APPEAL NO. 121133
FILED AUGUST 22, 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 11, 2012, with the record closing on May 7, 2012, in [City], Texas, with [hearing officer] presiding as hearing officer. The hearing officer resolved the sole disputed issue by deciding that the date of maximum medical improvement (MMI) is January 22, 2012.

The appellant (carrier) appeals the hearing officer's determination of the MMI date, contending that the designated doctor amended the date of MMI to a date subsequent to the certifying examination without performing a re-examination of the (respondent) claimant and that the designated doctor based his decision of MMI on a surgery that was performed after the date of statutory MMI without the proper records being supplied. The appeal file does not contain a response from the claimant.

DECISION

Reversed and remanded.

The parties stipulated that: (1) on [date of injury], the claimant sustained a compensable injury; **(**2) the Texas Department of Insurance, Division of Workers' Compensation (Division) appointed [Dr. T] as the designated doctor for the purpose of MMI and impairment rating (IR); (3) the claimant's IR is five percent; and (4) the date of statutory MMI is January 22, 2012.

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. T examined the claimant on March 4, 2011, and certified that the claimant reached MMI on April 4, 2010, with a five percent IR. The Report of Medical Evaluation (DWC-69) contains the MMI date of April 4, 2010. However, Dr. T in his narrative report states that according to the Official Disability Guidelines-Treatment in Workers' Comp published by Work Loss Data Institute, the claimant would have reached MMI after no more than three months of conservative treatment, this would be April 10, 2010.

A prior decision and order determined that the compensable injury of [date of injury], extends to symptomatic foraminal stenosis on the right at L5-S1 with right L5 radiculopathy and that the preponderance of the evidence is not contrary to the decision of the Independent Review Organization that the claimant is not entitled to anterior and posterior lumbar fusion with instrumentation at L5-S1.

On December 7, 2011, a letter of clarification (LOC) was sent to Dr. T which informed him of the results of the prior CCH and asked Dr. T what is the date of MMI and IR as the compensable injury now includes symptomatic foraminal stenosis on the right at L5-S1 with right L5 radiculopathy. In a response dated December 14, 2011, Dr. T stated in part that, "if the accepted diagnosis is lumbar radiculopathy, then the claimant's MMI date would remain the same."

In evidence is a certification of MMI/IR from [Dr. P], a doctor selected by the treating doctor to act in his place. Dr. P examined the claimant on December 2, 2011, and certified that the claimant reached MMI on December 1, 2011, with a five percent IR. In his narrative, Dr. P stated that the lumbar injury with non-verifiable radiculopathy is improved and stable following proper conservative care and noted that surgery has been denied.

In evidence is a pre-authorization determination dated February 29, 2012, which approved a requested surgical procedure of posterior decompression foraminotomy at L5-S1, a different surgical procedure than that which had previously been denied. The claimant testified at the CCH that on March 8, 2012, he had spinal surgery and that his back has improved since the surgery.

The hearing officer sent a (LOC) to Dr. T informing him of the extent-of-injury conditions found compensable by the prior decision and order as well as the parties' stipulations that the IR is five percent and the date of statutory MMI is January 22, 2012. Additionally, the hearing officer stated that on February 29, 2012, pre-authorization was approved for posterior decompression foraminotomy L5-S1 and the claimant had the surgery and testified he is much improved since the surgery. Dr. T was then asked if this additional information changed his opinion of the claimant's MMI date. Dr. T responded and attached an amended DWC-69. Dr. T in a written response dated April 19, 2012, stated "[i]f the conditions you mention in your letter have been accepted, as well as the [five percent] [IR], and surgery was approved and performed after the statutory MMI date, then in my opinion the date of MMI would be the statutory date of [January 22, 2012]."

The operative report was not in evidence at the CCH and there was no indication that the operative report and subsequent medical records were sent to the designated doctor for review in making his MMI determination. Additionally, although Dr. T noted in his amended DWC-69 that the date of exam of his amended certification was April 19, 2012, his response to the LOC indicated that the examination was March 4, 2011, the date of his only examination of the claimant. The amended certification did not include an accompanying narrative that documented any clinical findings of a physical examination nor did Dr. T indicate that he re-examined the claimant prior to his

amended certification. The change to a later date of MMI was made without re-examining the claimant.

28 TEX. ADMIN. CODE § 130.1(b)(4)(A and B) (Rule 130.1(b)(4)(A and B)) provides that to certify MMI the certifying doctor shall review medical records and perform a complete medical examination of the injured employee for the explicit purpose of determining MMI. *See* Appeals Panel Decision (APD) 010297-s, decided March 29, 2001; APD 090419, decided June 1, 2009. *See also* APD 071988, decided January 3, 2008.

Because the designated doctor did not re-examine the claimant prior to his amended DWC-69 and did not have the operative report and additional medical records since the date of his March 4, 2011, examination of the claimant, the hearing officer erred in her determination that the MMI date is January 22, 2012. Accordingly, we reverse the hearing officer's determination that the date of MMI is January 22, 2012.

As previously noted, the only other certification in evidence was from Dr. P. While Dr. P rated a lumbar injury, he noted that surgery had been denied and therefore, did not consider the surgery performed in certifying MMI. No other certification is in evidence. Accordingly, we remand the MMI issue 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 and if so, order Dr. T to re-examine the claimant and provide a DWC-69 and narrative report certifying MMI on the claimant's compensable injury considering the medical record and certifying examination in accordance with this decision, which can be the statutory date of MMI, January 22, 2012. The hearing officer should ensure that the treating doctor and insurance carrier shall send to the designated doctor all of the claimant's medical records that are in their possession relating to the MMI issue to be evaluated by 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 to determine MMI. The parties must be given an opportunity to respond to any amended report of the designated doctor. The hearing officer must then make a decision regarding the claimant's MMI date based on 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 **FEDERAL INSURANCE COMPANY** and the name and address of its registered agent for service of process is

CT CORPORATION SYSTEM
350 NORTH ST. PAUL STREET
DALLAS, TEXAS 75201.

Margaret L. Turner
Appeals Judge

CONCUR:

Cynthia A. Brown
Appeals Judge

Thomas A. Knapp
Appeals Judge