APPEAL NO. 120911
FILED JULY 10, 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 April 25, 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 appellant/cross-respondent (claimant) reached maximum medical improvement (MMI) on January 25, 2011; (2) the claimant's impairment rating (IR) is five percent; and (3) the claimant had disability from May 9, 2011, through November 16, 2011 (the claimed period of disability) as a result of the compensable injury sustained on [date of injury].

The claimant appealed the hearing officer's MMI determination. The claimant contended that the claimant reached MMI on October 28, 2011, as certified by [Dr. E], a referral doctor selected by the treating doctor, [Dr. T], to act in place of the treating doctor. Dr. E had initially certified the MMI date as January 25, 2011, but amended his MMI date after reviewing medical records of the claimant's treatment at a chronic pain management program in October of 2011.

The respondent/cross-appellant (carrier) cross-appealed the hearing officer's MMI, IR, and disability determinations. The carrier in its cross-appeal as well as its response to the claimant's appeal contended that the claimant reached MMI on May 26, 2010, with zero percent IR as certified by the designated doctor, [Dr. M]. In its response, the carrier, in the alternative, pleads that if the correct date of MMI is not May 26, 2010, then the MMI date of January 25, 2011, should be affirmed. In its cross-appeal, the carrier also contends that the claimant failed to establish disability as a result of the compensable injury. The claimant responded to the carrier's cross-appeal, urging reversal of the hearing officer's MMI determination as set out in her appeal.

DECISION

Affirmed in part and reversed and rendered in part.

The parties stipulated that the claimant sustained a compensable injury on [date of injury]. The claimant testified that her neck and upper back were injured by a patient while she was working as a dialysis nurse. In the Background Information section of his decision, the hearing officer stated that "[the] [c]arrier initially accepted a cervical strain. In a [d]ecision and [o]rder resulting from a [CCH] held on January 6, 2011, and May 9, 2011, the [Texas Department of Insurance, Division of Workers' Compensation (Division)] determined that injury included disc protrusions at C4-5 and C5-6. The

hearing officer also determined that [the] [c]laimant had disability from May 26, 2010, through the date of the hearing [May 9, 2011], as a result of the compensable injury."

DISABILITY

The hearing officer's determination that the claimant had disability resulting from the compensable injury of [date of injury], for the period beginning on May 9, 2011, and continuing through November 16, 2011, 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.

A review of the evidence reflects that the designated doctor initially appointed by the Division to address MMI/IR, extent of injury, and return to work was [Dr. B]. Dr. B examined the claimant on July 2, 2010, and on August 2, 2010, certified that the claimant reached clinical MMI on May 26, 2010, with zero percent IR. We note that Dr. B based his certification on MMI/IR on the conditions of cervical and upper back sprain/strains, and this failed to include the administratively determined cervical disc protrusions.

Subsequently, Dr. M was appointed by the Division to address in part MMI/IR. Dr. M examined the claimant on August 17, 2011, and certified that the claimant reached clinical MMI on May 26, 2010, with zero percent IR, as to disc protrusions at C4-5 and C5-6, cervical strain, upper back strain, and thoracic spine injury, placing the claimant in Diagnosis-Related Estimate (DRE) Cervicothoracic Category I and DRE Thoracolumbar Category I: Complaints or Symptoms.

In Finding of Fact No. 6, the hearing officer found that "[a]fter May 26, 2010 [the] [c]laimant received treatment that resulted in significant improvement and that treatment was, within reasonable medical probability, reasonably anticipated to result in further material recovery or lasting improvement to the compensable injury." That finding is supported by sufficient evidence.

In Finding of Fact No. 11, the hearing officer further found that "[t]he preponderance of the evidence is contrary to Dr. [M's] certification of [MMI] on May 26, 2010." That finding is supported by sufficient evidence.

