

APPEAL NO. 132215
FILED NOVEMBER 18, 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 October 4, 2012, with the record closing on August 12, 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 cervical radiculopathy, radiculitis, C5, C6, and C7 entrapment and herniated discs; lumbar radiculopathy, radiculitis and herniated discs; left shoulder impingement on the rotator cuff; rotator cuff syndrome; right shoulder lateral tear and recurrent instability; left knee medial meniscus tear and internal derangement of the knees; (2) the compensable injury extends to left wrist tenosynovitis; (3) the appellant (claimant) reached maximum medical improvement (MMI) on February 22, 2010; and (4) the claimant's impairment rating (IR) is 12%.

The claimant appealed the hearing officer's extent-of-injury determination adverse to her, as well as the hearing officer's MMI and IR determinations, on a sufficiency of the evidence point of error. The respondent (self-insured) responded, urging affirmance of the hearing officer's determinations. The hearing officer's determination that the compensable injury of [date of injury], extends to left wrist tenosynovitis 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: (1) the claimant sustained a compensable injury on [date of injury], at least to both knees, both shoulders, and left wrist; (2) [Dr. L], the designated doctor appointed by the Texas Department of Insurance, Division of Workers' Compensation (Division), certified that the claimant reached MMI on August 25, 2008, and assigned an 11% IR; (3) the treating doctor referral, [Dr. H] certified that the claimant reached MMI on February 22, 2010, and assigned a 16% IR; and (4) statutory MMI is February 22, 2010. The claimant testified she was injured on [date of injury], when, while unloading boxes from a truck onto a conveyor belt, she fell from the truck to the ground.

EXTENT OF INJURY

The hearing officer's determination that the compensable injury of [date of injury], does not extend to cervical radiculopathy, radiculitis, C5, C6, and C7 entrapment and herniated discs; lumbar radiculopathy, radiculitis and herniated discs; left shoulder

impingement on the rotator cuff, rotator cuff syndrome; right shoulder lateral tear and recurrent instability; left knee medial meniscus tear and internal derangement of the knees 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.

The hearing officer determined that the claimant reached MMI on February 22, 2010, with a 12% IR per [Dr. B], the subsequent designated doctor appointed by the Division.

Dr. B examined the claimant on March 22, 2013, and in a Report of Medical Evaluation (DWC-69) dated that same date, certified the claimant reached MMI statutorily on February 22, 2010, with a 12% IR. Dr. B noted the following injuries were compensable: “[l]eft wrist contusion and tenosynovitis (interchangeable); [b]ilateral [k]nees; [b]ilateral [s]houlders and [l]eft [w]rist.” Dr. B assessed 0% impairment for the claimant’s left and right knees based on range of motion (ROM) measurements; 14% upper extremity (UE) impairment for the right shoulder and 5% UE impairment for the left shoulder based on ROM measurements; and 1% UE impairment for the claimant’s left wrist based on ROM measurements. We note that Dr. B’s narrative report contains two different sets of ROM measurements containing different ROM values, and that both sets are dated March 22, 2013.

On June 24, 2013, the hearing officer sent Dr. B a letter of clarification notifying Dr. B that:

. . . in providing the [Request for Designated Doctor (DWC-32)] a compensable diagnosis accepted by the [self-insured] was left thumb sprain, however, it was not listed on the DWC-32. Please provide a rating which includes the left thumb sprain injury. Would this change the MMI date? [I]f so, please provide a date. Statutory MMI is [February 22, 2010].

In a response dated July 1, 2013, Dr. B noted:

Although not documented on my report [the] claimant was actually asked about DIP and PIP thumb pain, which was denied. Consequently, physical examination and angle measurements were focused on the wrist.

[The] [c]laimant reached statutory MMI on [February 22, 2010], and, consequently, reached clinical MMI on same date for her left wrist and thumb. The left thumb strain would not be expected to change her MMI date. From what can be best clinically estimated, there was no angular loss from the left thumb sprain and is consequently given a "0%" [IR] for this.

