APPEAL NO. 120564
FILED JUNE 7, 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 February 28, 2012, in [City], Texas, with [hearing officer] presiding as hearing officer. With regard to the disputed issues before him, the hearing officer determined that: (1) the compensable injury of [date of injury], extends to lumbago but does not extend to articular cartilage disorder in the left shoulder region, nonallopathic lesions in the lumbar region, a lumbar disc protrusion at L4-5 and L5-S1, or spondylosis with myelopathy; (2) the appellant/cross-respondent (claimant) has not yet reached maximum medical improvement (MMI); and (3) since the claimant has not reached MMI, she cannot be certified with an impairment rating (IR).

The claimant appealed the extent-of-injury determination adverse to her. The respondent/cross-appellant (self-insured) responded, urging affirmance of the claimant's disputed determination. The self-insured cross-appealed the extent-of-injury determination adverse to it as well as the hearing officer's MMI and IR determinations. The self-insured also contends that the hearing officer made an error in his decision when he recited that the parties stipulated that on [date of injury], the claimant was the employee of the [Employer] and the employer provided workers' compensation insurance as a self-insured. The appeal file does not contain a response to the self-insured's cross-appeal.

DECISION

Affirmed in part and reversed and remanded in part.

A review of the compact disc recording of the CCH reflects that the parties stipulated on the record that the claimant's employer was the [Employer] on [date of injury], and that the employer provided workers' compensation insurance as the self-insured. Also in evidence is the Benefit Review Conference Report, admitted as Hearing Officer's Exhibit No. 1, which lists the [Employer] as the employer. We find the self-insured's contention that Stipulations 1B and 1C are erroneous to be without merit.

The parties further stipulated that the claimant sustained a compensable injury on [date of injury], and [Dr. T] is the Texas Department of Insurance, Division of Workers' Compensation (Division)-appointed designated doctor to address MMI, IR, and extent of injury. It is also undisputed that Dr. T was appointed to address return to work (RTW).

EXTENT OF INJURY

The hearing officer's determination that the compensable injury of [date of injury], extends to lumbago but does not extend to articular cartilage disorder in the left shoulder region, nonallopathic lesions in the lumbar region, a lumbar disc protrusion at L4-5 and L5-S1, or spondylosis with myelopathy 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 in pertinent part that the assignment of an IR shall be based on the injured worker's condition as of the MMI date considering the medical record and the certifying examination.

The designated doctor, Dr. T, examined the claimant on February 18, 2011, and referred the claimant for a functional capacity evaluation (FCE), performed on March 1, 2011, which included range of motion (ROM) testing for the left shoulder and the lumbar spine. Dr. T certified that the claimant reached MMI on February 18, 2011, with 0% IR, using 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). Dr. T placed the claimant in Diagnosis-Related Estimate Lumbosacral Category I: Complaints or Symptoms, which yields 0% impairment. Dr. T assessed abnormal ROM for the left upper extremity, which "yields a 0% whole person impairment due to submaximal effort during testing." Dr. T assigned 0% whole person IR for the [date of injury], compensable injury. In his narrative report attached to his Report of Medical Evaluation (DWC-69), Dr. T stated that the claimant's condition is stable and that the claimant is able to RTW with restrictions on February 18, 2011, the certified date of MMI. In the Recommendations section of the March 1, 2011, FCE, [Dr. H] stated "[s]tart [rehabilitation] program,

[c]ontinue current [rehabilitation] program, depending on if she is able to RTW. If not allowed she should be in a . . . accredited RTW program."

In the Background Information of his decision, the hearing officer states:

> In this case, further material recovery could be anticipated on the date the [d]esignated [d]octor certified as the date of MMI. [The] [c]laimant was continuing physical therapy for her lumbar sprain/strain and additional injections were being requested for treatment to her shoulder. Even [the self-insured's] peer review doctor [Dr. L] recommended a transition to home exercises for [the] [c]laimant's back and a possible subacromial injection to [the] [c]laimant's shoulder at the time the [d]esignated [d]octor examined [the] [c]laimant . . . . In this case, the recovery and improvement could reasonably be anticipated. [The] [c]laimant was not at MMI, as certified by [(Dr. F), a doctor selected by the treating doctor to act in place of the treating doctor].

