

APPEAL NO. 111699
FILED DECEMBER 29, 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 June 14, 2011, with the record closing on October 10, 2011. With regard to the two issues before her, the hearing officer determined that the date of maximum medical improvement (MMI) is July 13, 2009, with no impairment rating (IR).

The appellant (claimant) appealed, contending that: the hearing officer erred in stating that the MMI stipulation had been "overruled;" there were internal inconsistencies in the hearing officer's determination of the MMI date; and the hearing officer had a potential conflict of interest. The respondent (carrier) responded, urging affirmance.

DECISION

Reversed and remanded.

The parties stipulated that the claimant sustained a compensable injury on (date of injury). The claimant testified that he was a maintenance worker and that while working on a forklift a very heavy attachment came loose and struck him in the head and right leg. The parties further stipulated that (Dr. L) was the Texas Department of Insurance, Division of Workers' Compensation (Division)-appointed designated doctor to determine MMI and the IR and that the date of MMI is May 5, 2008. The evidence reflects that there are several certifications of MMI and IR in evidence.

Dr. L, the initial designated doctor for the issues of MMI and IR, examined the claimant on May 5, 2008, and certified clinical MMI on that date with a 17% IR. The IR was calculated by giving impairments for three components: right femur fracture, right hip range of motion (ROM) and a chewing dysfunction as a result of a mandibular fracture.

(Dr. FG), a post-designated doctor required medical examination (RME) doctor examined the claimant on August 28, 2008, and certified MMI on May 5, 2008, with a 0% IR. Dr. FG's assessment was: "[s]tatus-post multiple scalp lacerations, resolved; [s]tatus-post right femur fracture, status-post closed reduction with pinning procedure, resolved;" "[p]robable mild post-concussion syndrome, uncertain;" and "[s]ubmandibular parasymphysial fracture, right subcondylar fracture, resolved." Dr. FG did not rate right hip ROM stating it "is not a body area of compensation."

The CCH was held on June 14, 2011. The hearing officer commented in the Background Information that another letter of clarification was sent to Dr. L after the CCH, however, Dr. L “was no longer available; and thus another designated doctor was appointed.” (Dr. S-M) was appointed as the second designated doctor. Dr. S-M examined the claimant on August 29, 2011, and certified that the claimant reached statutory MMI on July 13, 2009, with a 2% IR. Dr. S-M diagnosed a right femur fracture, a mandibular fracture, head contusion, facial laceration and tooth avulsion. Dr. S-M rated the cervical spine with a 0% impairment (Diagnosis Related-Estimate Cervicothoracic Category I, Complaints or Symptoms); 2% impairment for right hip loss of ROM; and knee 0% impairment which combined for a 2% IR.

Even though the extent of injury was not a specific issue before the hearing officer, the Appeals Panel has long held that when the issue before the hearing officer is the IR that the extent of injury is a threshold issue. See Appeals Panel Decision (APD) 060170-s, decided March 22, 2006, and APD 090639, decided July 3, 2009. In APD 060170-s, which cited APD 961324, decided August 16, 1996, we stated:

The Appeals Panel has noted in the past that the resolution of a dispute over an IR cannot proceed unless the “threshold” issue of the extent of injury is resolved either by the parties or the hearing officer, even if not expressly raised by the parties. See [APD] 951097, decided August 17, 1995. See *also* [APD] 941748, decided February 13, 1995.

In this case, the designated doctors, Dr. L and Dr. S-M, and the RME doctor, Dr. FG, are rating different body parts, most notably a right hip injury as well as a chewing dysfunction and possibly loss or injury to claimant’s teeth.

Regarding the MMI date, the hearing officer in Finding of Fact No. 10 finds that the RME doctor, Dr. FG, certified that the claimant reached MMI on May 5, 2008, and certified that the claimant did not have any impairment. In Finding of Fact No. 11, the hearing officer found that the “July 13, 2008, date of [MMI] and 2% [IR] certified by [Dr. FG] is contrary to the preponderance of the evidence. In Finding of Fact No. 12, the hearing officer finds the “May 5, 2008, date of [MMI] and no [IR] certified by [Dr. PG] is not contrary to the preponderance of the evidence.” In Finding of Fact No. 13, the hearing officer finds “the [IR] evaluation of [Dr. G] 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)].” There is no Dr. PG or Dr. G associated with this case.

The hearing officer goes on to determine in Conclusions of Law that the MMI date is May 5, 2008, and there is no IR. However, in the Decision portion of her

decision and order, the hearing officer stated the MMI date is July 13, 2009 (the date of MMI certified by Dr. S-M, the second designated doctor).

We reverse the hearing officer's determinations that the claimant reached MMI on July 13, 2009, with no impairment because the extent of injury has not been resolved and as being internally inconsistent. We remand the case back to the hearing officer for further action consistent with this decision.

Other problems with the hearing officer's decision which have largely been rendered moot but which were specifically appealed are that the hearing officer made a finding that the "stipulation regarding the MMI date was overruled." We agree with the claimant's appeal that there is no provision in Section 410.166 for a hearing officer to "overrule" a written or oral stipulation. The claimant also contends that there was "a serious ethics breach and a conflict of interest" by the hearing officer. In that we are remanding the case to a different hearing officer and because the hearing officer who initially heard this case is no longer with the Division, those allegations have become moot and we need not address the merits of the arguments.

REMAND INSTRUCTIONS

The hearing officer is first to add the issue of extent of injury and then resolve the extent of injury, either by agreement of the parties or by resolution of the hearing officer. Dr. S-M is the most recent designated doctor. On remand, the hearing officer is to determine if Dr. S-M is still qualified and available to be the designated doctor, and if so, the hearing officer is to advise the designated doctor of the extent of the compensable injury. The designated doctor is then to be advised of the statutory MMI date and requested to give an opinion on MMI (which cannot be after the statutory MMI date) and IR of the entire compensable injury pursuant to the AMA Guides as of the MMI date considering the medical record and certifying examination. If the parties are unable to agree on the extent of injury then the designated doctor is to be asked to provide alternative ratings concerning the disputed body parts. If Dr. S-M is no longer qualified or available to serve as the designated doctor, another designated doctor is to be appointed pursuant to 28 TEX. ADMIN. CODE § 126.7(h) (Rule 126.7(h)) 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. The hearing officer is then to make determinations on the date of MMI and 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 **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 78701-3232.**

Thomas A. Knapp
Appeals Judge

CONCUR:

Cynthia A. Brown
Appeals Judge

Margaret L. Turner
Appeals Judge