Dr. B attached an amended DWC-69 dated July 1, 2013, certifying the claimant reached MMI statutorily on February 22, 2010, with a 12% IR.

Dr. B's 12% IR contains an error in applying 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); specifically, Dr. B improperly utilized Figure 29 on page 3/38 of the AMA Guides in assessing 1% impairment for the claimant's left wrist. Dr. B measured 16° of radial deviation and assessed 1% impairment; Dr. B failed to round the measurements of radial deviation of the wrist to the nearest 10° to determine the UE impairment. Figure 29 on page 3/38, which is used to rate impairment based upon these measurements, uses increments of 5°, whereas the general directions on page 3/37 state to round the measurements of radial deviation to the nearest 10°. This conflict is resolved by looking to the general directions of interpolating, measuring, and rounding off which are found on page 2/9 of the AMA Guides and which provide as follows in relevant part:

In general, an impairment value that falls between those appearing in a table or figure of the *Guides* may be adjusted or interpolated to be proportional to the interval of the table or figure involved, unless the book gives other directions.

Here the AMA Guides do give other directions than applying the values given in Figure 29 on page 3/38. Those directions are on page 3/37 and provide that the measurements be rounded to the nearest 10°. Using the language cited above from page 2/9 of the AMA Guides, these directions control over Figure 29 and should have been applied in calculating the claimant's IR. See Appeals Panel Decision (APD) 022504-s, decided November 12, 2002; APD 111384, decided November 23, 2011. See *also* APD 131541, decided August 29, 2013.

The Appeals Panel has previously stated that, where the certifying doctor's report provides the component parts of the rating that are to be combined and the act of combining those numbers is a mathematical correction which does not involve medical judgment or discretion, the Appeals Panel can recalculate the correct IR from the figures provided in the certifying doctor's report and render a new decision as to the correct IR. See APD 121194, decided September 6, 2012; APD 041413, decided July 30, 2004; APD 100111, decided March 22, 2010; and APD 101949, decided February 22, 2011. However, in the case on appeal, Dr. B's 12% IR cannot be corrected. As previously discussed, Dr. B failed to round the measurements of radial deviation of the wrist to the nearest 10° to determine the UE impairment. Rounding radial deviation to derive the correct UE impairment requires medical judgment or discretion, so we cannot recalculate the correct IR using Dr. B's figures. Accordingly, we reverse the hearing officer's determinations that the claimant reached MMI on February 22, 2010, with a 12% IR.

There are numerous other MMI/IR certifications in evidence: three from Dr. L, the designated doctor previously assigned by the Division; two from Dr. H, a doctor selected by the treating doctor to act in place of the treating doctor; and two from [Dr. R], a doctor selected by the treating doctor to act in place of the treating doctor.

Dr. L's first certification is dated August 25, 2008. Dr. L certified that the claimant reached clinical MMI on August 25, 2008, with a 7% IR. The 7% IR includes ratings for cervical degenerative disc disease, a "[s]houlder sprain with aggravation of pre-existing mild rotator cuff disease," and a left knee lateral meniscus tear. As previously discussed, we have affirmed the hearing officer's determination that the compensable injury does not extend to the claimed extent-of-injury conditions, and two of those conditions are a lateral meniscus tear and rotator cuff syndrome. Dr. L's first certification cannot be adopted because it considers and rates conditions determined not to be part of the compensable injury.

Dr. L's second certification is dated July 6, 2009. Dr. L certified that the claimant had not reached MMI. However, given that the parties have stipulated that the date of statutory MMI is February 22, 2010, to adopt this certification would extend the

claimant's MMI date beyond the date of statutory MMI. Additionally, Dr. L notes in his attached narrative report impressions of cervical degenerative disc disease without radiculopathy; "[s]houlder sprain with aggravation of pre-existing mild rotator cuff disease," and a left knee lateral meniscus tear. Dr. L's second certification cannot be adopted because it considers and rates conditions determined not to be part of the compensable injury.