Therefore, because the designated doctor's certification of MMI/IR cannot be adopted, the hearing officer considered the only other certifications of MMI/IR in evidence, both from Dr. E, the referral doctor.[1]

Dr. E examined the claimant on October 25, 2011, and November 8, 2011. On November 8, 2011, Dr. B certified that the claimant reached MMI on January 25, 2011 (the date of MMI adopted by the hearing officer) with five percent IR, based on placing the claimant in DRE Cervicothoracic Category II: Minor Impairment and in DRE I Thoracolumbar Category I: Complaints or Symptoms. In his narrative report, Dr. E stated his disagreement with the designated doctor's certified date of May 26, 2010, based on well documented records provided to Dr. E reflecting that the claimant received significant treatment which resulted in significant improvements after May 26, 2010. Dr. E states that "[t]he last patient visit of Dr. [T] [treating doctor] was [January 25, 2011], and at that time [Dr. T] was scheduling the [claimant] for a work hardening programs (sic) up 4 weeks latter (sic)." Dr. E further states:

> [T]he carrier would not authorize or pay for additional venues of care by Dr. [T] and therefore the [claimant] was not able to obtain a follow-up appointment. The [claimant] informs [Dr. E] that [the claimant] has recently been accepted into a chronic pain program and states that she believes there has been improvement characterized by less pain and less stiffness in her neck. The chronic pain program records were not submitted to me for a review.

Dr. E then stated that based on the medical records submitted to him for review, his interview with the claimant, and his examination of the claimant, that the claimant reached MMI at the "time of the last visit with Dr. [T] [January 25, 2011]." Dr. E in his

[1] In evidence is an earlier certification of MMI/IR by [Dr. L], also a referral doctor selected by the treating doctor to act in place of the treating doctor. Dr. L examined the claimant on September 10, 2010, and certified that the claimant was not at MMI in regards to the injured cervical spine, thoracic spine and upper extremities as of the date of his exam. This examination was prior to the administrative determination by the Division that cervical disc protrusions were part of the compensable injury.

final comments noted that "[i]f more information becomes available at a latter (sic) date, an additional evaluation for reconsideration may be requested."

In an addendum dated March 19, 2012, Dr. E stated "I have been asked to reconsider my evaluation of MMI with reference to new information. The [claimant] submitted to a chronic pain management program . . . on [October 17 through October 28, 2011] that was ordered by [Dr. T] . . . ." Dr. E further stated that after reviewing the chronic pain management program records that he "determined that there was improvement with pain levels decrease from 8 out of 10 to 4 out of 10." Dr. E amended the claimant's date of MMI from January 25, 2011, to October 28, 2011, and submitted a new Report of Medical Evaluation (DWC-69).

In a medical record dated December 17, 2010, Dr. T stated that the claimant had been seen by [Dr. EA], an anesthesiologist, who had administered trigger point corticosteroid injections in the cervical area on September 30, 2010. Because of a good result, Dr. EA on December 7, 2010, recommended more injections. In his medical record of December 17, 2010, Dr. T agreed with Dr. EA's recommendation for trigger point injections as well as opined that the claimant needs a work hardening program to help her return to work without restrictions.

In a medical record dated January 25, 2011, Dr. T stated the claimant has undergone T3 thoracic trigger point corticosteroid injection and bilateral suboccipital nerve block injections with Dr. EA and reported that she "walks better." Dr. T noted that the claimant had a partial initial evaluation for the work hardening program, once it has been arranged. Dr. T's treatment plan of January 25, 2011, included the claimant returning for her evaluation for the work hardening program on February 1, 2011, and following up with Dr. EA for additional trigger point injections, once they were approved.

In a medical record dated March 22, 2011, Dr. EA stated that the claimant "has been taking medications and receiving therapy. [The claimant] had excellent results from trigger point injections and suboccipital nerve blocks. She did not get any therapy after the last set of injections because the treating doctor was incorrectly told that her case was closed. [The claimant] has now been referred for work hardening program." In the plan and recommendations section of his record, Dr. EA stated that "I agree [the claimant] is a good candidate for work hardening program. She has had her primary pain syndromes treated with good response thanks to good conservative care and injections. She clearly has some anxiety about her prospects of returning to work and this will definitely be addressed by the psychological aspect of the program."

