APPEAL NO. 121311
FILED AUGUST 31, 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 4, 2012, in [City], Texas, with [hearing officer] presiding as hearing officer. The hearing officer resolved the disputed issues by deciding that the appellant (claimant) reached maximum medical improvement (MMI) on June 2, 2011, with 2% impairment rating (IR) as certified by the Texas Department of Insurance, Division of Workers' Compensation (Division)-appointed designated doctor, [Dr. FF]. The claimant appealed, disputing the hearing officer's determinations on MMI and IR. The respondent (carrier) responded, urging affirmance.

DECISION

Reversed and remanded.

The parties stipulated that on [date of injury], the claimant sustained multiple compensable injuries. The claimant testified to his work injuries resulting from a serious motor vehicle accident in which he was ejected from the vehicle.

In evidence is a Notice of Disputed Issue(s) and Refusal to Pay Benefits (PLN-11) dated February 17, 2012, which states the carrier accepts that the compensable injury extends to the following: (1) multiple complex lacerations to the scalp, arm, and back; (2) left comminuted scapula fracture; (3) non-displaced left mid-shaft clavicle fracture; (4) left glenoid neck fracture; (5) bilateral pulmonary contusions with left hemopneumothorax; (6) left posterior rib fracture nos. 6, 7, and 8; (7) right-sided transverse thoracic spine fractures T1-6 and T10; (8) grade 2 liver laceration; (9) broken teeth nos. 8, 9, 12, and 18; and (10) myofascial low back pain.

Two certifications of MMI and IR are in evidence. There is one by Dr. FF, a Division-appointed designated doctor, and one by [Dr. PF], a referral doctor selected by the treating doctor to act in place of the treating doctor.

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.

The claimant contends in part that the hearing officer erred in adopting the certification of MMI and assigned IR by Dr. FF, who: (1) improperly certified an MMI date contrary to the definition of MMI in Section 401.011(30)(A); and (2) improperly calculated the claimant's IR according to 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) because he failed to rate the entire compensable injury which included transverse thoracic spine fractures and scarring. The claimant contends that Dr. FF's certification of MMI and IR was contrary to the preponderance of the evidence and that the hearing officer should have adopted the only other certification of MMI and IR in evidence by Dr. PF. The claimant argues that Dr. PF's IR was according to the AMA Guides and rated the entire compensable injury.

Dr. FF's Certification of MMI and IR

Dr. FF examined the claimant on June 2, 2011, and certified that the claimant reached clinical MMI on that day with 2% IR. In his narrative report attached to his Report of Medical Evaluation (DWC-69), Dr. FF documents a physical examination of the claimant's thoracic spine and the left upper extremity (UE) as to the left shoulder range of motion (ROM) measurements as well as a neurological examination of the UEs and lower extremities. In that narrative, Dr. FF lists the diagnoses of: (1) status post-cerebral concussion; (2) status post-fracture of the shaft of the left clavicle with healing; (3) status post-fracture of the left ribs, nos. 6, 8, and 9; and (4) status post fracture of the vertebral thoracic spine T1-6 and T10. The 2% IR is based on an abnormal ROM of the left shoulder (using his measurements provided in an attached worksheet) resulting in a 4% UE impairment which converts to 2% whole person IR); on placement of the claimant in Diagnosis-Related Estimate (DRE) Thoracolumbar Category I: Complaints

or Symptoms for 0% IR; and on no ratable diagnosis related impairments for the concussion, clavicle fracture or rib fractures.

As previously noted, a PLN-11 dated February 17, 2012, which states that the carrier accepts that the compensable injury extends to the following: (1) multiple complex lacerations to the scalp, arm, and back; (2) left comminuted scapula fracture; (3) non-displaced left mid-shaft clavicle fracture; (4) left glenoid neck fracture; (5) bilateral pulmonary contusions with left hemopneumothorax; (6) left posterior rib fracture nos. 6, 7, and 8; (7) right-sided transverse thoracic spine fractures T1-6 and T10; (8) grade 2 liver laceration; (9) broken teeth nos. 8, 9, 12, and 18; and (10) myofascial low back pain. No dispute was raised at the CCH that the compensable injury of [date of injury], did not include the extent-of-injury conditions listed in the February 17, 2012, PLN-11.