The hearing officer found that the February 18, 2011, date of MMI and 0% IR certified by Dr. T is not supported by a preponderance of the other medical evidence. That finding is supported by sufficient evidence. Because Dr. T based his 0% IR on the claimant's condition, a lumbar sprain/strain and left shoulder sprain/strain, on his certified MMI date of February 18, 2011, the hearing officer cannot adopt that IR.

There is one other certification of MMI and IR in evidence by Dr. F, the referral doctor, which will be discussed below after a brief review of the medical records in evidence.

A review of the records reflect that, from her initial treatment with her treating doctor,[Dr. K], the claimant has been diagnosed by Dr. K with left shoulder cartilage disorder, lumbar segmental dysfunction, left shoulder sprain/strain, lumbar spondylosis, and lower back pain (LBP). The claimant received 14 pre-authorized physical therapy visits for her low back and left shoulder. Dr. K also took the claimant off work but released her to RTW modified on March 7, 2011. The claimant was also treated by referral by an orthopedist, [Dr. C], beginning December 7, 2010. Dr. C diagnosed LBP with bilateral leg radiculopathy left more than right, left shoulder partial rotator cuff tear, AC joint impingement and bursitis, arthrofibrosis with limited motion, bilateral S1 joint pain, left more than right, and sprain. Dr. C attempted to get pre-authorization for bilateral S1 joint injections for the sacroiliac joint, which were denied. However, Dr. C did obtain pre-authorization for a left shoulder injection, which was performed on February 8, 2011.

In a report dated January 6, 2011, Dr. L, a peer review doctor, reviewed the claimant's medical records. In his report, Dr. L opined that the compensable injury of [date of injury], was a lumbar and left shoulder strain and that there was no evidence of a sacroiliac joint injury related to the compensable injury. Dr. L also stated that the claimant's current symptoms were due a sacroiliac joint dysfunction, non-work related; however, the effects of the compensable injury were not resolved because the claimant still suffered lingering left shoulder pain as well as lumbar tenderness. In his opinion 2-3 more weeks of further conservative treatment, which might include a left shoulder subacromial injection, was likely to resolve the symptoms. Dr. L recommended transitioning the claimant to a home exercise program regarding the lumbar spine over the next couple of weeks.

In a record dated March 10, 2011, claimant was seen by [Dr. R], who stated that the claimant had no benefit from her shoulder injection 3-4 weeks ago. Dr. R diagnosed LBP and left shoulder impingement/tendonopathy. Dr. R recommended more physical therapy to strengthen the low back, a TENS unit for spasms, and to teach the claimant a home exercise program. A review of the record indicates physical therapy resumed on March 15, 2011.

In a record dated May 3, 2011, Dr. R states that the claimant had physical therapy in the past with minimal benefits, that the claimant had returned to work for 1-2 months in a clerical position, and that "sometimes her LBP flares up while working." Dr. R indicates she will request more physical therapy. A report from [medical facility] dated May 20, 2011, indicates the self-insured denied the request for more physical therapy because the previous physical therapy was in excess of the Official Disability Guidelines recommendations. It also noted that it had been expected that the claimant would participate in a home exercise program and there had been a failure to progress with prior supervised rehabilitation.

In a letter dated June 24, 2011, Dr. R stated to the adjuster that the claimant needs arthroscopy of the left shoulder and work hardening for the lumbar spine but it continues to be denied. Dr. R states that the examination of the lumbar spine is significant for the sacroiliac and there is L4-5 paraspinal tenderness though good ROM of the lumbar spine. Also, the left shoulder MRI indicates significant tendinitis with over 90% of tendon involved. The lumbar spine MRI indicates 2 level disc bulges with stenosis.

