

APPEAL NO. 131554
FILED SEPTEMBER 3, 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 May 29, 2013, 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 right knee strain/sprain, patellar tendinosis of the right knee, prepatellar bursitis of the right knee, left knee strain/sprain, cervical sprain, thoracic sprain, lumbar strain/sprain, right shoulder strain/sprain, right shoulder impingement disorder, adhesive capsulitis of the right shoulder, partial thickness tear of the right rotator cuff, and rotator cuff tendinosis of the right shoulder; (2) the compensable injury of [date of injury], does not extend to pain disorder associated with both psychological factors and a general medical condition, anxiety disorder, and major depressive disorder; (3) the appellant/cross-respondent (claimant) has not reached maximum medical improvement (MMI); and (4) since the claimant has not reached MMI an impairment rating (IR) is premature.

The claimant appealed that portion of the hearing officer's extent-of-injury determination adverse to her. The appeal file does not contain a response from the respondent/cross-appellant (carrier) to the claimant's appeal. The carrier appealed that portion of the hearing officer's extent-of-injury determination adverse to it, as well as the hearing officer's MMI and IR determinations.

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 as compensable a cervical strain, a thoracic strain, and a right knee contusion. Although not noted in the decision and order, the parties stipulated at the CCH that the date of statutory MMI is March 18, 2013.

EXTENT OF INJURY

The hearing officer's determination that the compensable injury of [date of injury], extends to right knee strain/sprain, patellar tendinosis of the right knee, prepatellar bursitis of the right knee, left knee strain/sprain, cervical sprain, thoracic sprain, lumbar strain/sprain, right shoulder strain/sprain, right shoulder impingement disorder, adhesive capsulitis of the right shoulder, partial thickness tear of the right rotator cuff, and rotator cuff tendinosis of the right shoulder but does not extend to pain disorder associated with

both psychological factors and a general medical condition, anxiety disorder, and major depressive disorder 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.

In her decision signed on June 4, 2013, the hearing officer determined that the claimant had not reached MMI and that the IR is premature. However, the parties stipulated at the CCH that the date of statutory MMI is March 18, 2013. In this case the hearing officer’s determination that the claimant had not reached MMI is legal error. We therefore reverse the hearing officer’s determinations that the claimant has not reached MMI and that the IR is premature.

There are four other MMI/IR certifications in evidence. The first is from [Dr. H], the treating doctor. Dr. H examined the claimant on February 17, 2011, and in a Report of Medical Evaluation (DWC-69) certified that the claimant reached clinical MMI on the date of examination 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). In an accompanying report dated February 17, 2011, Dr. H noted diagnoses of right neck sprain, left thoracic sprain/strain, and a crushing injury to the knee. Dr. H noted full range of motion (ROM) in the cervical spine, upper extremities, thoracic spine, and right knee. As previously discussed, the hearing officer’s determination that the compensable injury extends to right knee strain/sprain, patellar tendinosis of the right knee, prepatellar bursitis of the right knee, left knee

strain/sprain, cervical sprain, thoracic sprain, lumbar strain/sprain, right shoulder strain/sprain, right shoulder impingement disorder, adhesive capsulitis of the right shoulder, partial thickness tear of the rotator cuff, and rotator cuff tendinosis of the right shoulder has been affirmed. Dr. H does not discuss all of the other extent-of-injury conditions determined by the hearing officer and affirmed in this decision. Dr. H did not consider and rate the entire compensable injury, and as such, his MMI/IR certification cannot be adopted. See Appeals Panel Decision (APD) 110267, decided April 19, 2011, and APD 043168, decided January 20, 2005.

The other three MMI/IR certifications in evidence are from [Dr. D], the second designated doctor appointed by the Division to determine MMI/IR, among other things. Dr. D initially examined the claimant on December 6, 2011, and completed two alternate DWC-69s. In the first DWC-69, Dr. D certified the claimant reached clinical MMI on April 26, 2011, with a zero percent IR. In his accompanying narrative report, Dr. D noted that this DWC-69 is based on conditions of cervical strain, right knee strain, and right shoulder strain. Dr. D placed the claimant in Diagnosis-Related Estimate (DRE) Cervicothoracic Category I: Complaints or Symptoms for zero percent impairment. Regarding the right knee strain, Dr. D noted that ROM was "intact" and symmetric to the uninjured left knee and assessed a zero percent impairment. Regarding the right shoulder strain, Dr. D noted a reduction in shoulder ROM, but he determined this was based largely on subjective pain rather than objective findings and more likely related to rotator cuff tendinosis and AC osteoarthritis, both of which Dr. D noted was listed by the carrier as noncompensable. Dr. D assessed a zero percent impairment for the claimant's right shoulder strain. Dr. D did not consider and rate the other extent-of-injury conditions determined to be part of the compensable injury by the hearing officer and affirmed in this decision. Because Dr. D's MMI/IR certification does not rate the entire compensable injury, it cannot be adopted. APD 110267, *supra*, and APD 043168, *supra*.