Dr. FF did not certify an MMI date based on the claimant's condition or rate the entire compensable injury because he failed to consider, document, and analyze an impairment (which could include 0% IR) for the complex lacerations to the scalp, arm, and back, the right-sided transverse thoracic spine fractures, the liver laceration, the four specific broken teeth, the left glenoid neck fracture, the bilateral pulmonary contusions with left hemopneumothorax, and the low back. *See* Rule 130.1(c); Appeals Panel Decision (APD) 120517, decided May 25, 2012. We note that in evidence is a peer review report by [Dr. C], who states that the placement of the claimant in DRE Thoracolumbar Category II: Minor Impairment (5% IR) is according to the AMA Guides. We note that under that category, the AMA Guides provide, on page 3/106, in pertinent part: "[s]pinous or transverse process fracture or displacement is a thoracolumbar category II impairment, because it does not disrupt the spinal canal."

The hearing officer's determination that "[t]he [IR] and date of [MMI] assigned by the designated doctor [Dr. FF] are not contrary to the preponderance of the other medical evidence" is so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust. We reverse the hearing officer's decision that the claimant reached MMI on June 2, 2011, with 2% IR.

Dr. PF's Certification of MMI and IR

There is only one other certification of MMI and IR in evidence by Dr. PF. Dr. PF examined the claimant on January 10, 2012, and certified that the claimant reached clinical MMI on September 1, 2011, with 17% IR. In his narrative report attached to his DWC-69, Dr. PF correctly lists all the conditions accepted by the carrier as compensable injuries (and as listed in the PLN-11 admitted into evidence).

However, Dr. PF certified the claimant at MMI on September 1, 2011, because the claimant received a lumbar facet injection [Dr. J] on August 22, 2011, and had some relief of pain. As noted, the carrier has accepted myofascial low back pain as a compensable injury. The lumbar injections were performed in connection with the diagnoses of lumbar facet syndrome and lumbar strain, two conditions not accepted by the carrier and not litigated by the parties as part of the compensable injury. Therefore, the date of MMI certified by Dr. PF is not supported by the evidence. The carrier also contends that Dr. PF's placement of the claimant in DRE Lumbosacral Category II: Minor Impairment does not conform with Rule 130.1(c) because Dr. PF does not document, analyze or explain the findings and signs for placement in this category. We agree.

Summary

Because there is no certification of MMI and IR that can be adopted by the hearing officer, we remand the issues of MMI and IR to the hearing officer for further action consistent with this decision.

REMAND INSTRUCTIONS

Dr. FF is the designated doctor in this case. On remand, the hearing officer is to determine whether Dr. FF is still qualified and available to be the designated doctor. If Dr. FF is no longer qualified or available to serve as the designated doctor, then another designated doctor is to be appointed to determine MMI and IR for the compensable injury of [date of injury].

The hearing officer is to make a finding on the date of statutory MMI or have the parties agree or stipulate to the date of statutory MMI. The hearing officer is to advise the designated doctor what the date of statutory MMI is.

The hearing officer is to ensure that the designated doctor is provided with the claimant's medical records not previously provided to the doctor that are necessary to determine the date of MMI and assignment of IR, which include but are not limited to the claimant's dental records.

The hearing officer is to advise the designated doctor that the compensable injury of [date of injury], includes the following as accepted and/or agreed to by the parties: (1) multiple complex lacerations to the scalp, arm, and back; (2) left comminuted scapula fracture; (3) non-displaced left mid-shaft clavicle fracture; (4) left glenoid neck fracture; (5) bilateral pulmonary contusions with left hemopneumothorax; (6) left posterior rib fracture nos. 6, 7, and 8; (7) right-sided transverse thoracic spine

fractures T1-6 and T10; (8) grade 2 liver laceration; (9) broken teeth nos. 8, 9, 12, and 18; and (10) myofascial low back pain.

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 and assignment of IR for the claimant's compensable injury of [date of injury], based on the claimant'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 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* APD 060721, decided June 12, 2006.

The true corporate name of the insurance carrier is **TEXAS MUTUAL INSURANCE COMPANY** and the name and address of its registered agent for service of process is

RON O. WRIGHT, PRESIDENT
6210 EAST HIGHWAY 290
AUSTIN, TEXAS 78723.

Cynthia A. Brown
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Margaret L. Turner
Appeals Judge