APPEAL NO. 120544
FILED MAY 29, 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 2, 2011, with the record closing on February 21, 2012, in [City], Texas, with [hearing officer] presiding as hearing officer. The hearing officer resolved the disputed issues by deciding that: (1) the compensable injury of [date of injury], extends to an injury to the left shoulder consisting of a superior labrum from anterior to posterior (SLAP) tear; (2) the respondent (claimant) reached maximum medical improvement (MMI) on December 15, 2011; (3) the claimant's impairment rating (IR) is 11%; and (4) the Texas Department of Insurance, Division of Workers' Compensation (Division) should contact the designated doctor, [Dr. O] to resolve the MMI and IR issues regarding the designated doctor's report dated March 18, 2010, pursuant to 28 TEX. ADMIN. CODE § 127.20 (Rule 127.20).

The appellant (self-insured) appeals the hearing officer's determinations on extent of injury, MMI, IR, and Division contact with Dr. O regarding MMI/IR issues, contending that the hearing officer erred by: (1) not adopting the opinion of [Dr. K], the designated doctor appointed by the Division on extent of injury; and (2) abusing her discretion in the letter of clarification (LOC) sent to Dr. O, the designated doctor appointed by the Division for MMI/IR, by seeking more than a clarification from Dr. O outside the provisions of Rule 127.20. The appeal file does not contain a response from the claimant.

DECISION

Affirmed in part and reversed and remanded in part.

The parties stipulated that: (1) the claimant sustained a compensable injury on [date of injury]; (2) the Division-appointed designated doctor for the purpose of extent of injury is Dr. K; and (3) the Division-appointed designated doctor for the purpose of determining MMI and IR is Dr. O.

EXTENT OF INJURY

The hearing officer's decision that the compensable injury of [date of injury], extends to an injury to the left shoulder consisting of a SLAP tear is supported by sufficient evidence and is affirmed.

LOC AND MMI/IR

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.

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. 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.

Rule 127.20(c) provides that the Division, at its discretion, may also request clarification from the designated doctor on issues the Division deems appropriate.

The record indicates that the disputed issues before the hearing officer at the CCH held on November 2, 2011, included extent of injury, MMI and IR. The only certification of MMI/IR in evidence at that setting was the initial certification of Dr. O, who examined the claimant on March 18, 2010, and certified that the claimant reached MMI on March 18, 2010, with 2% IR based on range of motion (ROM) deficits of the left shoulder. In his narrative report dated that same day, Dr. O assessed a partial rotator cuff tear of the left shoulder. Dr. O stated that the claimant was at MMI on that date unless the claimant undergoes left shoulder surgery. In his opinion under extent of the compensable injury, Dr. O stated that the claimant will probably need left shoulder surgery in the future to address the compensable injury.

The record establishes that the claimant underwent left shoulder surgery on March 25, 2011. The operative notes in evidence indicate that during the surgical

procedure, a SLAP tear was identified and debrided with a shaver and that the rotator cuff was intact and there was a distal clavicle resection performed.

The record was re-opened in order for the hearing officer to contact the designated doctor, Dr. O, in order to resolve the issues of MMI/IR because there was a disputed issue regarding extent of injury and because the claimant had undergone surgery since the initial designated doctor's examination. The hearing officer in Finding of Fact No. 6 stated that it was necessary to contact the designated doctor to resolve the issues of MMI and IR. This finding is supported by sufficient evidence. We affirm the hearing officer's determination that the Division should contact the designated doctor, Dr. O, to resolve MMI and IR issues regarding Dr. O's report dated March 18, 2010, pursuant to Rule 127.20.

However, the self-insured contends that the hearing officer abused her discretion in the wording of the LOC. The LOC is not in evidence as a hearing officer exhibit. We cannot address the self-insured's point of error that the hearing officer "overstepped what is contemplated by Rule 127.20" without this exhibit.

Further, the hearing officer indicates that Dr. O re-examined the claimant on December 15, 2011, in response to the LOC sent to him. Dr. O certified that the claimant reached MMI on December 15, 2011, with 11% IR, based on ROM deficits of the left shoulder (Figures 38, 41, and 44, pages 3/43 through 3/45 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) as well as an impairment for the distal clavicle resection under Table 27, page 3/61 of the AMA Guides. The CCH file contains a copy of Dr. O's amended certification of MMI/IR; however, it is not marked as a hearing officer's exhibit. The hearing officer's decision lists only the Benefit Review Conference Report and the Insurance Carrier Information Form as Hearing Officer's Exhibits Nos.1 and 2. The hearing officer has adopted this amended certification from Dr. O; however, there is no indication that it was admitted into evidence. It is clear from the self-insured's appeal that it received the LOC sent to Dr. O as well as Dr. O's amended certification of MMI/IR. Furthermore, the hearing officer indicates in the Background Information section of her decision, that Dr. O's amended certification of MMI/IR was distributed to the parties and they were given an opportunity to respond prior to the record closing on February 21, 2012, but there is no statement in the hearing officer's decision and order as to whether the parties responded or offered any evidence in response to Dr. O's amended certification of MMI/IR.

We reverse the hearing officer's decision because the LOC and Dr. O's amended certification of MMI/IR are not in evidence and remand the issues of MMI and IR. As

previously noted, the Appeals Panel cannot address the self-insured's contention that the hearing officer "overstepped what is contemplated by Rule 127.20" without the LOC admitted into evidence.

REMAND INSTRUCTIONS

On remand, the hearing officer is to admit as Hearing Officer's Exhibits the following: (1) the LOC sent to Dr. O to resolve the issues of MMI and IR regarding his report dated March 18, 2010; (2) the amended certification of MMI/IR by Dr. O in response to the LOC; (3) the correspondence to the parties forwarding the LOC and Dr. O's amended certification of MMI/IR; and (4) the response, if any, of the parties. The hearing officer is then to make a determination on the issues of MMI and IR consistent with this decision.

SUMMARY

We affirm the hearing officer's decision that the compensable injury of [date of injury], extends to an injury to the left shoulder consisting of a SLAP tear.

We affirm the hearing officer's decision that the Division should contact the designated doctor, Dr. O, to resolve the MMI and IR issues regarding Dr. O's report dated March 18, 2010, pursuant to Rule 127.20.

We reverse the hearing officer's decision that the claimant reached MMI on December 15, 2011, with 11% IR and remand the issues of MMI and IR to the hearing officer for further action 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* Appeals Panel Decision 060721, decided June 12, 2006.

The true corporate name of the insurance carrier is **(a self-insured governmental entity)** and the name and address of its registered agent for service of process is

[SB]
[ADDRESS]
[CITY], TEXAS [ZIP CODE].

Cynthia A. Brown
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Margaret L. Turner
Appeals Judge