

APPEAL NO. 132010
FILED OCTOBER 25, 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 July 30, 2013, in [City], Texas, with [hearing officer] presiding as hearing officer. The hearing officer resolved the disputed issues by deciding that: (1) the [date of injury], compensable injury does not extend to lumbar spine disc bulge at L2-3, L3-4, L4-5, and L5-S1, right shoulder sprain/strain, pain disorder associated with both psychological factors and a general medical condition, incontinence, and depression; (2) the appellant (claimant) reached maximum medical improvement (MMI) on September 2, 2010; and (3) the claimant's impairment rating (IR) is five percent.

The claimant appealed all of the hearing officer's determinations, contending that the hearing officer's determinations are so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust. The respondent (carrier) responded, urging affirmance of the hearing officer's determinations.

DECISION

Affirmed in part and reversed and remanded in part.

The claimant testified he was injured while reaching overhead and using a pneumatic drill to secure wiring to a cabinet. The parties stipulated at the CCH that the compensable injury includes at least a lumbar sprain/strain, cervical sprain/strain, thoracic sprain/strain, left shoulder sprain/strain, and right knee sprain/strain.

EXTENT OF INJURY

The hearing officer determined in part that the compensable injury of [date of injury], does not extend to lumbar spine disc bulge at L2-3, L3-4, L4-5, and L5-S1, pain disorder associated with both psychological factors and a general medical condition, incontinence, and depression. That determination is supported by sufficient evidence and is affirmed.

The hearing officer also determined that the compensable injury of [date of injury], does not extend to right shoulder sprain/strain. The hearing officer stated in his decision that the "[c]laimant stipulated that right shoulder sprain/strain is not part of his claim, only a left shoulder sprain/strain, which [the] [c]arrier accepts as part of the compensable injury." The hearing officer noted in the Background Information section that "the right shoulder was never in dispute," and noted in the decision section that the right shoulder sprain/strain "never was alleged." However, during the CCH the claimant

testified that he did not understand why the carrier had accepted the left shoulder because “everything I was doing was with the right side of my body. . . .” The hearing officer then clarified with the claimant on the record that the claimant’s position is the left shoulder was never injured; it was always the right shoulder that was injured. The claimant also testified that he continues to have problems with his right shoulder.

The hearing officer incorrectly stated in the decision that the claimant stipulated that the right shoulder sprain/strain is not part of the claimed injury and that the right shoulder sprain/strain was never in dispute. Although the hearing officer made a finding of fact, a conclusion of law, and a decision that the compensable injury does not extend to a right shoulder sprain/strain, the hearing officer’s decision makes clear that he mistakenly believed that condition was not in dispute. The hearing officer therefore did not consider and make appropriate findings of fact, conclusions of law, and a decision regarding the right shoulder sprain/strain, a condition which was in dispute. Accordingly, we reverse that portion of the hearing officer’s determination that the compensable injury does not extend to a right shoulder sprain/strain and we remand that issue to the hearing officer for further action consistent with this decision.

As noted above, the parties stipulated on the record that the compensable injury extends to a left shoulder sprain/strain. However, the claimant testified that he had never pursued a left shoulder sprain/strain. In Appeals Panel Decision (APD) 050265, decided March 25, 2005, the carrier contended on appeal that the parties stipulated at the CCH to an incorrect date of MMI by mistake. The Appeals Panel noted that Section 410.166 and 28 TEX. ADMIN. CODE § 147.4(c) (Rule 147.4(c)) provide, in part, that an oral agreement of the parties that is preserved in the record is final and binding on the date made. Rule 147.4(d)(1) further provides, in part, that an oral agreement is binding on a carrier through the final conclusion of all matters relating to the claim, whether before the Texas Department of Insurance, Division of Workers’ Compensation (Division) or in court, unless set aside by the Division or court on a finding of fraud, newly discovered evidence, or other good and sufficient cause. The Appeals Panel further noted that whether a good and sufficient cause exists is to be determined from the facts as they stand at the time the party seeks to set aside the agreement. APD 950625, decided June 5, 1995. The Appeals Panel reversed and remanded the hearing officer’s decision for a determination of whether good cause exists to set aside the parties’ stipulation as to the date of MMI. See *also* APD 131996, decided October 10, 2013.

