

APPEAL NO. 140862
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 (CCH) was held on March 5, 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) statutorily reached maximum medical improvement (MMI) on February 3, 2014; (2) the claimant's impairment rating (IR) is 9%; and (3) the compensable injury of [date of injury], extends to a biceps tendon rupture of the right shoulder.

The appellant (carrier) appealed all of the hearing officer's determinations. The carrier argues that the hearing officer erred in making a determination regarding the extent of the compensable injury because that issue was not properly before the hearing officer. The carrier also argues that the medical evidence is not sufficient to support the hearing officer's extent-of-injury determination in favor of the claimant. The carrier further argues that the hearing officer abused her discretion in admitting the MMI/IR certification of [Dr. M], the doctor selected by the treating doctor to act in the treating doctor's place, and because the hearing officer based her MMI/IR determination on Dr. M's MMI/IR certification that determination must be reversed. The carrier alternatively argues that the medical evidence does not support the hearing officer's MMI/IR determination. The appeal file does not contain a response from the claimant to the carrier's appeal.

DECISION

Affirmed in part and reversed and remanded in part.

The parties stipulated that the claimant sustained a compensable injury on [date of injury]. There was no stipulation by the parties as to what conditions comprise the compensable injury, although in evidence is a Request for Designated Doctor Examination (DWC-32) dated November 19, 2012, submitted by the claimant that states the injury determined to be compensable by the Texas Department of Insurance, Division of Workers' Compensation (Division) or accepted as compensable by the carrier is "right shoulder with internal derangement." The parties also stipulated that the statutory date of MMI is February 3, 2014, and that the designated doctor appointed by the Division was [Dr. C]. The claimant testified he injured his right shoulder while installing the rear end of a truck.

BICEPS TENDON RUPTURE

The carrier contended on appeal that the hearing officer exceeded the scope of the hearing by adding the issue of whether the compensable injury of [date of injury], extends to a biceps tendon rupture of the right shoulder and making a determination on that issue.

In the Statement of the Case portion of the decision, the hearing officer noted that although not certified, the issue of whether the compensable injury of [date of injury], extends to a biceps tendon rupture of the right shoulder was added because it was actually litigated at the CCH. The carrier contended that this issue was not litigated at the CCH. However, a review of the transcript of the March 5, 2014, CCH does in fact reflect that this issue was litigated by the parties, and that the carrier made no objections regarding the testimony taken on this issue. 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 Appeals Panel Decision (APD) 090639, decided July 3, 2009. Accordingly, the hearing officer did not err in adding this issue. The hearing officer’s determination that the compensable injury of [date of injury], extends to a biceps tendon rupture of the right 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 determined that the claimant statutorily reached MMI on February 3, 2014, with a 9% IR as certified by Dr. M, the doctor selected by the treating doctor to act in the treating doctor's place.

Dr. M examined the claimant on February 21, 2014, and certified that the claimant statutorily reached MMI on February 3, 2014, with a 9% IR based on 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). Dr. M assessed 6% upper extremity (UE) impairment for range of motion measurements of the claimant's right shoulder, and 10% UE impairment for an arthroplasty under Table 27 on page 3/61 of the AMA Guides for a combined 16% UE impairment, which converts to a 9% whole person impairment.

Dr. M noted in his narrative report dated February 21, 2014, that the claimant's diagnoses were rotator cuff tear of the right shoulder, right shoulder sprain/strain, and joint effusion of the right shoulder. Dr. M makes clear in his narrative report that he certified the claimant statutorily reached MMI on February 3, 2014, because the claimant would benefit from a surgical repair for his torn rotator cuff condition of the right shoulder. Dr. M does not discuss the need for surgery to repair a biceps tendon rupture of the right shoulder.

In the Discussion portion of the decision, the hearing officer noted that the claimant argued he is not clinically at MMI due to his biceps tendon rupture. The hearing officer also noted that Dr. M stated the claimant had been recommended for a subsequent surgery to his right shoulder which had not occurred at the time of his February 21, 2014, examination.