In a medical record dated May 17, 2011, Dr. EA stated "I am going to request that [the claimant] undergo an intake for a chronic pain program as work hardening has been denied . . . ."

In the Background Information section of his decision, the hearing officer noted that the carrier refused pre-authorization of the chronic pain management program and the refusal was appealed through the medical dispute resolution process. The hearing officer further noted that the Independent Review Organization (IRO) addressed the carrier's denial and overturned the denial for a 10-day trial in the chronic pain management program. The hearing officer stated that "[t]he IRO physician reviewer stated that adequate multidisciplinary evaluations had been made, all diagnostic assessments had been made, and [the] [c]laimant had no other treatment options pending and was not a surgical candidate. [The IRO physician] concluded that [the] [c]laimant therefore qualified for a trial of [10] sessions of chronic pain management." We note that the IRO report in evidence cited the Official Disability Guidelines-Treatment in Workers' Compensation published by Work Loss Data Institute (ODG) as the source of the screening criteria or clinical basis for its decision.

The medical reports from the chronic pain management program are in evidence. A report dated October 31, 2011,[2] entitled "Reassessment for Chronic Pain Management Program Continuation" states the assessments utilized and results of these assessments. Under the category of "[p]ain," the baseline (May 17, 2011), is listed as 8/10 and under the eighth day of treatment (October 26, 2011), is listed as 4/10. As previously noted above, in his amended narrative dated March 3, 2012, in Dr. E's medical opinion, after reviewing the program's records, the claimant's condition had improved during the chronic pain management program.

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).

In the instant case, there was no assertion that the trigger point injections, therapy, and chronic pain management program following January 25, 2011, were due to anything other than the compensable injury. In evidence are reports from Dr. T and Dr. EA, as well as the progress reports from the chronic pain management program, which document the treating doctors' proposed treatment options based on the ODG, by which the treating doctors and therapists reasonably anticipated further material recovery or lasting improvement to the claimant's injury. Said doctors, based on a reasonable medical probability, anticipated such recovery or improvement after the January 25, 2011, the MMI date that Dr. E initially certified, but then amended to October 28, 2011, after a review of the chronic pain management program progress

[2] Claimant's Exhibit No. 8, page 78.

notes. *See* Appeals Panel Decision (APD) 110670, decided July 8, 2011; APD 110896, decided August 15, 2011.

Therefore, in this case, the hearing officer's determination that MMI was reached on January 25, 2011, is so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust.

Accordingly, we reverse the hearing officer's determination that the claimant reached MMI on January 25, 2011, and render a new decision that the claimant reached MMI on October 28, 2011.

As previously noted, Dr. E in each of his certifications of MMI/IR assigned the claimant five percent IR. The hearing officer's determination that the claimant's IR is five percent is supported by sufficient evidence and is affirmed.

SUMMARY

We affirm the hearing officer's determination that the claimant had disability resulting from the compensable injury of [date of injury], for the period beginning on May 9, 2011, and continuing through November 16, 2011.

We reverse the hearing officer's determination that the claimant reached MMI on January 25, 2011, and render a new decision that the claimant reached MMI on October 28, 2011.

We affirm the hearing officer's determination that the claimant's IR is five percent.

The true corporate name of the insurance carrier is **THE TRAVELERS INDEMNITY COMPANY** and the name and address of its registered agent for service of process is

CORPORATION SERVICE COMPANY
D/B/A CSC-LAWYERS INCORPORATING SERVICE COMPANY
211 EAST 7TH STREET, SUITE 620
AUSTIN, TEXAS 78701-3218.

Cynthia A. Brown
Appeals Judge

CONCUR:

Carisa Space-Beam
Appeals Judge

Margaret L. Turner
Appeals Judge