APPEAL NO. 140982
FILED JULY 10, 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 26, 2014, with the record closing on March 28, 2014, in San Antonio, 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], does not extend to left wrist sprain/strain, left carpal tunnel syndrome (CTS), left wrist osteochondral defect, and a disc bulge at L4-5; (2) the appellant (claimant) reached maximum medical improvement (MMI) on December 7, 2012; (3) the impairment rating (IR) is six percent; and (4) the claimant did not have disability from December 8, 2012, through the date of the CCH, as a result of the compensable injury of [date of injury].

The claimant appealed all of the hearing officer's determinations and asserted that res judicata applied as the designated doctor's certification of MMI conflicted with a prior decision on the issue of MMI. Respondent 1 (carrier) responded, urging affirmance. The appeal file does not contain a response from Respondent 2 (subclaimant).

DECISION

Affirmed in part and reversed and remanded in part.

The parties stipulated that: (1) the claimant sustained a compensable injury on [date of injury], in form of a left distal radius fracture and lumbar sprain/strain; (2) the Texas Department of Insurance, Division of Workers' Compensation (Division)-selected designated doctor to determine MMI, IR, and return to work was (Dr. M); (3) on June 25, 2013, Dr. M, the designated doctor, certified that the claimant reached MMI on December 7, 2012, and assessed a six percent IR; and (4) on September 17, 2013, (Dr. H), the referral doctor, certified that the claimant had not reached MMI.

EXTENT OF INJURY AND DISABILITY

The hearing officer's determinations that the compensable injury does not extend to left wrist sprain/strain, left CTS, left wrist osteochondral defect, and a disc bulge at L4-5, and the claimant did not have disability from December 8, 2012, through the date of the CCH, as a result of the compensable injury of [date of injury], 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.

The hearing officer determined that the claimant reached MMI on December 7, 2012, with a six percent IR based on the certification of Dr. M, the designated doctor. At the CCH and on appeal, the claimant contends that Dr. M's certification of MMI/IR cannot be adopted because a prior Decision and Order dated April 29, 2013, conflicts with the hearing officer's MMI determination. The prior Decision and Order dated April 29, 2013, held that the claimant had not reached MMI based on a certification by Dr. H, the referral doctor dated March 12, 2013. Division records show that the carrier appealed the hearing officer's MMI and IR determinations in the prior CCH and the claimant did not respond to the carrier's appeal. The Appeals Panel did not issue a written decision; therefore, the hearing officer's decision of April 29, 2013, became final on August 9, 2013, and is the final decision of the Appeals Panel. *See* Section 410.204(c) and 28 TEX. ADMIN. CODE § 143.5(b) (Rule 143.5(b)).

In this case, the hearing officer states in the Discussion of the decision that the "[c]laimant asserts that the new MMI date of December 7, 2012, predates the date of the hearing officer's Decision and Order, and cannot be adopted under the principle of res judicata. However, the new certification of MMI date is nine months later than the first certification of MMI, and has not been previously adjudicated." The claimant states that it is illogical for the hearing officer to find that the claimant is at MMI as of December 7, 2012, which is an earlier date than the Decision and Order issued on April 29, 2013. Under the facts of this case we agree.

In Appeals Panel Decision (APD) 131674, decided September 11, 2013, the hearing officer determined that the claimant reached MMI on June 23, 2011, based on the post-designated doctor required medical examination doctor's certification of MMI/IR. However, in that case there was a prior Decision and Order that held that the claimant was not at MMI based on the treating doctor's certification dated July 7, 2011. Given that the prior decision held that the claimant was not at MMI, based on a

certification dated July 7, 2011, and that decision became final pursuant to Section 410.204(c) and Rule 143.5(b), the Appeals Panel held that a certification with an MMI date prior to July 7, 2011, cannot be adopted. Consequently, the Appeals Panel reversed the hearing officer's determination that the claimant reached MMI on June 23, 2011, which is an MMI date earlier than the July 7, 2011, certification.

Likewise as in APD 131674, *supra*, in this case the hearing officer determined that the claimant reached MMI on December 7, 2012, although a prior Decision and Order dated April 29, 2013, held that the claimant was not at MMI based on a certification by Dr. H dated March 12, 2013. Given that a prior decision held the claimant has not reached MMI based on a certification from Dr. H dated March 12, 2013, any date prior to March 12, 2013, cannot be adopted under the facts of this case.

Accordingly, we reverse the hearing officer's determination that the date of MMI is December 7, 2012, and we reverse the hearing officer's determination that the claimant's IR is six percent because it is based on the MMI date of December 7, 2012.

The record contains MMI/IR certifications from Dr. M, the designated doctor, and Dr. H, the referral doctor. There is a certification from Dr. M based on an examination on June 25, 2012, in which he certifies that the claimant reached MMI on March 6, 2012, with a zero percent IR. Dr. M's certification that the claimant reached MMI on March 6, 2012, cannot be adopted given that a prior decision held the claimant has not reached MMI based on a certification from Dr. H dated March 12, 2013.

The other certification of MMI/IR in evidence is from Dr. H, the referral doctor. Dr. H re-examined the claimant on September 17, 2013, and certified on that same date that the claimant has not reached MMI but was expected to do so on or about January 17, 2014. Dr. H states that the claimant is scheduled for left wrist surgery on September 19, 2013, and then should begin a post-op active therapy program. An operative report dated September 19, 2013, shows that the claimant underwent a left wrist carpal tunnel release. The hearing officer determined that the compensable injury of [date of injury], does not extend to left CTS. Dr. H's certification of MMI/IR dated September 17, 2013, cannot be adopted because he considers a condition that was not compensable as determined by the hearing officer, and affirmed in this decision. APD 110463, decided June 13, 2011; and APD 101567, decided December 20, 2010.

As there is no MMI/IR certification 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 does not extend to left wrist sprain/strain, left CTS, left wrist osteochondral defect, and a disc bulge at L4-5.

We affirm the hearing officer's determination that the claimant did not have disability from December 8, 2012, through the date of the CCH, as a result of the compensable injury of [date of injury].

We reverse the hearing officer's determination that the claimant reached MMI on December 7, 2012, with a six percent IR and we remand the issues of MMI and IR to the hearing officer for further action consistent with this decision.

REMAND INSTRUCTIONS

Dr. M is the designated doctor in this case. On remand, the hearing officer is to determine whether Dr. M is still qualified and available to be the designated doctor. If Dr. M 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], extends to left distal radius fracture and lumbar sprain/strain. The hearing officer is to advise the designated doctor that the compensable injury of [date of injury], does not extend to left wrist sprain/strain, left CTS, left wrist osteochondral defect, and a disc bulge at L4-5. 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 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 date of MMI cannot be prior to March 12, 2013.

The parties are to be provided the correspondence to the designated doctor, the designated doctor's response, 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 **INDEMNITY INSURANCE COMPANY OF NORTH AMERICA** and the name and address of its registered agent for service of process is

CT CORPORATION SYSTEM
1999 BRYAN STREET, SUITE 900
DALLAS, TEXAS 75201-3136.

Veronica L. Ruberto
Appeals Judge

CONCUR:

Carisa Space-Beam
Appeals Judge

Margaret L. Turner
Appeals Judge