While the hearing officer is correct that the claimant argued at the CCH that he reached MMI statutorily due to his biceps tendon rupture, the claimant also argued that he reached MMI statutorily because he requires further surgery to repair a right shoulder rotator cuff tear. The transcript of the March 5, 2014, CCH reflects that a right shoulder rotator cuff tear condition was actually litigated by the parties. The hearing officer made no Findings of Fact, Conclusions of Law, or a Decision regarding whether the [date of injury], compensable injury extends to a right shoulder rotator cuff tear, which was an issue actually litigated at the CCH. Accordingly, 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 [date of injury], compensable injury extends to a right shoulder rotator cuff tear. Because we have remanded this case to the hearing officer to add this extent-of-injury issue, we also reverse the hearing officer's determination that the claimant statutorily reached MMI on February 3, 2014, with a 9% IR, and we remand the

issues of MMI and IR to the hearing officer for further action consistent with this decision.

EVIDENTIARY RULING

At the CCH, the claimant offered into evidence a Functional Capacity Evaluation (FCE) report dated August 28, 2013, and the MMI/IR certification of Dr. M. The carrier objected to the admission of both these exhibits on the basis that there was no good cause for admitting an exhibit which was not timely exchanged. The hearing officer sustained the carrier's objection regarding the FCE, but admitted Dr. M's MMI/IR certification over the carrier's objection. Although the hearing officer did not make a specific determination of good cause regarding the admission of Dr. M's MMI/IR certification, the transcript of the March 5, 2014, indicates an implied finding of good cause by the hearing officer for the untimely exchange of Dr. M's MMI/IR certification.

To obtain reversal of a decision based upon error in the admission or exclusion of evidence, it must be shown that the evidentiary ruling was in fact error, and that the error was reasonably calculated to cause, and probably did cause the rendition of an improper decision. See APD 051705, decided September 1, 2005.

Even if the admission of Dr. M's MMI/IR certification could be considered error, under the facts of this case any error was harmless because the hearing officer's decision on MMI/IR based on this exhibit was reversed for other reasons and the issues of MMI/IR remanded to the hearing officer for further action consistent with this decision. Therefore, the admission of the certification of MMI/IR by Dr. M does not amount to reversible error.

SUMMARY

We affirm the hearing officer's determination that the compensable injury of [date of injury], extends to a biceps tendon rupture of the right shoulder.

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 [date of injury], compensable injury extends to a right shoulder rotator cuff tear.

We reverse the hearing officer's determinations that the claimant statutorily reached MMI on February 3, 2014, with a 9% IR, and we remand the issues of MMI and IR to the hearing officer for further action consistent with this decision.

REMAND INSTRUCTIONS

Dr. C is the designated doctor in this case. On remand, the hearing officer is to determine whether Dr. C is still qualified and available to be the designated doctor. If Dr. C 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.

On remand the hearing officer is to add the issue of whether the [date of injury], compensable injury extends to a right shoulder rotator cuff tear 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, including the November 19, 2012, DWC-32 submitted by the claimant.

Once the hearing officer makes a determination of the extent of the [date of injury], compensable injury, the hearing officer is to advise the designated doctor what conditions, in addition to a biceps tendon rupture of the right shoulder, are included in the [date of injury], compensable injury. The hearing officer is further to advise the designated doctor the date of statutory MMI in this case is February 3, 2014.

The hearing officer is to request the designated doctor to give an opinion on the claimant's date of MMI and rate the entire compensable injury in accordance with the AMA Guides considering the medical record and the certifying examination. The date of MMI cannot be after February 3, 2014, the date of statutory MMI.

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 **OLD REPUBLIC INSURANCE COMPANY** and the name and address of its registered agent for service of process is

**CORPORATION SERVICE COMPANY
211 EAST 7TH STREET, SUITE 620
AUSTIN, TEXAS 78701-3218.**

Carisa Space-Beam
Appeals Judge

CONCUR:

Veronica L. Ruberto
Appeals Judge

Margaret L. Turner
Appeals Judge