APPEAL NO. 122002
FILED DECEMBER 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 was held on September 5, 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 April 18, 2011, and the claimant's impairment rating (IR) is 5%. The claimant appealed, contending that the hearing officer erred in adopting [Dr. W] certification of MMI/IR because there is no Report of Medical Evaluation (DWC-69) from Dr. W in evidence. The respondent (carrier) responded, urging affirmance.

DECISION

Reversed and remanded.

The evidence reflected that the claimant sustained a compensable injury on [date of injury]. It was administratively determined by the Texas Department of Insurance, Division of Workers' Compensation (Division) that the compensable injury includes a herniated disc at C5-6.

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 hearing officer in his determination of MMI relied on the certification of Dr. W, the designated doctor, assigning an April 18, 2011, MMI date. That determination is

incorrect because there is no DWC-69 from Dr. W in evidence. Rule 130.1(d)(1) requires that a certification of MMI, determination of permanent impairment, and assignment of an IR (if permanent impairment exists) "requires completion, signing, and submission of the [DWC-69] and a narrative report." Rule 130.1(d)(1)(A) requires that the DWC-69 be signed by the certifying doctor. Although a narrative is in evidence, there is no DWC-69 by Dr. W; therefore, his certification of MMI/IR cannot be adopted by the hearing officer. *See* Appeals Panel Decision (APD) 091960, decided February 19, 2010.

There is one other certification of MMI/IR in evidence by [Dr. F]. The parties stipulated that Dr. F was the claimant's treating doctor when he certified the date of MMI and assigned an IR. The parties further stipulated that Dr. F is certified by the Division in accordance with Rule 130.1 to certify MMI and IRs.

Dr. F examined the claimant on November 22, 2011, and certified that the claimant reached MMI on November 9, 2011, the date of statutory MMI, with 15% IR based on placing the claimant in Diagnosis-Related Estimate (DRE) Cervicothoracic Category III: Radiculopathy in accordance with 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).

The specific description of DRE Cervicothoracic Category III: Radiculopathy found on page 3/104 of the AMA Guides states:

Description and Verification: The patient has significant signs of radiculopathy, such as (1) loss of relevant reflexes, or (2) unilateral atrophy with greater than 2 [centimeter (cm)] decrease in circumference compared with the unaffected side, measured at the same distance above or below the elbow. The neurologic impairment may be verified by electrodiagnostic or other criteria (differentiators 2, 3, and 4, Table 71 [page 3/109].

Consequently, in APD 072220-s, decided February 5, 2008, the Appeals Panel, to clarify any inconsistency, held that to receive a rating for radiculopathy the claimant must have significant signs of radiculopathy, such as loss of relevant reflexes, or measured unilateral atrophy of 2 cm or more above or below the knee, compared to measurements on the contralateral side at the same location. The atrophy or loss of relevant reflex must be spine-injury-related for radiculopathy to be rated. This same reasoning would apply in this case involving the cervical spine and a measured unilateral atrophy of 2 cm or more above or below the elbow.

In his narrative report dated November 22, 2011, attached to his DWC-69, Dr. F did not document significant signs of radiculopathy, but placed the claimant in DRE Cervicothoracic Category III: Radiculopathy with 15% IR. Dr. F certified that the claimant reached statutory MMI on November 9, 2011, but there is no evidence that supports that is the date of statutory MMI or what treatments were completed or were anticipated to improve the claimant's compensable injury. Accordingly, there are no certifications of MMI/IR that can be adopted.

We reverse the hearing officer's determination that the claimant reached MMI on April 18, 2011, with 5% IR and remand the issues of MMI and IR to the hearing officer for further action consistent with this decision.

REMAND INSTRUCTIONS

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

We note that the hearing officer took the parties' stipulation on the record that the claimant sustained a compensable injury on [date of injury]. On remand, the hearing officer is to include that stipulation in his decision and order. The hearing officer is to take a stipulation as to the date of statutory MMI or to make a determination on the date of statutory MMI supported by the evidence.

The hearing officer is to ensure that the designated doctor is furnished with all the claimant's relevant medical records, which include, but are not limited to the records of evaluation or treatment subsequent to the date of the last designated doctor's exam on February 24, 2012, including reports from a chronic pain management program or CORE program.

The hearing officer is to advise the designated doctor that the compensable injury of [date of injury], includes an injury to the cervical spine and the diagnosis of C5-6 disc herniation (as administratively determined by the Division) and to advise the designated doctor as to the date of statutory MMI.

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 to be requested to re-examine the claimant and to determine whether the claimant has reached MMI, and if so, assign an 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.

After the designated doctor re-examines the claimant and submits a new certification of MMI and IR, the parties are to be provided with the designated doctor's DWC-69 and narrative report. 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 **OLD REPUBLIC GENERAL INSURANCE CORPORATION** and the name and address of its registered agent for service of process is

CORPORATION SERVICE COMPANY
701 BRAZOS STREET, SUITE 1050
AUSTIN, TEXAS 78701-3232.

Cynthia A. Brown
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Margaret L. Turner
Appeals Judge