

APPEAL NO. 140772
FILED JUNE 23, 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 March 7, 2014, in [City], Texas, with [hearing officer] presiding as hearing officer. The hearing officer resolved the disputed issues by deciding that: (1) the respondent (claimant) sustained a compensable injury on [date of injury]; (2) the claimant did have disability resulting from an injury sustained on [date of injury], beginning June 25, 2013, and continuing through August 1, 2013; (3) the claimant reached maximum medical improvement (MMI) on August 1, 2013; and (4) the claimant's impairment rating (IR) is nine percent. The appellant (carrier) appealed all of the hearing officer's determinations, arguing that they are erroneous as a matter of law and so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. The carrier contends that the claimant's hernia was not caused by her work-related activities. The claimant did not respond to the carrier's appeal.

DECISION

Affirmed in part, and reversed and remanded in part.

The claimant testified that she was employed as a general manager at a restaurant and that she sustained a left hernia injury while reorganizing items in the freezer on [date of injury]. On that same date, the claimant was terminated from her employment by her employer for an inventory discrepancy. Also, on that same date, the claimant was treated at the emergency room for pain to her left groin area. Medical records dated [date of injury], show that the claimant was diagnosed with a left inguinal hernia. An operative report dated July 11, 2013, shows that the claimant underwent a left inguinal hernia repair on July 11, 2013.

The parties stipulated that on November 14, 2013, [Dr. M], a referral doctor, certified that the claimant reached MMI on August 1, 2013, and assigned a nine percent IR. It is undisputed that a designated doctor has not been appointed by the Texas Department of Insurance, Division of Workers' Compensation (Division) to opine on MMI and IR.

COMPENSABLE INJURY AND DISABILITY

The hearing officer's determinations that the claimant sustained a compensable injury on [date of injury], and that the claimant did have disability resulting from an injury sustained on [date of injury], beginning June 25, 2013, and continuing through August 1, 2013, are supported by sufficient evidence and are 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 evidence in the record indicates that there has not been a designated doctor appointed in this case to address MMI and IR. The hearing officer adopted the certification from Dr. M, a referral doctor, in which he certified that the claimant reached MMI on August 1, 2013, and assigned a nine percent IR.

Section 408.125(a) provides if an IR is disputed, the commissioner shall direct the employee to the next available doctor on the Division's list of designated doctors, as provided by Section 408.0041. In Appeals Panel Decision (APD) 132423, decided December 19, 2013, the hearing officer mistakenly found that the treating doctor was the designated doctor appointed on the issues for MMI and IR, however there was no designated doctor appointed on the issues of MMI/IR. In that case, the Appeals Panel reversed the hearing officer’s MMI and IR determinations and remanded the issues of MMI and IR. In this case, there was no designated doctor appointed on the issues of MMI and IR. Accordingly, we reverse the hearing officer’s determinations that the claimant reached MMI on August 1, 2013, with a nine percent IR, and remand the issues of MMI/IR to the hearing officer for further action consistent with this decision.

Furthermore, the Appeals Panel has held that the resolution of a dispute over an IR cannot proceed unless the “threshold” issue of extent of injury is resolved either by the parties or by the hearing officer. See APD 090639, decided July 3, 2009. Although, not certified, the issue of whether the compensable injury of [date of injury], extends to a left inguinal hernia was actually litigated by the parties. In the Discussion portion of the

decision the hearing officer states that “it appears from the documentary evidence and [the] [c]laimant’s testimony that she did sustain damage or harm to the physical structure of her body, in the form of an inguinal hernia, as a result of lifting heavy items in the course and scope of her employment on [date of injury].” The hearing officer adopted Dr. M’s certification of MMI and IR which considered and rated the claimant’s inguinal hernia. However, as previously mentioned, the issue of whether the compensable injury of [date of injury], extends to a left inguinal hernia was actually litigated by the parties. The hearing officer made no Findings of Fact, Conclusions of Law, or a Decision regarding whether the compensable injury of [date of injury], extends to a left inguinal hernia. Therefore, we reverse the hearing officer’s decision as incomplete and we remand this case to the hearing officer to add the issue of whether the compensable injury of [date of injury], extends to a left inguinal hernia.

SUMMARY

We affirm the hearing officer’s determination that the claimant sustained a compensable injury on [date of injury].

We affirm the hearing officer’s determination that the claimant did have disability resulting from an injury sustained on [date of injury], beginning June 25, 2013, and continuing through August 1, 2013.

We reverse the hearing officer’s determinations that the claimant reached MMI on August 1, 2013, with a nine percent IR, and remand the issues of MMI/IR to the hearing officer for further action consistent with this decision.

We reverse the hearing officer’s decision as incomplete, and we remand this case to the hearing officer to add the issue of whether the compensable injury of [date of injury], extends to a left inguinal hernia.

REMAND INSTRUCTIONS

On remand the hearing officer is to add the issue of whether the [date of injury], compensable injury extends to a left inguinal hernia and make Findings of Fact, Conclusions of Law, and a Decision regarding the compensability of this condition which is consistent with and is supported by the evidence. The hearing officer is also to take stipulations from the parties as to what conditions comprise the [date of injury], compensable injury. If the parties are not willing to make stipulations regarding the extent of the compensable injury, the hearing officer is to make a determination on the extent of the [date of injury], compensable injury, considering the evidence.

On remand, the hearing officer is to request the appointment of a designated doctor for the issues of MMI and IR. The hearing officer is to advise the designated doctor that the claimant sustained a compensable injury on [date of injury]. The hearing officer is to request the designated doctor to give an opinion on the extent of injury, MMI, and IR 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 MMI and IR certification and are to be allowed an opportunity to respond. The hearing officer is to reconsider the evidence on extent of injury, MMI and IR. The hearing officer is then to make a determination on extent of injury, 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 HIGHWAY 290 EAST
AUSTIN, TEXAS 78723.**

Veronica L. Ruberto
Appeals Judge

CONCUR:

Carisa Space-Beam
Appeals Judge

Margaret L. Turner
Appeals Judge