

APPEAL NO. 132400  
FILED DECEMBER 5, 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 September 3, 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 cervical radiculopathy at C5-6, cervical disc bulges/protrusions at C3-4, C4-5, C5-6, and C6-7; (2) the appellant (claimant) reached maximum medical improvement (MMI) on December 30, 2011; and (3) the claimant's impairment rating (IR) is 5%. The claimant appealed, contending that she presented sufficient expert medical evidence to prove the extent-of-injury conditions in dispute are part of the compensable injury. She further argued that she reached MMI statutorily on October 11, 2012, with a 13% IR in accordance with [Dr. S] certification. The respondent (carrier) responded, urging affirmance of the disputed determinations.

**DECISION**

Affirmed in part, and reversed and remanded in part.

The parties stipulated that: (1) on [date of injury], the claimant sustained a compensable injury at least in the form of a right shoulder sprain and right shoulder rotator cuff tear; (2) the Texas Department of Insurance, Division of Workers' Compensation (Division) selected designated doctor, [Dr. T], certified that the claimant reached MMI on December 30, 2011, and assigned a 5% IR; and (3) statutory MMI is October 11, 2012. The claimant testified that she was injured while throwing heavy trash bags into a large dumpster. The evidence established that she had surgery to repair her rotator cuff on September 23, 2011.

**EXTENT OF INJURY**

The hearing officer's determination that the compensable injury of [date of injury], does not extend to cervical radiculopathy at C5-6, cervical disc bulges/protrusions at C3-4, C4-5, C5-6, and C6-7 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 December 30, 2011, with a 5% IR in accordance with Dr. T's certification. Dr. T examined the claimant on September 19, 2012, and in a narrative report of the same date, he explained his choice of MMI date as follows:

Rationale: According to the [Medical Disability Advisor, Workplace Guidelines for Disability Duration, excluding all sections and tables relating to rehabilitation published by the Reed Group, Ltd. (MDG)], arthroscopic rotator cuff repair for heavy work, during of days [sic], maximum for returning to work is 112 days or [13] weeks, and this puts the time at [December 30, 2011]. The claimant actually has not returned to work.

Dr. T calculated the claimant's IR by using range of motion (ROM) measurements for the claimant's right shoulder, which resulted in a 5% impairment.

Dr. T's certification that the claimant reached MMI on December 30, 2011, with a 5% IR cannot be adopted. The Appeals Panel has previously held that the MDG 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, and APD 130187, decided March 18, 2013. As Dr. T based his date of MMI on the MDG without considering the claimant's physical examination and medical records, his MMI/IR certification cannot be adopted. Accordingly, we reverse the hearing officer's determination that the claimant reached MMI on December 30, 2011, with a 5% IR.

There are three other certifications in evidence. Dr. S, a doctor selected by the treating doctor to act in his place, examined the claimant on June 14, 2013, and determined that the claimant reached MMI on the statutory date of October 11, 2012, with a 13% IR. Regarding MMI, Dr. S explains that the claimant required further MRI

studies to her right shoulder in 2012, and she may still require surgery for her cervical spine. Dr. S placed the claimant in Diagnosis-Related Estimate Cervicothoracic Category II: Minor impairment: clinical signs of neck injury are present without radiculopathy or loss of motion segment integrity for a 5% impairment, and assigned an 8% impairment based on ROM of the right shoulder. As discussed above, we have affirmed the hearing officer's determination that the compensable injury does not extend to the cervical conditions in dispute. As Dr. S rated a noncompensable body part, his certification of MMI/IR cannot be adopted.

Also in evidence are two certifications from previous designated doctors, [Dr. P] and [Dr. M]. Dr. P and Dr. M examined the claimant on May 27, 2011, and April 11, 2012, respectively and found that the claimant had not reached MMI. However, as the date of statutory MMI in this case is October 11, 2012, as stipulated by the parties, these certifications cannot be adopted. The Appeals Panel has previously held that it is legal error to determine a claimant has not reached MMI in a decision and order dated after the date of statutory MMI. See APD 131554, decided September 3, 2013.

Since there are no other MMI/IR certifications 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], does not extend to cervical radiculopathy at C5-6, cervical disc bulges/protrusions at C3-4, C4-5, C5-6, and C6-7.

We reverse the hearing officer's determination that the claimant reached MMI on December 30, 2011, with a 5% IR, and we remand the issues of MMI and IR to the hearing officer for further action consistent with this decision.

### **REMAND INSTRUCTIONS**

Dr. T is the designated doctor in this case. On remand, the hearing officer is to determine whether Dr. T is still qualified and available to be the designated doctor. If Dr. T 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 right shoulder sprain and right shoulder rotator cuff tear, as stipulated to by the parties. The hearing officer is also to advise the designated

doctor that the [date of injury], compensable injury does not extend to cervical radiculopathy at C5-6, cervical disc bulges/protrusions at C3-4, C4-5, C5-6, and C6-7. The hearing officer is to inform the designated doctor that the date of statutory MMI in this case is October 11, 2012. 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 October 11, 2012, date of statutory 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 **TEXAS MUTUAL INSURANCE COMPANY** and the name and address of its registered agent for service of process is

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

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Cristina Beceiro  
Appeals Judge

CONCUR:

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Carisa Space-Beam  
Appeals Judge

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Margaret L. Turner  
Appeals Judge