APPEAL NO. 111610
FILED DECEMBER 9, 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 was held on October 4, 2011, in (City), Texas, with [hearing officer] presiding as hearing officer. The hearing officer resolved the disputed issues by deciding that the appellant (claimant) reached clinical maximum medical improvement (MMI) on March 18, 2010, with 0% impairment rating (IR) as certified by Dr. C. The claimant appealed, disputing the hearing officer's MMI and IR determinations. The respondent (self-insured) responded, urging affirmance of the MMI and IR determinations.

DECISION

Reversed and remanded.

The parties stipulated that: (1) the claimant sustained a compensable right upper back stab wound injury on [date of injury]; (2) Dr. C was appointed as the designated doctor by the Texas Department of Insurance, Division of Workers' Compensation (Division) to address the issues of MMI, IR, and the ability of the claimant to return to work; (3) Dr. C certified the claimant reached MMI on March 18, 2010, with 0% IR; and (4) Dr. W, the doctor selected by the treating doctor acting in place of the treating doctor, certified that the claimant reached MMI on May 31, 2011, with 11% IR. The only two certifications of MMI and IR in evidence are those from Dr. C and from Dr. W.

It was undisputed that the claimant, a store manager, was stabbed from behind by a co-worker on [date of injury], while at work. The claimant suffered a punctured lung and has undergone two surgeries at [hospital], including the removal of the 10" butcher knife and lung surgery. The medical records in evidence reflect that subsequent to his work injury, the claimant has undergone treatment in the form of medication, psychological counseling, physical therapy, and work hardening.

In evidence, in a [hospital] medical record, dated August 27, 2009, Dr. M, the claimant's initial treating doctor, stated that that the claimant "has a lot of sweats at night. He has kind of a fear of going back to work, and kind of all the issues that are going to be raised when he goes back to work, and is having difficulty emotionally struggling with this problem and would like to see a counselor for some counseling." Under Dr. M's treatment plan, he stated that the claimant would be set up with mental health counseling for his injury. The [hospital] psychiatric record, dated August 28, 2009, stated that the claimant is diagnosed with an adjustment disorder, "[r]ule out acute stress disorder." This record also stated that "should his difficulties sleeping

and/or nightmares persist, we could intervene pharmacologically . . . . I have recommended ongoing supportive psychotherapy to deal with this traumatic experience as well as how to handle situations such as returning to work." The claimant testified that he had two "minimal" counseling sessions at [hospital]. The claimant also testified that he continued to have problems with his nerves, with sleeping, and recurrent nightmares, and that he had problems returning to work, eventually retiring in June of 2010.

In evidence is Dr. M's medical record, dated October 7, 2009. Dr. M stated that the claimant "has a good range of motion [(ROM)] of the shoulders, but it still kind of pulls in that right chest wall region." Under his treatment plan, Dr. M stated that he referred the claimant to physical therapy to increase the strength in his upper extremities (UE), the ROM of his UE, particularly his right shoulder, and to increase his aerobic capacity and endurance. A physical therapy note, dated October 14, 2009, listed the claimant's diagnosis as "[r]ight [s]houlder" and "[open wound of scapula]." The physical therapy notes in evidence reflected that the right shoulder and the thoracic spine received treatment. In a Work Status Report (DWC-73) dated November 4, 2009, Dr. M included the work injury diagnosis as "[open wound of scapula]" and released the claimant to return to work with restrictions beginning November 16, 2009.

Dr. M, in a medical report dated January 18, 2010, stated that the claimant suffered from "chest wall pain in the mid scapular region on the right and radiating around." Under his treatment plan, Dr. M referred the claimant for a steroid block. The medical records in evidence reflect that the claimant received 3 myofascial steroid/local anesthetic injections as well as the use of a "TENS" unit. In a medical report dated June 15, 2010, Dr. M recommended evaluating the claimant for a thoracic nerve root block over several nerve roots in that region to control the pain. Dr. M also discussed with the claimant the use of an antidepressant for chronic pain.