Dr. L's third certification is dated October 12, 2009. Dr. L again certified that the claimant reached clinical MMI on August 25, 2008, with an 11% IR. However, Dr. L's 11% IR, like his 7% IR, includes ratings for cervical degenerative disc disease, a "[s]houlder sprain with aggravation of pre-existing mild rotator cuff disease," and a left knee lateral meniscus tear. Dr. L's third certification cannot be adopted because it considers and rates conditions determined not to be part of the compensable injury.

Dr. H's first certification is dated June 10, 2010. Dr. H certified that the claimant reached MMI statutorily on February 22, 2010, with a 16% IR. Dr. H notes in his narrative report a diagnosis of a cervical sprain/strain, and Dr. H placed the claimant in Diagnosis-Related Estimate Cervicothoracic Category II: Minor Impairment for 5% impairment. Dr. H also assigned 4% impairment for a partial medial and lateral meniscectomy. As previously mentioned, we have affirmed the hearing officer's determination that the compensable injury does not extend to the claimed extent-of-injury conditions, and one of those conditions is a left knee medial meniscus tear. Dr. H's first certification cannot be adopted because it considers and rates a condition determined not to be part of the compensable injury.

Dr. H's second certification is also dated June 10, 2010. Dr. H certified that the claimant reached clinical MMI on June 10, 2010, with a 12% IR. However, given that the parties have stipulated the date of statutory MMI is February 22, 2010, Dr. H's second certification cannot be adopted because June 10, 2010, is after statutory MMI.

Dr. R issued two certifications on April 9, 2013. In the first certification Dr. R certified that the claimant reached MMI statutorily on February 22, 2010, with a 30% IR. In an alternative certification, Dr. R certified that the claimant reached MMI statutorily on February 22, 2010, with an 18% IR. Both of Dr. R's certifications assess 10% for the claimant's left wrist. However, Dr. R's 10% impairment for the claimant's left wrist contains the same error as Dr. B's IR; that is, Dr. R also improperly utilized Figure 29 on page 3/38 of the AMA Guides in assessing 10% for the claimant's left wrist. Dr. R measured 15° of radial deviation for 1% impairment and 23° of ulnar deviation for 1% impairment; Dr. R failed to round the measurements of radial deviation and ulnar deviation of the wrist to the nearest 10° to determine the UE impairment. Just like Dr. B's 12% IR could not be corrected, as discussed above, Dr. R's 30% and 18% IR

cannot be corrected because rounding radial and ulnar deviation to derive the correct UE impairment requires medical judgment or discretion. Accordingly, neither of Dr. R's certifications can be adopted.

As 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 decision that the compensable injury of [date of injury], does not extend to cervical radiculopathy, radiculitis, C5, C6, and C7 entrapment and herniated discs; lumbar radiculopathy, radiculitis and herniated discs; left shoulder impingement on the rotator cuff, rotator cuff syndrome; right shoulder lateral tear and recurrent instability; left knee medial meniscus tear and internal derangement of the knees.

We reverse the hearing officer's determinations that the claimant reached MMI on February 22, 2010, with a 12% 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 date of statutory MMI is February 22, 2010. The hearing officer is also to advise the designated doctor that the compensable injury of [date of injury], extends to at least both knees, both shoulders, and left wrist as stipulated to by the parties, a left thumb sprain as accepted by the self-insured, and left wrist tenosynovitis as administratively determined. The hearing officer is also to advise the designated doctor that the [date of injury], compensable injury does not extend to cervical radiculopathy, radiculitis, C5, C6, and C7 entrapment and herniated discs; lumbar radiculopathy, radiculitis and herniated discs; left shoulder impingement on the rotator cuff, rotator cuff syndrome; right shoulder lateral tear and recurrent instability; left knee medial meniscus tear and internal derangement of the knees 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 the statutory date of MMI, which is February 22, 2010, 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 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 **(a certified self-insured)** and the name and address of its registered agent for service of process is

**CT CORPORATION SYSTEM
350 NORTH ST. PAUL STREET
DALLAS, TEXAS 75201.**

Carisa Space-Beam
Appeals Judge

CONCUR:

Cristina Beceiro
Appeals Judge

Margaret L. Turner
Appeals Judge