APPEAL NO. 121244
FILED AUGUST 16, 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 June 5, 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 sustained on [date of injury], does not extend to right medial epicondylitis with a high grade partial thickness interstitial tear at the origin of the right pronator teres (right elbow tear), an L4-5 disc bulge, an L5-S1 disc bulge, and mild to moderate bilateral foraminal narrowing at L4-5 (the extent-of-injury issue was amended with permission of the parties at the CCH); (2) the appellant (claimant) reached maximum medical improvement (MMI) on July 22, 2011; and (3) the claimant's impairment rating (IR) is 6%. The claimant appealed, disputing the hearing officer's determinations on all three disputed issues. The respondent (self-insured) responded, urging affirmance.

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 Texas Department of Insurance, Division of Workers' Compensation (Division)-selected designated doctor, [Dr. T], was asked to provide an opinion, among other issues, regarding the extent of the compensable injury; (3) the Division-selected designated doctor, [Dr. S], was asked to provide an opinion regarding the date of MMI and IR; (4) Dr. S certified that the claimant reached MMI on July 22, 2011, with 6% IR; and (5) the claimant's treating doctor, [Dr. K], certified that the claimant reached MMI on November 30, 2011, with 12% IR.

The claimant testified that she was a teacher's assistant and slipped and fell onto the right side of her body at work. The claimant testified that she was asymptomatic until her fall. The record reflects that the claimant received her initial medical care from the [urgent care center] and was diagnosed with a neck and right shoulder strain, noting also right elbow pain. In evidence are MRI diagnostic studies of her right elbow (performed February 15, 2011), her lumbar spine (performed January 4, 2011), and her right shoulder (performed November 22, 2010).

The hearing officer, at the beginning of the CCH and on the record, stated that she understood that the self-insured had accepted a cervical sprain/strain, a right elbow sprain/strain, a right shoulder tear, and a lumbar sprain/strain. The self-insured stated on the record that it had accepted these conditions as the [date of injury], compensable injury.

In evidence is a Notice of Disputed Issue(s) and Refusal to Pay Benefits (PLN-11) dated December 8, 2010, which states that the self-insured accepts the claimant's injuries of a partial tear of tendon-right shoulder (right shoulder tear), right elbow sprain and lumbar sprain as compensable but disputes the November 22, 2010, right shoulder MRI finding of arthrosis.

Also in evidence is a PLN-11 dated January 11, 2011, which states that the self-insured accepts the claimant's injuries of right shoulder strain, cervical strain, and lumbar strain as compensable but disputes the January 4, 2011, lumbar spine MRI findings of facet osteoarthritis, multilevel spondylotic changes, bilateral foraminal narrowing, hemangloma and small hypointense area at L-4 sclerotic region in the low back.

Further in evidence is a Benefit Dispute Agreement (DWC-24) dated June 21, 2011, signed by the parties and by the Division, which states that the compensable injury sustained on [date of injury], includes a small articular surface partial tear of the distal supraspinatus tendon of the right shoulder (right shoulder tear).

The evidence reflects that the Amended Request for Designated Doctor Examination (DWC-32) dated July 18, 2011, and submitted by the self-insured for purposes of an examination for MMI/IR, lists all injuries determined to be compensable by the Division or accepted as compensable by the self-insured as "[r]ight shoulder strain with a small articular surface partial tear of the distal supraspinatus tendon of the right shoulder [right shoulder tear], cervical strain, and lumbar strain."

The claimant testified that she has had surgery to her right shoulder and there are no other surgeries pending. In evidence is an operative report dated March 23, 2011, which states that the claimant underwent an arthroscopic right shoulder subacromial decompression and acromioplasty for the diagnosis of right shoulder impingement syndrome.

EXTENT OF INJURY

The hearing officer's determination that the compensable injury sustained on [date of injury], does not extend to right medial epicondylitis with a high grade partial thickness interstitial tear at the origin of the right pronator teres (right elbow tear), an L4-5 disc bulge, an L5-S1 disc bulge, and mild to moderate bilateral foraminal narrowing at L4-5 is supported by sufficient evidence and is affirmed.

MMI/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.

The claimant contends that the hearing officer erred in adopting the designated doctor's Dr. S certification of MMI/IR because Dr. S did not rate the entire compensable injury and based his IR on what Dr. S was told to consider. The claimant argues that the hearing officer should have adopted Dr. K's, the treating doctor, certification of MMI/IR.

As previously discussed, the most recently appointed designated doctor for MMI/IR was Dr. S. Dr. S examined the claimant on August 8, 2011, and certified that the claimant had not reached MMI "because she has a right elbow tear that may need to have surgery and she is wearing a splint for it. [The claimant] has pain with her L4-5. She needs to have her L4-5 disc continued to be investigated." Dr. S anticipated that the claimant would reach MMI on November 8, 2011. Dr. S diagnosed the claimant with right shoulder repair, right elbow tear, and right side of her lumbar spine, L4-5, a disc which has not been addressed.

In his narrative report dated August 8, 2011, and attached to a Report of Medical Evaluation (DWC-69), Dr. S does not mention or examine the claimant's cervical spine. The only measurements included in his narrative report are flexion/extension, adduction/extension, and internal and external rotation measurements of the right shoulder. However, since Dr. S found the claimant not at MMI, no IR was assigned.

The Division sent a letter of clarification (LOC) dated October 13, 2011, to Dr. S, which stated:

[Designated doctor] [Dr. S] [p]lease provide an alternate certification of MMI/IR on a DWC-69 based on the accepted compensable injuries only — lumbar sprain, right elbow sprain, and partial tear of the tendon of the right shoulder [right shoulder tear].