The parties in this case stipulated on the record that the compensable injury includes a sprain/strain to the left shoulder as written by the hearing officer in his decision and order. However, the claimant testified that he has not pursued a left shoulder sprain/strain. We reverse the portion of the hearing officer’s Finding of Fact

No. 1.D. that states the compensable injury extends to a left shoulder sprain/strain and we remand the hearing officer's decision for a determination of whether good cause exists to set aside the parties' stipulation that the compensable injury extends to a left shoulder sprain/strain.

MMI/IR

The hearing officer determined the claimant reached MMI on September 2, 2010, with a five percent IR per [Dr. D], the second designated doctor appointed for MMI/IR by the Division.¹ We note that in Dr. D's Report of Medical Evaluation (DWC-69) dated May 9, 2013, Dr. D certified the claimant reached MMI statutorily on September 2, 2010; however, in Dr. D's attached narrative report dated April 30, 2013, the date of examination, Dr. D stated that "[t]he [claimant] was at statutory [MMI] on September 3, 2010" and that "[t]he date of [MMI] is September 3, 2010, statutory." A letter of clarification was sent to Dr. D on May 21, 2013, and in a response dated May 23, 2013, Dr. D noted that the statutory date "was merely a typo, I have adjusted the report to state September 3, 2010." Dr. D noted that she attached a DWC-69 which "includes the noncompensable injuries," and attached to her response is a DWC-69 dated May 23, 2013, certifying the claimant reached MMI statutorily on September 3, 2010, with a zero percent IR. There is not a DWC-69 from Dr. D in evidence which certifies that the claimant reached MMI statutorily on September 3, 2010, with a five percent IR.

The hearing officer's determination that the claimant reached MMI on September 2, 2010, is not supported by the evidence. Furthermore, we have reversed that portion of the hearing officer's extent-of-injury determination that the compensable injury does not extend to a right shoulder sprain/strain and have remanded that issue to the hearing officer. We therefore reverse the hearing officer's determinations that the claimant reached MMI on September 2, 2010, 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.

SUMMARY

We affirm that portion of the hearing officer's extent-of-injury determination that the compensable injury of [date of injury], does not extend to lumbar spine disc bulge at L2-3, L3-4, L4-5, and L5-S1, pain disorder associated with both psychological factors and a general medical condition, incontinence, and depression.

¹ We note that the decision section of the decision and order states incorrectly that the claimant reached MMI on September 2, 2011.

We reverse 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 sprain/strain and we remand that issue to the hearing officer for further action consistent with this decision.

We reverse the portion of the hearing officer's Finding of Fact No. 1.D. that states the compensable injury of [date of injury], extends to a left shoulder sprain/strain and we remand that portion of Finding of Fact No. 1.D. for a determination of whether good cause exists to set aside the parties' stipulation that the compensable injury extends to a left shoulder sprain/strain.

We reverse the hearing officer's determinations that the claimant reached MMI on September 2, 2010, 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. 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 take a stipulation from the parties on the date of statutory MMI. If the parties are unable to stipulate to the date of statutory MMI, the hearing officer is to make a determination of the date of statutory MMI in order to inform the designated doctor of the date of statutory MMI.

The hearing officer is to make a determination whether the compensable injury of [date of injury], extends to right shoulder sprain/strain and/or left shoulder sprain/strain. The hearing officer is to then advise the designated doctor that the compensable injury of [date of injury], extends to lumbar sprain/strain, cervical sprain/strain, thoracic sprain/strain, and right knee sprain/strain as administratively determined, and right shoulder sprain/strain and left shoulder sprain/strain, depending upon the hearing officer's determination regarding the right shoulder sprain/strain and left shoulder sprain/strain.

The hearing officer is to request the designated doctor to give an opinion on the claimant's date of MMI, which cannot be after the date of statutory MMI, and rate the entire compensable injury as of the date of MMI 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 **TEXAS MUTUAL INSURANCE COMPANY** and the name and address of its registered agent for service of process is

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

Carisa Space-Beam
Appeals Judge

CONCUR:

Veronica L. Ruberto
Appeals Judge

Margaret L. Turner
Appeals Judge