APPEAL NO. 120071
FILED MARCH 9, 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 was held on December 20, 2011, in [City], Texas, with [hearing officer] presiding as hearing officer. With regard to the two issues before her, the hearing officer determined that the appellant (claimant) reached maximum medical improvement (MMI) on January 29, 2010, and that the claimant's impairment rating (IR) is 8%.

The claimant appealed, contending that the MMI date should be June 27, 2011, with an 18% IR as assessed by the designated doctor whose opinion should be given presumptive weight. The respondent (carrier) responded, urging affirmance of the hearing officer's decision and noting that the claimant's condition had not improved since January 29, 2010.

DECISION

Reversed and rendered in part and reversed and remanded in part.

The parties stipulated that the claimant sustained a compensable injury on [date of injury]. The claimant testified that he was working as a pipe layer and that on [date of injury], he was in a ditch lifting a ladder when he slipped and fell, injuring his left shoulder. The parties stipulated that the Texas Department of Insurance, Division of Workers' Compensation (Division)-selected designated doctor was [Dr. R], who was asked to give an opinion on the date of MMI and IR. The medical records reflect that the claimant had left shoulder surgery for a left shoulder "massive rotator cuff tear" on June 20, 2009.

MMI

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.

Dr. R, the designated doctor, initially examined the claimant on January 29, 2010, and certified that the claimant had not reached MMI because additional surgery and treatment might benefit the claimant. Dr. R diagnosed a "[l]eft shoulder, irreparable tear of rotator cuff." Dr. R commented "I cannot explain why the tear was irreparable."

Dr. R next examined the claimant on January 6, 2011, certifying that the claimant reached clinical MMI on January 29, 2010 (the date of his previous examination) and commented that the claimant "has not had any definite improvement since he was last seen on January 29, 2010; I am assigning a [MMI] date of January 29, 2010."

The claimant had a second left shoulder surgery (left shoulder hemiarthroplasty with cuff tear arthroplasty head, pectoralis major transfer, rotator cuff repair and biceps tenodesis) on May 17, 2011.

Dr. R next examined the claimant on July 6, 2011, and certified the claimant not at MMI referencing the May 17, 2011, surgery. Dr. R commented that the claimant had not completed his physical therapy in his left shoulder since that procedure was six weeks ago (the May 17, 2011, surgery). In an addendum to the July 6, 2011, report, Dr. R stated that a letter of clarification (LOC) had informed him that the actual statutory date of MMI is June 27, 2011, and asked Dr. R if a rating could be assigned based on his July 6, 2011, examination. A copy of the LOC in evidence stated that a benefit review conference of August 2, 2011, determined that the claimant reached statutory MMI (SMMI) on June 27, 2011. The evidence reflects that June 27, 2011, is the date of SMMI. Dr. R, in an amended Report of Medical Evaluation (DWC-69) and narrative dated August 11, 2011, referenced his July 6, 2011, examination, and certified the claimant at SMMI on June 27, 2011.

The treating doctor, in a DWC-69 and narrative dated March 16, 2011, certified that the claimant was not at MMI. The treating doctor noted that two surgeons had recommended further surgery to the claimant's left shoulder.

The hearing officer determined that the claimant reached MMI on January 29, 2010, based on the fact that the claimant's condition had not improved since that date. The hearing officer, in her Background Information commented:

> [The] claimant repeatedly testified that the surgery of May 17, 2011, did not help him in any way, and in fact, has worsened his condition. [The] claimant's testimony was similar to the history provided to the designated doctor on January 29, 2010, and thereafter.

In Appeals Panel Decision (APD) 012284, decided November 1, 2001, the Appeals Panel noted that the question regarding the date of MMI was not whether the claimant actually recovered or improved during the period at issue, but whether based upon reasonable medical probability, material recovery or lasting improvement could reasonably be anticipated. The Appeals Panel held that it is of no moment that the treatment did not ultimately prove successful in providing material recovery or lasting improvement in the claimant's condition if improvement could reasonably be anticipated. *See also* APD 110670, decided July 8, 2011.

