

APPEAL NO. 131165
FILED JULY 19, 2013

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 February 4, 2013, and continued on April 15, 2013, in [City], Texas, with [hearing officer] presiding as hearing officer. The hearing officer resolved the disputed issues by deciding that: (1) the compensable injury of [date of injury], extends to a superior labrum to anterior posterior (SLAP) tear of the left shoulder but does not extend to cervical degenerative disc disease at C5-6, C6-7 disc bulge/protrusion, and cervical brachial syndrome; (2) the appellant/cross-respondent (claimant) has not reached maximum medical improvement (MMI); and (3) because the claimant has not reached MMI, she cannot be assigned an impairment rating (IR). The claimant appealed the hearing officer's extent-of-injury determinations that were adverse to her. The respondent/cross-appellant (carrier) responded to the claimant's appeal, urging affirmance. The carrier cross-appealed the hearing officer's determination that the compensable injury of [date of injury], extends to a SLAP tear of the left shoulder, and the MMI and IR determinations. The carrier requests that a certification of MMI and IR be adopted which includes only the accepted injury of a left shoulder strain. There is no response to the carrier's cross-appeal from the claimant.

DECISION

Affirmed in part, and reversed and rendered in part.

It is undisputed that the claimant sustained a compensable injury on [date of injury]. In evidence is a Notice of Disputed Issue(s) and Refusal To Pay Benefits (PLN-11) dated November 22, 2011, in which the carrier has accepted a left shoulder strain. The claimant testified that on the date of injury she and a co-worker were using a bed sheet to reposition a heavy patient in bed, and the co-worker's handgrip on the sheet slipped causing the claimant to reposition the heavy patient by herself. The claimant testified that the mechanism of repositioning the patient caused her to sustain injuries to her left shoulder and neck.

EXTENT OF INJURY

The hearing officer's extent-of-injury determination that the compensable injury of [date of injury], extends to a SLAP tear of the left shoulder but does not extend to cervical degenerative disc disease at C5-6, C6-7 disc bulge/protrusion, and cervical brachial syndrome is supported by sufficient evidence and is affirmed.

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 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 Division appointed [Dr. M] as the designated doctor to determine the claimant’s MMI, IR and extent of injury. Dr. M examined the claimant on three separate dates (December 28, 2011, November 13, 2012, and March 8, 2013, respectively) and certified after each examination that the claimant had not reached MMI, because the claimant had not been afforded a reasonable, adequate opportunity of care for her injuries due to the fact that the carrier has denied any additional future treatment or other procedures. Based on the narrative reports for each certification of MMI and IR, Dr. M considered a SLAP tear of the left shoulder, cervical degenerative disc disease, and cervical brachial syndrome in determining that the claimant had not reached MMI. As previously stated, the hearing officer’s determination that the compensable injury of [date of injury], extends to a SLAP tear of the left shoulder but does not extend to cervical degenerative disc disease at C5-6, C6-7 disc bulge/protrusion, and cervical brachial syndrome is affirmed. Given that Dr. M considered the cervical degenerative disc disease and cervical brachial syndrome conditions in determining the claimant’s MMI and IR in all the certifications of MMI and IR in evidence, none of his certifications can be adopted. See Appeals Panel Decision (APD) 110463, decided June 13, 2011, and APD 101567, decided December 20, 2010. Accordingly, we reverse the hearing officer’s determination that the claimant has not reached MMI. Likewise, we reverse the hearing officer’s determination that because the claimant has not reached MMI, she cannot be assigned an IR.

As previously mentioned, the carrier has accepted a left shoulder sprain/strain and the hearing officer's determination that the claimant's compensable injury extends to a SLAP tear of the left shoulder is affirmed. In evidence is one certification of MMI and IR that considers and rates the left shoulder sprain/strain and a SLAP tear. [Dr. C], the post-designated doctor required medical examination doctor, examined the claimant on July 17, 2012, and certified that the claimant reached MMI on July 17, 2012, with a seven percent whole person impairment using the Guides to the Evaluation of Permanent Impairment, fourth edition (first, second, third, or fourth printing, including corrections and changes as issued by the American Medical Association prior to May 16, 2000) based on loss of range of motion of the left shoulder. Dr. C's certification of MMI and IR is supported by the evidence. Accordingly, we render a new decision that the claimant reached MMI on July 17, 2012, with a seven percent IR.

SUMMARY

We affirm the hearing officer's determination that the compensable injury of [date of injury], extends to a SLAP tear of the left shoulder but does not extend to cervical degenerative disc disease at C5-6, C6-7 disc bulge/protrusion, and cervical brachial syndrome.

We reverse the hearing officer's determination that the claimant has not reached MMI, and because the claimant has not reached MMI, she cannot be assigned an IR, and we render a new decision that the claimant reached MMI on July 17, 2012, with a seven percent IR.

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

**CORPORATION SERVICE COMPANY
211 EAST 7TH STREET, SUITE 620
AUSTIN, TEXAS 78701-3232.**

Veronica L. Ruberto
Appeals Judge

CONCUR:

Carisa Space-Beam
Appeals Judge

Margaret L. Turner
Appeals Judge