In the alternate DWC-69, Dr. D certified the claimant reached clinical MMI on October 12, 2011, with a five percent IR. In his accompanying narrative report, Dr. D noted that this DWC-69 is based on conditions of thoracic and lumbar strains, prepatellar bursitis, rotator cuff tendinosis, and osteoarthritis of the AC joint. We note that the condition of osteoarthritis of the AC joint was not a part of the extent-of-injury issue, was not accepted by the carrier as compensable, nor was this condition actually litigated at the CCH. Dr. D placed the claimant in DRE Thoracolumbar Category I: Complaints or Symptoms for zero percent impairment and DRE Lumbosacral Category I: Complaints or Symptoms for zero percent impairment. Regarding the prepatellar bursitis, Dr. D noted no muscle atrophy of the upper and lower leg and symmetric ROM; and therefore, assessed zero percent for the prepatellar bursitis. Regarding the rotator cuff tendinosis and AC osteoarthritis, Dr. D assessed a nine percent upper extremity

impairment based on ROM deficits, which translates to a five percent whole person impairment. Dr. D did not consider and rate the other extent-of-injury conditions determined to be part of the compensable injury by the hearing officer and affirmed in this decision. Because Dr. D's MMI/IR certification does not rate the entire compensable injury, it cannot be adopted. APD 110267, *supra*, and APD 043168, *supra*.

Dr. D's final MMI/IR certification was made in response to a letter of clarification dated December 12, 2012. Dr. D noted in his response dated February 6, 2012, that he had been asked to provide an alternate certification for the injuries of cervical strain, bilateral knee contusion, and thoracic strain. Dr. D stated that "[b]ased on a review of the medical records, the [claimant] would also most likely be at MMI . . . on [April 26, 2011]." Dr. D again assessed a zero percent IR by placing the claimant in DRE Cervicothoracic Category I: Complaints or Symptoms for zero percent; DRE Thoracolumbar Category I: Complaints or Symptoms for zero percent; and zero percent for the bilateral knee contusions. Dr. D did not consider and rate the other extent-of-injury conditions determined to be part of the compensable injury by the hearing officer and affirmed in this decision. Because Dr. D's MMI/IR certification does not rate the entire compensable injury, it cannot be adopted. APD 110267, *supra*, and APD 043168, *supra*.

Because there is no MMI/IR certification in evidence that can be adopted, 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], extends to right knee strain/sprain, patellar tendinosis of the right knee, prepatellar bursitis of the right knee, left knee strain/sprain, cervical sprain, thoracic sprain, lumbar strain/sprain, right shoulder strain/sprain, right shoulder impingement disorder, adhesive capsulitis of the right shoulder, partial thickness tear of the right rotator cuff, and rotator cuff tendinosis of the right shoulder.

We affirm the hearing officer's determination that the compensable injury of [date of injury], does not extend to pain disorder associated with both psychological factors and a general medical condition, anxiety disorder, and major depressive disorder.

We reverse the hearing officer's determinations that the claimant has not reached MMI and that the IR is premature, and we remand the issues of MMI and IR to the hearing officer for further action consistent with this decision.

REMAND INSTRUCTIONS

Dr. D is the designated doctor in this case. On remand, the hearing officer is to determine whether Dr. D is still qualified and available to be the designated doctor. If Dr. D 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 [date of injury], compensable injury extends to right knee strain/sprain, patellar tendinosis of the right knee, prepatellar bursitis of the right knee, left knee strain/sprain, cervical sprain, thoracic sprain, lumbar strain/sprain, right shoulder strain/sprain, right shoulder impingement disorder, adhesive capsulitis of the right shoulder, partial thickness tear of the right rotator cuff, and rotator cuff tendinosis of the right shoulder. The hearing officer is also to advise the designated doctor that the compensable injury does not extend to pain disorder associated with both psychological factors and a general medical condition, anxiety disorder, and major depressive disorder.

The hearing officer is to further advise the designated doctor that the statutory date of MMI as stipulated to by the parties is March 18, 2013, and that the certification of MMI can be no later than the March 18, 2013, statutory date of MMI. The assignment of an IR is required to be based on the claimant's condition as of the MMI date considering the medical records and the certifying examination and according to the rating criteria of the AMA Guides and the provisions of Rule 130.1(c)(3). The parties are to be allowed an opportunity to respond. The hearing officer is to determine the issues of 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 **TEXAS MUTUAL INSURANCE COMPANY** and the name and address of its registered agent for service of process is

**RICHARD J. GERGASKO, PRESIDENT
6210 HIGHWAY 290 EAST
AUSTIN, TEXAS 78723.**

Carisa Space-Beam
Appeals Judge

CONCUR:

Veronica L. Ruberto
Appeals Judge

Margaret L. Turner
Appeals Judge