In a response dated October 17, 2011, to the LOC, Dr. S stated that he was submitting an alternative certification of MMI/IR based on the compensable injuries of "lumbar sprain, right elbow sprain, and partial tear of the tendon of the right shoulder [right shoulder tear]." Dr. S submitted a DWC-69 that certified that the claimant reached MMI on July 22, 2011, with 6% IR. Dr. S stated the certified MMI date was when work hardening was completed. The assigned 6% 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) was based on placing the claimant in Diagnosis-Related Estimate Lumbosacral Category I: Complaints or Symptoms, on assigning 0% impairment for right elbow strain, without providing any range of motion (ROM) measurements as provided by the AMA Guides (Figure 32, page 3/40, and Figure 35, page 3/41), and on assigning 10% upper extremity (UE) impairment for the right shoulder (Figure 38, page 3/43, Figure 41, page 3/44, and Figure 44, page 3/45), which converts to 6% whole person IR (Table 3, page 3/20). We note that the ROM measurements for the right shoulder as included in Dr. S's narrative report result in 10% UE impairment using the appropriate figures in the AMA Guides.

There was no assessment for the cervical spine by Dr. S as the Division specifically excluded that body part when its LOC requested an alternative certification of MMI/IR from Dr. S. As previously discussed, the self-insured has accepted a cervical sprain/strain as compensable.

Therefore, Dr. S's initial certification of MMI/IR and his alternative certification of MMI/IR do not rate the entire compensable injury, and therefore, cannot be adopted by the hearing officer.

The hearing officer's finding that "[t]he July 22, 2011, date of [MMI] and 6% [IR] certified by the designated doctor is not contrary to the preponderance of the evidence" is so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust because Dr. S failed to rate the entire compensable injury, which includes the cervical spine, and failed to document and analyze in his narrative report the assigned 0% impairment for the right elbow.

We reverse the hearing officer's decision that the claimant reached MMI on July 22, 2011, with 6% IR as certified by Dr. S, the designated doctor for MMI/IR.

There are two other certifications of MMI/IR in evidence. Dr. K, the treating doctor, examined the claimant on November 30, 2011, and certified that the claimant reached MMI on that date with 12% IR. In his narrative report dated that same day and attached to his DWC-69, Dr. K describes only findings regarding the lumbar spine, the right shoulder, and right elbow. Dr. K does not address the cervical spine sprain/strain, accepted by the self-insured as compensable. Therefore, Dr. K does not rate the entire compensable injury.

The other certification of MMI/IR in evidence is from Dr. T, the first designated doctor to address extent of injury as well as MMI/IR. Dr. T examined the claimant on March 1, 2011, prior to the self-insured's acceptance and DWC-24 agreement for the right shoulder tear and prior to the claimant's right shoulder surgery, and certified that the claimant reached MMI on December 1, 2010, with 2% IR. Dr. T diagnosed the claimant with strain/sprains of the cervical spine, lumbar spine, right shoulder and the right elbow. Dr. T documents his findings as to each of these body parts; however, his certification of MMI/IR cannot be adopted because it does not include the entire compensable injury, the right shoulder tear, nor did Dr. T consider the subsequent shoulder surgery in certifying the MMI date.

Therefore, because there are no certifications of MMI/IR that can be adopted, we remand the issues of MMI/IR to the hearing officer for further action consistent with this decision.

SUMMARY

We affirm the hearing officer's decision that the compensable injury of [date of injury], does not extend to right medial epicondylitis with a high grade partial thickness interstitial tear at the origin of the right pronator teres (right elbow tear), an L4-5 disc bulge, an L5-S1 disc bulge, and mild to moderate bilateral foraminal narrowing at L4-5.

We reverse the hearing officer's decision that the claimant reached MMI on July 22, 2011, with 6% IR and remand the issues of MMI/IR to the hearing officer for further action consistent with this decision.

REMAND INSTRUCTIONS

Dr. S is the designated doctor in this case. On remand, the hearing officer is to determine whether Dr. S is still qualified and available to be the designated doctor. If Dr. S is no longer qualified or available to serve as the designated doctor, then another designated doctor is to be appointed to determine MMI/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], right shoulder sprain/strain with a small articular surface partial tear of the distal supraspinatus tendon of the right shoulder (right shoulder tear), cervical sprain/strain, and lumbar sprain/strain (as accepted and/or agreed to by the parties) has been administratively determined by the Division to not extend to right medial epicondylitis with a high grade partial thickness interstitial tear at the origin of the right pronator teres (right elbow tear), an L4-5 disc bulge, an L5-S1 disc bulge, and mild to moderate bilateral foraminal narrowing at L4-5.

The hearing officer is to advise the designated doctor that Rule 130.1(c)(3) provides that the doctor assigning the IR shall: (A) identify objective clinical or laboratory findings of permanent impairment for the current compensable injury; (B) document specific laboratory or clinical findings of an impairment; (C) analyze specific clinical and laboratory findings of an impairment; and (D) compare the results of the analysis with the impairment criteria and provide the following: (i) [a] description and explanation of specific clinical findings related to each impairment, including [0%] [IRs]; and (ii) [a] description of how the findings relate to and compare with the criteria described in the applicable chapter of the AMA Guides. The doctor's inability to obtain required measurements must be explained.

The designated doctor is then to be requested to give a certification of MMI/IR for the claimant's compensable injury of [date of injury], based on the injured employee's condition as of the MMI date, which can be no later than the date of statutory MMI, considering the claimant's medical record and the certifying examination.

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 then to make a determination on MMI/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 **(a self-insured governmental entity)** and the name and address of its registered agent for service of process is

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

Cynthia A. Brown
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Margaret L. Turner
Appeals Judge