

APPEAL NO. 140791  
FILED JUNE 9, 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 (CCH) was held on March 6, 2014, 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 right lateral epicondylitis of the common extensor tendon; (2) the compensable injury of [date of injury], does not extend to right cubital tunnel syndrome and impingement syndrome of the right shoulder and right axillary and suprascapular neuritis; (3) the appellant (claimant) did not have disability during the period beginning December 1, 2013, and continuing through the date of the hearing; (4) the claimant reached maximum medical improvement (MMI) on July 9, 2012; and (5) the claimant's impairment rating (IR) is zero percent.

The claimant appealed the hearing officer's extent-of-injury determination that was not favorable to her, as well as the disability, MMI and IR determinations based on sufficiency of the evidence. The respondent (carrier) responded, urging affirmance. The hearing officer's determination that the compensable injury of [date of injury], extends to right lateral epicondylitis of the common extensor tendon was not appealed and has become final pursuant to Section 410.169.

#### DECISION

Affirmed in part and reversed and rendered in part.

The parties stipulated that: (1) on [date of injury], the claimant sustained a compensable injury to at least her right elbow; (2) the designated doctor, [Dr. W] was appointed to determine MMI, IR and extent of injury; (3) the designated doctor determined that the claimant reached MMI on July 9, 2012, with an IR of zero percent and that "the compensable injury included right elbow contusion and right elbow lateral epicondylitis and none of the rest of the disputed conditions;" and (4) the referral doctor, [Dr. H] determined that the claimant has not reached MMI.

#### EXTENT OF INJURY AND DISABILITY

The hearing officer's determinations that: (1) the compensable injury of [date of injury], does not extend to right cubital tunnel syndrome and impingement syndrome of the right shoulder and right axillary and suprascapular neuritis, and (2) the claimant did not have disability during the period beginning December 1, 2013, and continuing through the date of the CCH 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 Texas Department of Insurance, Division of Workers’ Compensation (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 July 9, 2012, with a zero percent IR per Dr. W, the designated doctor. Dr. W was appointed for the purpose of determining MMI and IR. Dr. W examined the claimant on June 6, 2013, and certified that the claimant reached MMI on July 9, 2012, and assessed a zero percent IR based on range of motion for the right elbow. Dr. W noted in his report a diagnosis of “[r]ight elbow, contusion.”

Subsequently, Dr. W was reappointed for the purpose of extent of injury. Dr. W re-examined the claimant on February 6, 2014, and opined that the claimant’s compensable injury of [date of injury], extends to right lateral epicondylitis. As previously mentioned, the hearing officer’s determination that the compensable injury of [date of injury], extends to right elbow lateral epicondylitis of the common extensor tendon was not appealed and became final pursuant to Section 410.169. We note that there was no evidence in the record that Dr. W provided an alternate certification that included the right elbow contusion and right elbow lateral epicondylitis. The hearing officer found that Dr. W’s certification of MMI and IR is supported by a preponderance of the evidence. However, Dr. W did not consider and rate the entire compensable injury, and as such his MMI/IR certification cannot be adopted. See Appeals Panel Decision (APD) 110463, decided June 13, 2011; and APD 101567, decided December 20, 2010. Accordingly, we reverse the hearing officer’s determination that the claimant reached MMI on July 9, 2012, with a zero percent IR.

In evidence are two certifications from Dr. H, the referral doctor, which are dated July 25, 2013, and December 30, 2013, respectively, and both certifications state that the claimant has not reached MMI. The subsequent certification dated December 30, 2013, by Dr. H cannot be adopted because he considered a non-compensable injury.<sup>1</sup> However, the first certification dated July 25, 2013, is adoptable. Dr. H examined the claimant on July 25, 2013, and certified that the claimant had not reached MMI. Dr. H's narrative report dated July 25, 2013, considers the claimant's compensable right elbow contusion and right elbow lateral epicondylitis. Dr. H states that the claimant has lateral epicondylitis which has not improved and that has not been administered or prescribed treatment that would resolve the effects of her injury. Dr. H's certification can be adopted because he did consider the entire compensable injury. The evidence supports that the claimant has not reached MMI as of the date of Dr. H's certification dated July 25, 2013, and since MMI has not been reached the claimant's IR cannot be determined.

Since Dr. H's certification dated July 25, 2013, is the only certification in evidence that can be adopted because it considers the entire compensable injury, we render a new decision that the claimant has not reached MMI as of the date of Dr. H's certification dated July 25, 2013, and since MMI has not been reached the claimant's IR cannot be determined.

### **SUMMARY**

We affirm the hearing officer's determination that the compensable injury of [date of injury], does not extend to right cubital tunnel syndrome and impingement syndrome of the right shoulder and right axillary and suprascapular neuritis.

We affirm the hearing officer's determination that the claimant did not have disability during the period beginning December 1, 2013, and continuing through the date of the CCH.

We reverse the hearing officer's determinations that the claimant reached MMI on July 9, 2012, with a zero percent IR, and we render a new decision that the claimant has not reached MMI as of the date of Dr. H's certification dated July 25, 2013, and since MMI has not been reached the claimant's IR cannot be determined.

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<sup>1</sup> Dr. H examined the claimant on December 30, 2013, and certified that the claimant had not reached MMI. Dr. H's certification dated December 30, 2013, considers the claimant's compensable right elbow contusion and right elbow lateral epicondylitis. Dr. H also considers a non-compensable injury, cubital tunnel syndrome, which is a condition that the hearing officer determined was not compensable. Dr. H's certification dated December 30, 2013, cannot be adopted.

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.**

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Veronica L. Ruberto  
Appeals Judge

CONCUR:

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Carisa Space-Beam  
Appeals Judge

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Margaret L. Turner  
Appeals Judge