dr. M's] certification of MMI/IR is contrary to the preponderance of the evidence" and that the claimant's treating doctor had written a report explaining that the claimant is not at MMI as of June 23, 2011, due to ongoing treatment and improvement as shown by her records. No other certification of MMI/IR was in evidence. The hearing officer determined that the claimant has not reached MMI and because the claimant is not at MMI, an IR is premature.

The carrier argues on appeal that the hearing officer erred in his determinations that the claimant is not at MMI and an IR is premature in part because the claimant failed to present a DWC-69 certifying the claimant had not reached MMI. In evidence was correspondence from the claimant's treating doctor dated June 23, 2011, which stated that in her opinion the claimant still has not reached MMI. Additionally, the claimant's referral doctor, Dr. H in a medical report dated April 5, 2010, stated that in his opinion the claimant is not at MMI and noted that one block had improved her pain and function. Rule 130.1(b)(2) provides that MMI must be certified before an IR is assigned.

In the instant case, the hearing officer determined that the preponderance of the other medical evidence was contrary to the certification of MMI/IR by the designated doctor, Dr. M. In evidence was an opinion from the claimant's treating doctor that the claimant was not at MMI. Although there was no other DWC-69 in evidence, the hearing officer was not required to adopt the certification of MMI/IR from Dr. M, because it was contrary to the preponderance of the other medical evidence as evidenced by the medical records of the treating doctor and Dr. H. Section 408.1225 provides that the designated doctor's report has presumptive weight and the Division shall base its determination of MMI on the report of the designated doctor only if the preponderance of the other medical evidence is not contrary to the designated doctor's report. The hearing officer's determination that the claimant was not at MMI (without a DWC-69) is supported by sufficient evidence and is affirmed.

We affirm the hearing officer's determinations that the first certification of MMI and assigned IR from Dr. M on March 10, 2010, did not become final under Section 408.123; the claimant has not reached MMI; and because the claimant is not at MMI, an IR is premature.

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

**CORPORATION SERVICE COMPANY
211 EAST 7TH STREET, SUITE 620
AUSTIN, TEXAS 78701-3218.**

Margaret L. Turner
Appeals Judge

CONCUR:

Cynthia A. Brown
Appeals Judge

Thomas A. Knapp
Appeals Judge