

APPEAL NO. 131201  
FILED JULY 31, 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 (CCH) was held on April 4, 2013, with the record closing on April 17, 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 left shoulder strain; a cervical sprain/strain; and a low back injury; (2) the compensable injury of [date of injury], does not extend to chronic pain to the left shoulder and low back; anxiety; and depression; (3) as of the date of the CCH, the appellant (claimant) has sustained disability from February 23 through February 26, 2008, only; (4) the claimant reached maximum medical improvement (MMI) on April 23, 2008; and (5) the claimant has a 0% impairment rating (IR).

The claimant appealed the hearing officer's extent-of-injury determination and disability determination adverse to him, as well as the hearing officer's MMI and IR determinations. Respondent 1 (carrier) responded, urging affirmance. The appeal file does not contain a response from respondent 2 (subclaimant) to the claimant's appeal.

The hearing officer's determinations that the compensable injury of [date of injury], extends to a left shoulder strain, a cervical sprain/strain, and a low back injury, and that portion of the hearing officer's disability determination that the claimant sustained disability from February 23 through February 26, 2008, have not been appealed and have become final pursuant to Section 410.169.

#### DECISION

Affirmed in part and reversed and remanded in part.

The claimant testified that he sustained an injury at work on [date of injury], when his supervisor hit and pushed him.

#### EXTENT OF INJURY

The hearing officer's determination that the compensable injury of [date of injury], does not extend to chronic pain to the left shoulder and low back; anxiety; and depression is supported by sufficient evidence and is affirmed.

## **DISABILITY**

The hearing officer's determination that disability ended on February 26, 2008, is supported by sufficient evidence and is affirmed.

## **MMI/IR**

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 determined that the claimant reached MMI on April 23, 2008, with a 0% IR per [Dr. B], the designated doctor appointed by the Division.

Dr. B examined the claimant on April 23, 2008, and in a Report of Medical Evaluation (DWC-69) dated that same date certified the claimant reached clinical MMI on April 23, 2008, with a 0% IR. In an attached narrative report Dr. B listed diagnoses of "[r]egional pain syndrome (no identified pathology)" and "[d]ysfunctional illness behavior." Dr. B noted that the claimant's shoulder range of motion (ROM) was unreliable and in his opinion due to lack of effort, and therefore assessed a 0% whole person impairment. However, as previously discussed the hearing officer's determination that the compensable injury extends to a left shoulder strain, a cervical sprain/strain, and a low back injury was not appealed and has become final under Section 410.169. Dr. B did not consider or rate a cervical sprain/strain or a low back injury. Because Dr. B did not consider or rate the entire compensable injury, his certification of MMI and IR cannot be adopted. See Appeals Panel Decision (APD) 110267, decided April 19, 2011, and APD 043168, decided January 20, 2005. Accordingly, we reverse the hearing officer's determination that the claimant reached MMI on April 23, 2008, with a 0% IR.

There are two other MMI/IR certifications in evidence. The first is from [Dr. S], a post-designated doctor required medical examination doctor selected by the carrier. Dr. S examined the claimant on August 22, 2012, and in a DWC-69 dated that same date certified the claimant reached clinical MMI on March 28, 2008, with a 0% IR. Dr. S placed the claimant in Diagnosis-Related Estimate (DRE) Cervicothoracic Category I: Complaints or Symptoms for 0% impairment for a “thoracic sprain and strain.” Dr. S did not place the claimant in any of the DRE Thoracolumbar categories. Dr. S noted that the claimant had complete and full ROM of both shoulders, and assessed 0% impairment for the claimant’s left shoulder. Finally, Dr. S assessed 0% impairment for a chest contusion. As previously discussed, the hearing officer’s determination that the compensable injury extends to a left shoulder strain, a cervical sprain/strain, and a low back injury was not appealed and has become final under Section 410.169. Although Dr. S placed the claimant in DRE Cervicothoracic Category I: Complaints or Symptoms, he did so for a thoracic sprain, not a cervical sprain. Dr. S does not consider or rate a cervical sprain/strain or a low back injury. Because Dr. S did not consider or rate the entire compensable injury, his certification of MMI and IR cannot be adopted. APD 110267, *supra*, and APD 043168, *supra*.

The other certification in evidence is from [Dr. R], the claimant’s treating doctor. Dr. R examined the claimant on April 1, 2013, and in a DWC-69 dated that same date certified the claimant reached statutory MMI on February 22, 2010, with an 11% IR. During the CCH the parties agreed that the first day of disability was February 23, 2008. Taking into account that 2008 was a leap year, the eighth day of disability was March 1, 2008. Section 401.011(30)(B) defines statutory MMI as “the expiration of 104 weeks from the date on which income benefits begin to accrue.” As the eighth day of disability in this case was March 1, 2008, the date of statutory MMI under Section 401.011(30)(B) would be no earlier than February 27, 2010. See APD 090539, decided June 1, 2009, and APD 070930, decided July 11, 2007. Given that statutory MMI could not be earlier than February 27, 2010, Dr. R’s certification that the claimant reached MMI statutorily on February 22, 2010, is legally incorrect, and as such his certification of MMI and IR cannot be adopted.

There are no other certifications in evidence. Therefore, we remand the issues of MMI and IR to the hearing officer for further action consistent with this decision.

### **SUMMARY**

We affirm the hearing officer’s determination that the compensable injury of [date of injury], does not extend to chronic pain to the left shoulder and low back; anxiety; and depression.

We affirm the hearing officer's determination that the claimant's disability ended on February 26, 2008.

We reverse the hearing officer's determinations that the claimant reached MMI on April 23, 2008, with a 0% IR, and we remand the issues of MMI and IR to the hearing officer for further action consistent with this decision.

### **REMAND INSTRUCTIONS**

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

The hearing officer is to advise the designated doctor that the compensable injury of [date of injury], includes a left shoulder strain; a cervical sprain/strain; and a low back injury, and that the compensable injury of [date of injury], does not extend to chronic pain to the left shoulder and low back; anxiety; or depression as administratively determined. The hearing officer is to request the designated doctor to give an opinion on the claimant's MMI, which cannot be after statutory MMI, and rate the entire compensable injury 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) considering the medical record and the certifying examination. The hearing officer is to make a finding regarding the date of statutory MMI and provide the date of statutory MMI to the designated doctor.

The parties are to be provided with the designated doctor's new MMI/IR certification and 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 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.**

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Carisa Space-Beam  
Appeals Judge

CONCUR:

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Veronica L. Ruberto  
Appeals Judge

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Margaret L. Turner  
Appeals Judge