

APPEAL NO. 131730
FILED SEPTEMBER 4, 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 June 11, 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 an injury to the left knee in the form of a left knee sprain/strain, but does not extend to a left shoulder labral tear; (2) the appellant (claimant) reached maximum medical improvement (MMI) on November 8, 2011; and (3) the claimant's impairment rating (IR) is five percent. The claimant appealed all of the hearing officer's determinations that were adverse to him. The claimant requested that the referral treating doctor's certification of MMI/IR be adopted. The respondent (carrier) responded, urging affirmance. That portion of the hearing officer's determination that the compensable injury of [date of injury], extends to an injury to the left knee in the form of a left knee sprain/strain 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], the carrier accepted liability for a lumbar sprain/strain and a left cheek burn, and [Dr. H] is the designated doctor appointed by the Texas Department of Insurance, Division of Workers' Compensation (Division) for extent of injury, MMI, and IR. The claimant testified that he sustained an injury to his face, back, left knee and left shoulder at work on [date of injury]. The claimant testified and the medical records describe that the injury occurred at work on the date of injury as follows: the claimant was standing on a scaffold drilling a flange, when the flange suddenly exploded and ignited with flames burning his left cheek. As the claimant attempted to get away from the area, the rope of his drill became entangled on his left arm, causing his body to jerk. He then felt a pop to his back, hyperextended his left shoulder, and twisted his left knee.

EXTENT OF INJURY

That portion of the hearing officer's determination that the compensable injury of [date of injury], does not extend to a left shoulder labral tear 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 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 this case, there are two certifications of MMI/IR in evidence, one from Dr. H, the designated doctor, and one from [Dr. G], the referral treating doctor. As previously mentioned the carrier accepted liability for a lumbar sprain/strain and a left cheek burn, and the hearing officer's determination that the compensable injury extends to a left knee sprain/strain became final pursuant to Section 410.169. Dr. G examined the claimant on May 13, 2013, and certified that the claimant reached MMI on October 11, 2012, with six percent IR. In the Background Information section of the decision the hearing officer correctly stated that Dr. G's certification of MMI/IR cannot be adopted because he rated the left shoulder labral tear, which has been determined not to be part of the compensable injury.

The other certification is from Dr. H, the designated doctor. Dr. H examined the claimant on June 29, 2012. In a Report of Medical Evaluation (DWC-69) and narrative report dated July 2, 2012, Dr. H certified the claimant reached clinical MMI on November 8, 2011, with a five percent IR. Regarding the claimant's MMI, Dr. H stated that:

The [MMI] date is November 8, 2011, which was calculated by using the [Medical Disability Advisor, Workplace Guidelines for Disability Duration, excluding all sections and tables relating to rehabilitation published by the Reed Group, Ltd. (MDA)], heavy work, and for maximum days for return to duty.

Dr. H's certification that the claimant reached MMI on November 8, 2011, with a five percent IR cannot be adopted. The Appeals Panel has previously held that the MDA cannot be used alone, without considering the claimant's physical examination and medical records, in determining a claimant's date of MMI. See Appeals Panel Decision (APD) 130191, decided March 13, 2013, APD 130187, decided March 18, 2013. In this case, Dr. H based his date of MMI solely on the MDA without considering the claimant's physical examination and medical records. Accordingly, we reverse the hearing officer's determination that the claimant reached MMI on November 8, 2011.

Given that the MMI determination is reversed, we must also reverse the hearing officer's IR determination because it was based on a date of MMI of November 8, 2011. The IR must be assessed as of the date of MMI. See Rule 130.1(c)(3). Because the MMI must be re-assessed, so must the IR. Accordingly, we reverse the hearing officer's determination that the claimant's IR is five percent.

There are no other certifications of MMI and IR in evidence. Since there are no other certifications of MMI and IR 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], does not extend to a left shoulder labral tear.

We reverse the hearing officer's determinations that the claimant reached MMI on November 8, 2011, with a five percent IR, and we remand the issues of MMI and IR to the hearing officer for further action consistent with this decision.

REMAND INSTRUCTIONS

Dr. H is the designated doctor in this case. On remand, the hearing officer is to determine whether Dr. H is still qualified and available to be the designated doctor. If Dr. H 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 lumbar sprain/strain, left cheek burn, and a left knee sprain/strain. The hearing officer is also to advise the designated doctor that the [date of injury], compensable injury does not include a left shoulder labral tear. The hearing officer is to request the designated doctor to give an opinion on the claimant's 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 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 GENERAL 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.**

Veronica L. Ruberto
Appeals Judge

CONCUR:

Carisa Space-Beam
Appeals Judge

Margaret L. Turner
Appeals Judge