

APPEAL NO. 111825
FILED JANUARY 26, 2012

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 November 1, 2011, in [City], Texas, with [hearing office] presiding as hearing officer. With regard to the issues before him, the hearing officer determined that: (1) the compensable injury of [date of injury], includes a left shoulder torn labrum but does not include injuries of left ulnar nerve neuropathy, left elbow impingement, left shoulder parasthesia, or left rotator cuff tear; (2) the first certification of maximum medical improvement (MMI) and impairment rating (IR) assigned by [Dr. C] on January 27, 2011, did not become final under Section 408.123; (3) the appellant (claimant) reached MMI on January 27, 2011; and (4) the claimant's IR is 5%.

The hearing officer's determination that the claimant's compensable injury includes a left shoulder torn labrum has not been appealed and has become final pursuant to Section 410.169. The parties resolved the finality issue by stipulating that the first certification of MMI and IR assigned by Dr. C did not become final. The finality issue was not appealed and therefore has become final pursuant to Section 410.169.

The claimant appealed the extent-of-injury determinations adverse to him, citing evidence which supports his position. The claimant also appealed the IR, contending that the designated doctor, Dr. C, failed to correctly rate the compensable injury, and the MMI date contending it is not supported by the evidence. The claimant, on appeal, also objected to the respondent's (carrier) offer of "Carrier's Brief on Causation/Aggravation." The carrier responded to the claimant's appeal, urging affirmance of the hearing officer's decision.

DECISION

Affirmed in part and reversed and remanded in part.

The claimant testified that he was injured at work on [date of injury], when he felt a "slip" in his left shoulder while trying to push a heavy cart filled with parts. The parties stipulated that: the claimant sustained a compensable injury on [date of injury], to his left shoulder in the form of a sprain/strain; Dr. C was the Texas Department of Insurance, Division of Workers' Compensation (Division)-appointed designated doctor; and that Dr. C certified that the claimant reached MMI on January 27, 2011, with a 5% IR.

EVIDENTIARY MATTER

The claimant also objects to the carrier's submission of a brief on the relevant law at the close of the CCH. We note that there was no objection from the claimant to this offer at the time nor did the claimant request the hearing officer to keep the record open in order for the claimant to submit a rebuttal brief. The claimant, neither having objected to the submission of the brief nor having requested the hearing officer keep the record open so the claimant could submit a brief, has not preserved his objection on appeal. We perceive no error by the hearing officer.

EXTENT OF INJURY

The hearing officer's determination that the claimant's compensable injury does not include left ulnar nerve neuropathy, left elbow impingement, left shoulder parasthesia, or left rotator cuff tear is supported by sufficient evidence and is affirmed.

MMI AND 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.

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 parties stipulated that Dr. C was the designated doctor and that he had certified that the claimant had reached MMI on January 27, 2011, with a 5% IR. Dr. C assessed alternative ratings in his January 27, 2011, report. In a rating just for the left shoulder, Dr. C assessed a 4% IR based on left shoulder loss of range of motion (ROM). Dr. C does not mention the left shoulder torn labrum which the hearing officer, in an unappealed determination, found compensable. There is no Report of Medical Evaluation (DWC-69) in evidence assessing a 4% IR. Consequently, the 4% IR cannot be adopted because it did not rate the entire compensable injury and was not documented with a DWC-69. In an alternative rating, Dr. C rated sensory difficulty of the left ulnar nerve added to the loss of ROM for the left shoulder to arrive at a 5% IR which the hearing officer adopted. However, the 5% IR cannot be adopted because it also does not rate the left shoulder torn labrum and it does rate sensory loss of the left ulnar nerve which the hearing officer determined, and we have affirmed, is not part of the compensable injury. Dr. C's date of MMI must also be reversed because Dr. C did not consider the entire compensable injury in either of his reports and rates a condition found not to be part of the compensable injury in the alternative report. The hearing officer's finding that the IR and MMI assigned by Dr. C, the designated doctor, is not contrary to the preponderance of the other medical evidence is so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust. See Appeals Panel Decision (APD) 111177, decided October 6, 2011.

There is one other certification of MMI/IR in evidence from [Dr. LS], a doctor selected by the treating doctor acting in place of the treating doctor. In a DWC-69 and narrative report dated April 22, 2011, Dr. LS certifies the claimant is not at MMI. In another DWC-69 and narrative dated May 4, 2011, Dr. LS certifies the claimant at statutory MMI with an 11% IR. Dr. LS simply states the claimant is at statutory MMI. Dr. LS rates both the left shoulder and elbow including the left shoulder joint and left ulnar nerve. Dr. LS also rates an arthroplasty of a distal clavicle resection. The distal clavicle resection was not one of the conditions addressed in the extent-of-injury issue and the hearing officer determined the left ulnar nerve condition was not compensable. Dr. LS's certification of MMI and IR cannot be adopted because it rates conditions found not to be part of the compensable injury.

We hold that the hearing officer's determinations that the claimant reached MMI on January 27, 2011, with a 5% IR are so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust. We reverse the hearing officer's determinations that the claimant reached MMI on January 27, 2001, with a 5% IR and remand the case for further action consistent with this decision.

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 the compensable injury extends to a left shoulder sprain/strain and left shoulder torn labrum. The hearing officer is also to determine the date of statutory MMI, either by agreement of the parties or by resolution of the hearing officer. 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 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) as of the MMI date considering the medical record and certifying examination. If Dr. C is no longer qualified or available to serve as the designated doctor, another designated doctor is to be appointed pursuant to Rule 127.5(c) 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 the IR which is supported by the evidence.

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 **HARTFORD INSURANCE COMPANY OF THE MIDWEST** 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.**

Thomas A. Knapp
Appeals Judge

CONCUR:

Cynthia A. Brown
Appeals Judge

Margaret L. Turner
Appeals Judge