

APPEAL NO. 122013
FILED DECEMBER 3, 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 August 29, 2012, in [City], Texas, with [hearing officer] presiding as hearing officer. The hearing officer determined that: (1) the compensable injury of [date of injury], extends to a right shoulder sprain/strain but not a left shoulder sprain/strain, cervical spine sprain/strain, lumbar spine L3-4 disc bulge, L4-5 disc herniation or L5-S1 disc protrusion; (2) the appellant (claimant) reached maximum medical improvement (MMI) on June 7, 2011; and (3) the claimant's impairment rating (IR) is 5%.

The claimant appeals that portion of the extent-of-injury issue adverse to him and the MMI/IR determinations, contending that he is not at MMI and that an IR is premature. The respondent (carrier) responded, urging affirmance.

DECISION

Affirmed in part and reversed and remanded in part.

The claimant, a plumber's helper, testified that on [date of injury], he fell approximately eight feet from a ladder and struck the floor. The parties stipulated that the compensable injury of [date of injury], includes a left wrist fracture, left leg contusion, and left wrist, right elbow, left hand and lumbar sprain/strains and that [Dr. R] was the designated doctor appointed on the issues of MMI, IR, and extent of injury.

EXTENT OF INJURY

The hearing officer's determination that the compensable injury of [date of injury], extends to a right shoulder sprain/strain but not a left shoulder sprain/strain, cervical spine sprain/strain, lumbar spine L3-4 disc bulge, L4-5 disc herniation, or L5-S1 disc protrusion 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 Texas Department of Insurance, Division of Workers' Compensation (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 adopted the MMI date and IR assessed by Dr. R, the designated doctor. Dr. R, the designated doctor for MMI/IR examined the claimant on August 16, 2011, and certified that the claimant reached clinical MMI on June 7, 2011, with a 5% IR. Regarding the MMI date, Dr. R writes "[t]here is really nothing that prevents [the claimant] from going back to work, except his pains. [The claimant] has reached his maximum treatment potential." We note that Dr. R's date of MMI is less than one month after the date of injury. Dr. R does not consider the entire compensable injury that includes a left leg contusion but considered a condition of a left shoulder sprain/strain, which is not part of the compensable injury. Dr. R bases his MMI on the claimant's "going back to work." Because there are no certifications of MMI/IR which can be adopted, we remand the issues of MMI/IR to the hearing officer for further action consistent with this decision.

Regarding the IR, Dr. R listed a diagnosis for: (1) sprain neck; (2) sprain shoulders; (3) avulsion fracture of the dorsal wrist; (4) sprain left wrist; (5) sprain right elbow; (6) sprain right leg; and (7) sprain left hand. Dr. R discussed range of motion (ROM) impairment to the left wrist (and gave measurements which resulted in a 6% upper extremity impairment); and ROM impairment to the right elbow (and gave measurements which resulted in a 2% upper extremity impairment). The upper extremity ROM was converted to the 5% whole person impairment in Table 3, page 3/20 of 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). Dr. R also commented that ROM measurements were performed by a certified technician of: (1) the right knee for a "0% upper [probably means lower] extremity impairment;" (2) right shoulder for 0% upper extremity impairment; and (3) left shoulder for a 0% upper extremity impairment. Under the heading of "Diagnosis Related Impairment" Dr. R states "[the claimant] shows no diagnosis related impairment for the left wrist, right elbow, right knee, and right or left shoulders that would be ratable." Dr. R also assessed a 0% impairment for the "cervicothoracic spine" which was later corrected in a letter of clarification (LOC), to the lumbosacral spine, based on Table 72, Diagnosis-Related Estimate (DRE) Lumbosacral Category I: Complaints or Symptoms, page 3/110 of the AMA Guides.

A LOC, dated January 19, 2012, was sent to Dr. R noting that he had examined the claimant on August 16, 2011, and he had determined a June 7, 2011, MMI date. The LOC noted that Dr. R's examination had not included the injury to the lumbar spine. The LOC also forwarded additional medical records and asked if the records have an impact on Dr. R's determinations of MMI and IR. Dr. R replied by letter dated January 23, 2012. Dr. R corrected his report to reflect a rating of the lumbar spine instead of the cervical spine and included an amended Report of Medical Evaluation (DWC-69) and concluded "[t]he MMI and IR established at the time of my evaluation remains unchanged."

Dr. R's certification of MMI and IR cannot be adopted for the following reasons: (1) Dr. R did not rate a left leg contusion which is one of the accepted conditions; (2) Dr. R rated a left shoulder injury, a condition the hearing officer found, and we have affirmed, as being not compensable, albeit giving a 0% impairment; and (3) although including a left-hand sprain in his diagnosis, Dr. R did not specifically rate a left-hand sprain/strain, a condition accepted as compensable. Because Dr. R failed to rate the entire compensable injury (the left leg contusion and left-hand sprain/strain) and because Dr. R rated a condition which the hearing officer found not compensable, and we have affirmed (a left shoulder sprain/strain), Dr. R's IR cannot be adopted.

We reverse the hearing officer's determination that the claimant reached MMI on June 7, 2011, with a 5% IR as certified by Dr. R, the designated doctor for MMI/IR.

There is one other certification of MMI/IR in evidence. [Dr. D], a doctor selected by the treating doctor acting in place of the treating doctor, examined the claimant on January 10, 2012, and certified clinical MMI on that date with a 10% IR. Regarding the MMI date, Dr. D simply stated; "[c]linical MMI on [January 10, 2012]," without further explanation. Dr. D assessed the 10% IR based on DRE Lumbosacral Category III: Radiculopathy without discussing or listing the verification elements required by the AMA Guides. Dr. R did not rate the left wrist fracture, left leg contusion, left wrist sprain/strain, right elbow sprain/strain, left-hand sprain/strain or right shoulder sprain/strain conditions which have either been accepted or administratively found compensable. For those reasons Dr. D's report cannot be adopted.

SUMMARY

We affirm the hearing officer's determination that the compensable injury of [date of injury], extends to a right shoulder sprain/strain but not a left shoulder sprain/strain, cervical spine sprain/strain, lumbar spine L3-4 disc bulge, L4-5 disc herniation, or L5-S1 disc protrusion.

We reverse the hearing officer's decision that the claimant reached MMI on June 7, 2011, with a 5% IR and remand the issues of MMI/IR to the hearing officer for further action consistent with this decision.

REMAND INSTRUCTIONS

Dr. R is the designated doctor in this case. On remand the hearing officer is to determine whether Dr. R is still qualified and available to be the designated doctor. If Dr. R 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], is a left wrist fracture, left leg contusion, and lumbar, right elbow, left-hand, left wrist sprains/strains and right shoulder sprain/strain (as accepted or administratively determined by the Division). The hearing officer is also to advise the designated doctor that the compensable injury does not extend to a left shoulder sprain/strain, a cervical spine sprain/strain, a lumbar spine L3-4 disc bulge, L4-5 disc herniation or L5-S1 disc protrusion.

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 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/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 **SERVICE LLOYD'S INSURANCE COMPANY** and the name and address of its registered agent for service of process is

**JOSEPH KELLY-GRAY, PRESIDENT
6907 CAPITOL OF TEXAS HIGHWAY NORTH
AUSTIN, TEXAS 78755.**

Thomas A. Knapp
Appeals Judge

CONCUR:

Cynthia A. Brown
Appeals Judge

Margaret L. Turner
Appeals Judge