APPEAL NO. 111639
FILED DECEMBER 28, 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 September 27, 2011. The hearing officer resolved the disputed issues by deciding that: (1) the appellant/cross-respondent (claimant) reached maximum medical improvement (MMI) on April 15, 2011; (2) the claimant's impairment rating (IR) is seven percent; and (3) the claimant had disability beginning on April 16, 2011, and continuing through September 8, 2011 (the time period specified in the disability issue at the CCH as agreed to by the parties) as a result of the compensable injury sustained on (date of injury).

The claimant appealed, disputing the hearing officer's determinations of MMI and IR. The respondent/cross-appellant (carrier) responded, urging affirmance of the MMI and IR determinations. The carrier also cross-appealed, disputing the hearing officer's determination that the claimant had disability beginning on April 16, 2011, and continuing through September 8, 2011. The appeal file does not contain a response from the claimant to the carrier's cross-appeal.

DECISION

Affirmed in part and reversed and rendered in part.

The parties stipulated that the claimant sustained a compensable injury on (date of injury), and that the Texas Department of Insurance, Division of Workers' Compensation (Division)-selected designated doctor, (Dr. M) certified that the claimant reached MMI on April 15, 2011, and assigned a seven percent IR. The claimant's initial medical record reflects that he broke both the radius and ulna bones of his left forearm. An operative report dated September 16, 2010, stated the claimant had a left radius and ulna shaft open reduction and internal fixation.

DISABILITY

The hearing officer's determination that the claimant had disability beginning on April16, 2011, and continuing through September 8, 2011, 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 designated doctor, Dr. M, first examined the claimant on January 7, 2011. In his narrative report, Dr. M stated the claimant had not yet reached MMI and would not until x-rays reveal a solid bone union of both fractures. Dr. M additionally noted that the claimant needs to continue strengthening exercises.

Dr. M re-examined the claimant on April 15, 2011, and certified he reached MMI on that date with a seven percent IR. Dr. M stated that "it is felt [the claimant] reached [MMI] as of the date of this examination, April 15, 2011." Dr. M noted in his narrative that the claimant was presently working light duty but stated his arm is somewhat painful but is improving as time goes by. In his physical examination results, Dr. M stated that when measuring the claimant's forearm circumference, it is 2 centimeters smaller on the left side than the right and the claimant had restriction of motion in his left wrist. Although Dr. M documented that x-rays were not available for this examination, in his summary of the records, he stated the claimant's last x-ray revealed that the fractures were united.

In physical therapy notes dated February 28, 2011, the therapist noted the claimant would benefit from continuation of treatment in order to reach all functional goals and allow him to return to work full duty. On March 14, 2011, a medical record recommended the claimant enter a work conditioning or work hardening program to help improve his functional levels. The claimant's surgeon in a medical record dated March 22, 2011, stated the claimant needed work conditioning to get strong enough to do his normal work and without it he is not likely to return to that job. A medical record

dated June 3, 2011, documented that the claimant had started a work conditioning program. In evidence are several Work Hardening/Conditioning Daily Notes, which evidence the claimant's progress. The claimant's physical demand level when he entered the program was identified as light. The notes document that the claimant showed good progression and tolerance to upper extremity resistance exercises and that there was a decrease in his left forearm pain and soreness with improved strength while exercising. The notes document "progressive improvement in the claimant's left forearm and wrist strength with each succeeding day of practice." The daily note dated June 24, 2011, listed the claimant's current physical demand level at that time to be medium. Additional notes dated in August document the claimant had improved lifting tolerance with box/material handling activities. In a daily note dated August 15, 2011, the claimant was reported to have reached a physical demand level of medium-heavy and had a good tolerance to the job simulation activities and material handling exercises.

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 evidence establishes that the claimant attended work hardening/conditioning after April 15, 2011, the date Dr. M certified the claimant reached MMI. The progress notes document the claimant's improvement and the claimant testified that he returned to work in September of 2011.

In evidence is another certification from (Dr. L), a doctor selected by the treating doctor acting in place of the treating doctor. Dr. L examined the claimant on June 3, 2011, and certified that the claimant has not reached MMI. Dr. L noted that the claimant has started a work-conditioning program and that previous attempts for the claimant to undergo work-conditioning and work-hardening programs were denied until recently. Dr. L further noted that the claimant is currently making significant functional improvement with sustaining and lasting material recovery as a result. Dr. L stated that as a result of the claimant's current functional gain the claimant is not at MMI at this time and MMI status and IR should be assessed after work-conditioning is completed.

We acknowledge that although a claimant is determined to be at MMI, that does not mean he is pain free or that he may not experience some improvement over time. *See* Appeals Panel Decision (APD) 991731, decided September 29, 1999. However, in the instant case, medical evidence in the record documents significant improvement in functional gain after the additional treatment of the work-hardening.

In APD 071599-s, decided October 31, 2007, the medical evidence in the record established that the claimant continued to receive treatment for the compensable injury after the date of MMI certified by the designated doctor, and that the additional treatment did improve the claimant's condition. In that case, the Appeals Panel reversed the hearing officer's MMI determination because of the claimant's improved condition and rendered a new determination of a later MMI date. In the instant case, as in APD 071599-s, the evidence establishes that the claimant's medical condition improved after receiving treatment after the date of MMI certified by the designated doctor.

The hearing officer's determination that the MMI date is April 15, 2011, is so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust. The preponderance of the other medical evidence is contrary to the designated doctor's certification of MMI. Accordingly, we reverse the hearing officer's determination that the claimant reached MMI on April 15, 2011, with an IR of seven percent and render a new decision that the claimant has not reached MMI. Since the claimant has not reached MMI there can be no assessment of an IR.

SUMMARY

We affirm the hearing officer's determination that the claimant had disability beginning on April 16, 2011, and continuing through September 8, 2011.

We reverse the hearing officer's determination that the claimant reached MMI on April 15, 2011, with an IR of seven percent and render a new decision that the claimant has not reached MMI. Since the claimant has not reached MMI there can be no assessment of an IR.

The true corporate name of the insurance carrier is **OLD REPUBLIC 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