

APPEAL NO. 131224
FILED JULY 15, 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 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], does not extend to bilateral carpal tunnel syndrome (BCTS), right shoulder, and cervical radiculopathy; (2) the appellant (claimant) reached maximum medical improvement (MMI) on January 17, 2012; and (3) claimant's impairment rating (IR) is zero percent.

The claimant appealed, disputing the hearing officer's determination that the compensable injury of [date of injury], does not extend to right shoulder and cervical radiculopathy and the determinations of MMI and IR. The respondent (carrier) responded, urging affirmance of the disputed extent of injury, MMI, and IR determinations.

That portion of the hearing officer's determination that the compensable injury of [date of injury], does not extend to BCTS was not appealed and has become final pursuant to Section 410.169.

DECISION

Affirmed in part and reversed and remanded in part.

The parties stipulated that the claimant sustained a compensable injury on [date of injury], and that the carrier has accepted a lumbar strain and a cervical strain as part of the compensable injury of [date of injury]. The claimant testified that he was injured when pushing and pulling on a beam at work.

EXTENT OF INJURY

That portion of the hearing officer's extent-of-injury determination that the compensable injury of [date of injury], does not extend to right shoulder and cervical radiculopathy 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.

[Dr. A] was appointed by the Division to opine on the issues of the claimant's MMI and IR. Dr. A examined the claimant on April 18, 2012, and certified that the claimant reached MMI on January 17, 2012, with a zero percent IR, using 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. A stated in his narrative report dated April 18, 2012, "[a]s per the claimant's same words he has had no difference in the condition and he was treated conservatively as I mentioned. Based on that for the lumbar sprain and cervical sprain the claimant has reached clinical [MMI] on [March 14, 2012]. However, statutory MMI was reached on [January 17, 2012]."

A Request for Designated Doctor Examination (DWC-32) dated March 26, 2012, requested by the carrier was in evidence. The DWC-32 states that the date of statutory MMI is January 17, 2012. However, Section 401.011(30)(B) defines statutory MMI as the expiration of 104 weeks from the date on which income benefits begin to accrue. Given the definition of statutory MMI and that the claimant's date of injury is [date of injury], statutory MMI in this case cannot be January 17, 2012. The hearing officer found that the preponderance of the evidence is consistent with Dr. A's certification of MMI and IR. However, it is clear from his narrative report that Dr. A certified that the claimant reached MMI on January 17, 2012, only because he was mistakenly informed that the statutory MMI date was January 17, 2012. Accordingly, we reverse the hearing officer's determination that the claimant reached MMI on January 17, 2012.

The only other certifications in evidence are from [Dr. F], a doctor selected by the treating doctor to act in place of the treating doctor. Dr. F examined the claimant on September 4, 2012, and certified that the claimant was not at MMI considering the right shoulder. As previously noted, the hearing officer's determination that the compensable injury of [date of injury], does not extend to the right shoulder is affirmed. Accordingly,

Dr. F's certification that the claimant is not at MMI cannot be adopted because it considers a condition which has been determined not to be part of the compensable injury. See Appeals Panel Decision (APD) 110463, decided June 13, 2011.

The other certification in evidence from Dr. F certified that the claimant reached MMI on January 17, 2012, with a zero percent IR using the AMA Guides. In the narrative report dated September 4, 2012, Dr. F stated, "[the claimant] has been placed at [MMI] effective January 17, 2012. . . . If the shoulder in fact is compensable, then he would not be at MMI pending further workup to the right shoulder." Dr. F states that ". . . no further treatment has been rendered at all through the course of this year and addressing the areas in question as far as the lumbar spine is concerned, I would agree that he has reached [MMI] effective January 17, 2012." Dr. F places the claimant in Diagnosis-Related Estimate Lumbosacral Category I: Complaints or Symptoms, assigning a zero percent IR for the lumbar spine. As previously noted, the parties stipulated that the compensable injury includes a cervical strain. Dr. F did not consider the cervical strain when he rated the compensable injury and accordingly, his certification of MMI/IR cannot be adopted. See APD 110267, decided April 19, 2011.

Since we have reversed the hearing officer's determination that the claimant reached MMI on January 17, 2012, and there is not another certification in evidence that can be adopted, we reverse the hearing officer's determination that the claimant's IR is zero percent and 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 does not extend to right shoulder and cervical radiculopathy.

We reverse the hearing officer's determinations that the claimant reached MMI on January 17, 2012, with a zero percent IR, and remand the issues of MMI and IR to the hearing officer for further action consistent with this decision.

REMAND INSTRUCTIONS

Dr. A is the designated doctor in this case. On remand, the hearing officer is to determine whether Dr. A is still qualified and available to be the designated doctor. If Dr. A 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 obtain a stipulation from the parties as to the date of statutory MMI or take evidence in order to make a finding on the date of statutory MMI. The hearing officer is to advise the designated doctor that the compensable injury of [date of injury], includes a lumbar strain and a cervical strain but does not include BCTS, right shoulder, or cervical radiculopathy. The hearing officer is to request that the designated doctor give an opinion on the claimant's MMI, which can be no later than the date of statutory MMI, and rate the entire compensable injury, in accordance with the AMA Guides, considering the medical record and the certifying examination.

The parties are to be provided with the designated doctor's new certification of MMI and IR 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 **AMERICAN ZURICH 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 78701-3218.**

Margaret L. Turner
Appeals Judge

CONCUR:

Veronica L. Ruberto
Appeals Judge

Carisa Space-Beam
Appeals Judge