

APPEAL NO. 132991
FILED FEBRUARY 12, 2014

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 November 7, 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 a C5-6 disc herniation, C6 radiculopathy and cervical strain/sprain; (2) the compensable injury of [date of injury], does not extend to bursitis of the left shoulder, labral tear and partial tear of the left supraspinatus tendon, and rotator cuff tendinopathy of the left shoulder; (3) the appellant (claimant) reached maximum medical improvement (MMI) on February 22, 2013; and (4) the claimant's impairment rating (IR) is seven percent.

The claimant appealed, disputing the hearing officer's determination that the compensable injury did not extend to the disputed shoulder conditions as well as the hearing officer's determinations of MMI and IR. The claimant argues that she presented sufficient evidence to establish that the compensable injury extends to the disputed shoulder conditions. Further, the claimant argues that the certification adopted by the hearing officer did not rate the entire compensable injury and additionally rated injuries which have not been determined to be part of the compensable injury. The respondent (carrier) responded, urging affirmance of the disputed determinations. The carrier argued that the claimant failed to meet her burden of proof on the extent-of-injury issue. The carrier contended that the certification adopted by the hearing officer can be adopted because the certification rates both the cervical spine and left shoulder and contained no 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).

The hearing officer's determination that the [date of injury], compensable injury extends to a C5-6 disc herniation, C6 radiculopathy, and cervical strain/sprain 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], and the Texas Department of Insurance, Division of Workers' Compensation (Division) appointed [Dr. D] as designated doctor on the issues of MMI, IR, and return to work. The claimant testified that she was injured when she reached above her head to move a tote that weighed approximately 100 pounds.

EXTENT OF INJURY

The hearing officer's determination that the compensable injury of [date of injury], does not extend to bursitis of the left shoulder, labral tear and partial tear of the left supraspinatus tendon, and rotator cuff tendinopathy of the left shoulder 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 found that the certification of MMI and assigned IR of Dr. D, the designated doctor appointed for MMI and IR is not supported by the preponderance of the evidence. Dr. D examined the claimant on May 21, 2013, and certified that the claimant reached MMI on September 14, 2012, with a zero percent IR. In his narrative report, Dr. D noted that the Request for Designated Doctor Examination (DWC-32) listed a right shoulder strain as determined to be compensable by the Division or accepted as compensable by the insurance carrier. However, Dr. D further noted that the medical records all note an injury to the left shoulder and "[t]his determination is for the left shoulder." Dr. D noted that physical therapy was complete on September 14, 2012. Dr. D measured range of motion (ROM) of the right and left shoulder and determined no impairment resulted. Dr. D noted that the claimant's neurological examination was normal with regard to strength and sensation and that manual muscle testing was normal without muscle atrophy. Dr. D did not discuss or consider a cervical injury in his certification of MMI or assessment of impairment. As previously noted, the hearing officer's determination that the [date of injury], compensable injury extends to a

C5-6 disc herniation, C6 radiculopathy, and cervical strain/sprain was not appealed and has become final pursuant to Section 410.169. Dr. D did not rate the entire compensable injury and his certification cannot be adopted. Accordingly, the hearing officer's determination that the certification of MMI and assigned IR of Dr. D is not supported by the preponderance of the evidence is correct.

The hearing officer found that the certification of MMI and assigned IR by [Dr. H] is supported by the preponderance of the evidence. Dr. H was a doctor selected by the treating doctor to act in his place. Dr. H examined the claimant on October 21, 2013, and certified the claimant reached MMI on February 22, 2013, with a seven percent IR, using the AMA Guides. Dr. H noted that the claimant had no treatment since February 22, 2013, and her condition has plateaued. Dr. H placed the claimant in Diagnosis Related Estimate Cervicothoracic Category II: Minor Impairment assessing five percent for the cervical spine. Dr. H took ROM measurements for both the right and left shoulder and assessed two percent whole person impairment for the left shoulder. Dr. H noted that loss of ROM for the left shoulder would result in seven percent upper extremity impairment but after using the right shoulder for comparison and control he assessed four percent upper extremity impairment which he then converted to two percent whole person impairment. Dr. H combined the five percent impairment assessed for the cervical spine with the two percent impairment assessed for the left shoulder for a total whole person impairment of seven percent.

Dr. H stated in his narrative report that the claimant was diagnosed as having the following conditions: left rotator cuff syndrome, left shoulder strain, cervical disc displacement, and left cervical radiculitis. Dr. H noted that the claimant had a significant left disc protrusion at C5-6 and had persistent paresthesia radiating into her left ring and little fingers and noted she had mild atrophy of her left upper extremity compared to her right. Dr. H did not discuss or consider the claimant's cervical strain/sprain which has been determined to be part of the [date of injury], compensable injury. Further, Dr. H considered a left rotator cuff syndrome, cervical disc displacement, and left cervical radiculitis, which are conditions that have not been determined to be part of the [date of injury], compensable injury. See Appeals Panel Decision (APD) 110463, decided June 13, 2011, and APD 101567, decided December 20, 2010. Accordingly, the hearing officer's determination that the claimant reached MMI on February 22, 2013, with a seven percent IR is reversed.

The only other certification in evidence is from [Dr. A], who was the first designated doctor appointed by the Division for MMI/IR. Dr. A examined the claimant on December 7, 2012, and certified that the claimant had not yet reached MMI but was expected to reach MMI on March 7, 2013. Dr. A listed the following diagnoses in her narrative: cervical IVD disorder without myelopathy, cervical radiculopathy, cervical

spine strain/sprain, and left shoulder strain/sprain. Dr. A stated the claimant had not been afforded a reasonable, adequate opportunity of care for her injuries. Dr. A did not consider or rate a C5-6 herniation which has been determined to be part of the claimant's compensable injury and did consider cervical IVD disorder without myelopathy which has not been determined to be part of the compensable injury. Accordingly, her certification cannot be adopted.

No other certification of MMI/IR is in evidence. Since there is no certification of MMI/IR in evidence that can be adopted, the issues of MMI and IR are remanded 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 bursitis of the left shoulder, labral tear and partial tear of the left supraspinatus tendon, and rotator cuff tendinopathy of the left shoulder.

We reverse the hearing officer's determinations that the claimant reached MMI on February 22, 2013, and that the claimant's IR is seven percent and 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 for MMI/IR. 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 will need to be appointed.

The hearing officer is to advise the designated doctor that the compensable injury of [date of injury], extends to a C5-6 herniation, C6 radiculopathy, cervical strain/sprain, and left shoulder strain but does not extend to bursitis of the left shoulder, labral tear and partial tear of the left supraspinatus tendon, or rotator cuff tendinopathy of the left shoulder. The hearing officer is to request the designated doctor to rate the entire compensable injury based on the claimant's condition as of the date of MMI 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 and 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 **SAFETY NATIONAL CASUALTY CORPORATION** and the name and address of its registered agent for service of process is

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

Margaret L. Turner
Appeals Judge

CONCUR:

Cristina Beceiro
Appeals Judge

Carisa Space-Beam
Appeals Judge