We further note that 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. The designated doctor's most recent report, the amended report of August 11, 2011, on the issue of MMI, has presumptive weight.

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).

As discussed above, because the hearing officer based her MMI determination on whether the claimant's condition had improved since January 29, 2010, rather than on the definition of MMI set out in Section 401.011(31)(A), we reverse the hearing officer's determination that the claimant reached MMI on January 29, 2010, as being so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust. We reverse the hearing officer's determination that the claimant reached MMI on January 29, 2010, and render a new decision that the claimant reached SMMI on June 27, 2011, as certified by the designated doctor in his last amended report.

IR

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. R's first report dated January 29, 2010, found the claimant not at MMI and no IR was assigned. Dr. R's second report certified the January 29, 2010, MMI date which we have reversed. In that report Dr. R based his IR on range of motion measurements to arrive at an 8% IR. We would note that Dr. R does not correctly apply the tables 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) to his measurements. Dr. R's next report, dated July 6, 2011, certified the claimant not at MMI based on the May 17, 2011, surgery.

Dr. R's amended DWC-69 and narrative dated August 11, 2011, certified the claimant at SMMI on January 27, 2011, and assessed an 18% IR. Dr. R explains his IR as follows:

> At the July 6, 2011, examination the examinee had little active function of the affected extremity, so in my opinion no competent rating could be assigned on the basis of any functional parameter, such as motion or strength. In my opinion that is not a permanent state and is simply the result of recent surgery and will likely be much improved after normal recovery time. But I am bound by the rules to tender a rating related to his state on or about the statutory date of [MMI], as I understand Division rules.
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> Therefore, in my opinion he is best rated under Table 27 on page 61 for total shoulder implant arthroplasty, for 30% upper extremity impairment which converts to 18% whole person impairment. It is noted that his procedure was not a total shoulder, but the [AMA] Guides do not indicate an alternative, and this is the best method available to me under these circumstances of [SMMI]. An amended DWC-69 is attached.

Dr. R arrived at the 18% IR by rating the claimant under Table 27, page 3/61 of the AMA Guides for a total shoulder implant arthroplasty, a condition which Dr. R acknowledges the claimant did not have. Because Dr. R rated a condition which the claimant did not have, his 18% IR cannot be adopted. The treating doctor in his DWC-69 and narrative, dated March 16, 2011, does not assign an IR. Consequently, there

are no IRs (assigned as of the MMI date of June 27, 2011), in evidence which can be adopted.

We reverse the hearing officer's determination that the claimant's IR is 8% (assigned as of the MMI date of January 29, 2010, which we have reversed) as being so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust. We remand the issue of the IR to the hearing officer for further action consistent with this decision.

SUMMARY

We reverse the hearing officer's determination that the claimant reached MMI on January 29, 2010, and render a new decision that the claimant reached MMI on June 27, 2011 (the date of SMMI).

We reverse the hearing officer's determination that the claimant's IR is 8% and remand the issue of IR to the hearing officer for further action consistent with this decision.

REMAND INSTRUCTIONS

Dr. R is the designated doctor. On remand the hearing officer is to determine if Dr. R is still qualified and available to be the designated doctor, and if so, the hearing officer is to advise the designated doctor that the claimant reached SMMI on June 27, 2011, and request the designated doctor to rate only the compensable injury pursuant to the AMA Guides as of the SMMI date considering the medical record and certifying examination. We note that ratings for surgical procedures under Table 27 should be assigned only if the actual described surgical procedure was performed. If Dr. R 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 the IR for the compensable injury. The parties are to be provided with the hearing officer's letter to the designated doctor, the designated doctors response, and are to be allowed an opportunity to present evidence and respond. The hearing officer is then to make a determination on the 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 **OLD REPUBLIC GENERAL INSURANCE CORPORATION** and the name and address of its registered agent for service of process is

CORPORATION SERVICE COMPANY
701 BRAZOS STREET, SUITE 1050
AUSTIN, TEXAS 78701-3232.

Thomas A. Knapp
Appeals Judge

CONCUR:

Cynthia A. Brown
Appeals Judge

Margaret L. Turner
Appeals Judge