Dr. F, the referral doctor selected by Dr. K, examined the claimant on July 19, 2011, for the purposes of MMI and IR. Dr. F certified that the claimant was not yet at MMI and no IR was assigned. On the DWC-69 and in his narrative report, Dr. F indicated that the claimant was diagnosed with articular cartilage disorder, shoulder

region, nonallopathic lesion (subluxation) lumbar region, sprains and strains, shoulder nonspecific (NOS), spondylosis of unspecified site with myelopathy, and lumbago. Dr. F stated, "[t]he . . . MMI is to be set on the day she completes a course of injections into her left shoulder region in conjunction with physical therapies to increase efficacy, which could reasonably be completed within 2-3 months, or October 19, 2011." When certifying that the claimant had not yet reached MMI, Dr. F considered conditions/diagnoses that the hearing officer determined, and which the Appeals Panel has affirmed, were not part of the compensable injury. Further, the injections requested were requested treatment for a rotator cuff pathology, a condition not determined to be part of the compensable injury. It is unclear from the records whether the requested additional physical therapy is related to the compensable injury, lumbar and left shoulder sprain/strain and lumbago, or to a sacroiliac injury and rotator cuff tear/tendinitis, which are not part of the compensable injury.

The hearing officer erred in the adoption of Dr. F's certification that the claimant has not yet reached MMI because Dr. F considered conditions/diagnoses not determined to be part of the [date of injury], injury, to-wit: articular cartilage disorder, shoulder region, nonallopathic lesion (subluxation) lumbar region, and spondylosis of unspecified site with myelopathy. Therefore, we reverse the hearing officer's determinations that the claimant has not yet reached MMI, and because the claimant has not yet reached MMI, she cannot be certified with an IR. Because, there is no other certification of MMI and IR in evidence that can be adopted, we remand the issues of MMI and IR to the hearing officer for further action consistent with this decision.

SUMMARY

We affirm the hearing officer's determination that the compensable injury of [date of injury], extends to lumbago but does not extend to articular cartilage disorder in the left shoulder region, nonallopathic lesions in the lumbar region, a lumbar disc protrusion at L4-5 and L5-S1, or spondylosis with myelopathy.

We reverse the hearing officer's determinations that the claimant has not reached MMI, and because the claimant has not reached MMI, she cannot be certified with an IR, and remand the issues of MMI and IR to the hearing officer for further action consistent with this decision.

REMAND INSTRUCTIONS

Dr. T is the designated doctor in this case. On remand, the hearing officer is to determine whether Dr. T is still qualified and available to be the designated doctor. If Dr. T is no longer qualified or available to serve as the designated doctor, then another

designated doctor is to be appointed pursuant to Rule 127.5(c) to determine MMI and IR for the compensable injury of [date of injury].

The hearing officer is to advise the designated doctor that the compensable injury of [date of injury], extends to a lumbar sprain/strain, a left shoulder sprain/strain, and lumbago, but does not extend to articular cartilage disorder in the left shoulder region, nonallopathic lesions in the lumbar region, a lumbar disc protrusion at L4-5 and L5-S1, or spondylosis with myelopathy.

The hearing officer is then to request the designated doctor to provide a certification of MMI and IR for the claimant's [date of injury], compensable injury. The assignment of an IR is required to be based on the claimant's condition as of the MMI date considering the medical record and the certifying examination and according to the rating criteria of the AMA Guides and the provisions of Rule 130.1(c)(3).

The parties are to be provided with the hearing officer's letter to the designated doctor and the designated doctor's response. The parties are to be allowed an opportunity to respond. The hearing officer is to determine the issues of MMI and 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* Appeals Panel Decision 060721, decided June 12, 2006.

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

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

Cynthia A. Brown
Appeals Judge

CONCUR:

Carisa Space-Beam
Appeals Judge

Margaret L. Turner
Appeals Judge