The records in evidence reflect that, after the claimant switched treating doctors from Dr. M to Dr. B, in July of 2010, Dr. B's subsequent diagnoses included neuropathy to the right chest wall, status post multiple chest tube insertions; neuropathy to the thoracic spine, lumbar spine and perithoracic musculature; post-traumatic stress disorder (PTSD), and anxiety. In evidence is a behavioral medicine consultation dated July 23, 2010, in which the claimant is diagnosed with pain disorder and PTSD, chronic, secondary to the work injury. Also in evidence are individual counseling records reflecting the claimant received six psychotherapy sessions for his diagnosed conditions. The medical records also indicated that Dr. B recommended in December of 2010, that the claimant complete a chronic pain/work hardening program.

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 in pertinent part that the assignment of an IR shall be based on the injured worker's condition as of the MMI date considering the medical record and the certifying examination and the doctor assigning the IR shall:

(A) identify objective clinical or laboratory findings of permanent impairment for the current compensable injury;

(B) document specific laboratory or clinical findings of an impairment;

(C) analyze specific clinical and laboratory findings of an impairment;

(D) compare the results of the analysis with the impairment criteria and provide the following:

(i) [a] description and explanation of specific clinical findings related to each impairment, including [0%] [IRs]; and

(ii) [a] description of how the findings relate to and compare with the criteria described in the applicable chapter of 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 doctor's inability to obtain required measurements must be explained.

See Appeals Panel Decision (APD) 110219, decided April 26, 2011.

As previously mentioned, Dr. C, the designated doctor appointed to address MMI, IR, and return to work, examined the claimant on March 18, 2010, and certified that the claimant reached clinical MMI on March 18, 2010, with 0% IR. Dr. C noted on

the date of examination, that the claimant complained of pain in the right shoulder and chest on right side with numbness, pins/needles, tingling, burning, weakness, and hyposensitivity. On the physical examination, Dr. C stated the lungs were clear bilaterally, no wheezing. Dr. C documented well healed surgical scars at right posterior chest wall measuring 22 cm and stab wound scar of right posterior upper scapular region measuring 2.5 cm. A functional capacity evaluation reflected that the claimant could perform a medium physical level job. In his narrative report dated March 18, 2010, regarding MMI, Dr. C stated "the [claimant] has reached a plateau in his symptoms. No further active treatment or surgery is warranted." Regarding the IR, Dr. C assigned a 0%, stating "Chest/Lungs: 0% based on chapter 5 on page 153."

The claimant contends that Dr. C's certification of MMI and IR is contrary to the preponderance of the evidence because the claimant continued to have active treatment for his compensable injury subsequent to the designated doctor's certified date of MMI and because the designated doctor did not rate the entire compensable injury, which extends to PTSD and depression.

In his March 18, 2010, narrative report attached to his Report of Medical Evaluation (DWC-69), Dr. C indicated that the claimant was stabbed in his back and sustained injury to the lung which required surgeries. Dr. C, in the treatment history section of his record, listed only conservative care including physical therapy, "TENS" unit, and injections as well as the two surgeries. Dr. C failed to include in his narrative report a reference to the claimant's psychiatric evaluation and psychological counseling that occurred prior to Dr. C's certifying exam. Subsequent to the certifying examination, both of the claimant's treating doctors, Drs. M and B, recommended further treatment for the claimant's work injury, which the two doctors opined included as injured body parts/conditions, the right shoulder and the thoracic spine, and also for Dr. B, included a psychological condition.

Dr. W, the doctor acting in place of the claimant's treating doctor, Dr. B, examined the claimant on May 31, 2011, and certified that the claimant reached clinical MMI on that date with 11% IR, using the AMA Guides, based on "Chest and Thorax 0%; [UE] Impairment: Right Shoulder, Loss of [ROM] 8% UE [which converts to] 5% [whole person (WP) IR];[1] Mental and Psychological Disorder Mild to Moderate class 2 1-10% [assigning] 6% WP [IR]. Combined impairment is 11%." Dr. W diagnosed the claimant's work injury as open wound of the chest wall (pneumothorax); right shoulder

[1] We note that the AMA Guides on page 3/42 provide that in assessing abnormal ROM for the shoulder, flexion and extension, the measurements of the maximum flexion and extension are rounded to the nearest 10 degrees when using Figure 38 on page 3/43. There is no provision in the AMA Guides that the measurements used in Figure 38 must be rounded up or rounded down to the nearest 10 degrees.

motion deficit (as a result of injury, subsequent surgeries and scar tissue); and depression PTSD (as a result of the attack and stabbing).

The hearing officer finds that the IR of Dr. C was performed in accordance with the AMA Guides and that his certification of MMI and IR is not contrary to the preponderance of the evidence. The hearing officer adopted the certification of MMI and IR of Dr. C, the designated doctor.

The Appeals Panel has held that an extent-of-injury issue is a threshold issue that must be resolved before MMI and IR can be resolved, and that the resolution of the MMI and IR issues will flow from the resolution of the extent issue. *See* APD 110854, decided August 15, 2011.

Rule 130.6 (b)(5) provides:

> When the extent of the injury may not be agreed upon by the parties (based upon documentation provided by the treating doctor and/or insurance carrier or the comments of the employee regarding his/her injury), the designated doctor shall provide multiple certifications of MMI and [IRs] that take into account the various interpretations of the extent of the injury so that when the Division resolves the dispute, there is already an applicable certification of MMI and [IR] from which to pay benefits as required by the Act.

In APD 002675, decided December 21, 2000, the sole issue before the hearing officer was IR. There were multiple certifications of MMI/IR in which differing body parts were rated as the compensable injury. There was no prior Division determination of the extent of the compensable injury or agreement by the parties. In that case, the Appeals Panel held that "[w]henever the issue is an IR, by necessity the extent of injury is subsumed in that issue." Further, the Appeals Panel held that "[w]hile a designated doctor can state an opinion whether a certain condition is or is not part of the injury," it is the Division "that determines what the injury is and the extent of the injury, not the doctor." The Appeals Panel reversed the hearing officer's decision on IR and remanded the case for the hearing officer to first determine the extent of injury and then for the designated doctor to be advised what the extent of the injury was and to be requested to rate only the compensable injury as determined by the hearing officer. *See also* APD 101539, decided December 27, 2010.

With the issues of MMI and IR before him and the certifications of MMI and IR in evidence differing as to the extent of the compensable injury, we reverse the hearing officer's determination that the claimant reached MMI on March 18, 2010, with a 0% IR. The hearing officer erred in failing to add the issue of the extent of the compensable

injury and to make any finding of fact and conclusion of law regarding the extent of the compensable injury.

Whenever the issue is an IR, by necessity, the extent of the injury is subsumed in that issue. Accordingly, we remand the case to the hearing officer to add the issue of extent of injury and to make determinations on extent of injury, MMI, and IR consistent with this decision.

REMAND INSTRUCTIONS

Dr. C is the designated doctor in this case. On remand, the hearing officer is to determine whether Dr. C is still qualified and available to be the designated doctor. If Dr. C is no longer qualified or available to serve as the designated doctor, then another designated doctor is to be appointed pursuant to Rule 127.5(c) to determine the date of MMI and IR for the compensable injury. The hearing officer is to advise the designated doctor the body parts and/or conditions which are in dispute and to request the designated doctor to provide multiple certifications of MMI and IR that take into account the various body parts and/or conditions that are in dispute.

The parties are to be provided with the hearing officer's letter to the designated doctor and the designated doctor's response. The parties are to be allowed an opportunity to respond.

SUMMARY

We reverse the hearing officer's determination that the claimant reached MMI on March 18, 2010, with 0% IR and remand the case to the hearing officer to add the issue of extent of injury and to make determinations on extent of injury, MMI, and IR consistent with this decision.

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 **(a certified self-insured)** and the name and address of its registered agent for service of process is

(ADDRESS)
(CITY), TEXAS (ZIP CODE).

Cynthia A. Brown
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Margaret L. Turner
Appeals Judge