

APPEAL NO. 141065
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 February 12, 2014, with the record closing on April 10, 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 right carpal tunnel syndrome (CTS); (2) the appellant (claimant) reached maximum medical improvement (MMI) on November 2, 2012; and (3) the claimant's impairment rating (IR) is 0%. The claimant appealed, disputing the hearing officer's determinations that the compensable injury does not extend to right CTS, MMI, and IR. The respondent (carrier) responded, urging affirmance of the disputed determinations.

DECISION

Affirmed in part and reversed and remanded in part.

The parties stipulated that: (1) on [date of injury], the claimant sustained a compensable injury in the form of a right wrist volar ganglion cyst and left lateral epicondylitis; (2) the Texas Department of Insurance, Division of Workers' Compensation (Division) appointed (Dr. M) as the designated doctor to opine on the issues of MMI, IR, and extent of injury; (3) Dr. M determined that the claimant's compensable injury included right CTS; (4) Dr. M certified that the claimant reached MMI on August 7, 2013, with an IR of 14% if the compensable injury included the disputed condition; (5) Dr. M certified that the claimant reached MMI on August 7, 2013, with a 4% IR if the compensable injury did not include the disputed condition; and (6) the required medical examination (RME) doctor, (Dr. O) determined that the claimant reached MMI on November 3, 2012, with an IR of 0%. The claimant testified that she injured her right wrist and left arm while performing her job duties cleaning.

EXTENT OF INJURY

The hearing officer's determination that the compensable injury of [date of injury], does not extend to right CTS 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.

Dr. M, the designated doctor, initially examined the claimant for purposes of MMI and IR on January 16, 2013. Dr. M also was asked to give an opinion regarding the extent of the compensable injuries for various conditions that were not in dispute at this CCH: longitudinal split of the extensor carpi ulnaris tendon (ECU tendon split), small amount of fluid in the distal radioulnar joint with mild degenerative changes of the TFCC, and mild tenosynovitis of the second compartment of the right wrist. Dr. M opined that the conditions mentioned above were in her opinion better explained as the result of degenerative changes from ordinary processes of life. However, Dr. M provided three alternative certifications for various conditions.

First, Dr. M certified that for the conditions of ECU tendon split and TFCC degenerative changes, the claimant reached clinical MMI on August 28, 2012, with a 0% IR, using 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). As previously noted, the parties stipulated that the claimant sustained a compensable injury in the form of a right wrist volar ganglion cyst and left lateral epicondylitis. This certification from Dr. M did not rate the entire compensable injury and considered and rated conditions that have not been accepted or determined to be part of the compensable injury and cannot be adopted.

Second, Dr. M certified that the claimant had not yet reached MMI considering the following conditions: right wrist volar ganglion cyst, left lateral epicondylitis, ECU tendon split, and tenosynovitis of the second compartment of the right wrist. This certification considers and rates conditions that have not yet been determined to be part of the compensable injury and cannot be adopted.

In the third alternative certification from Dr. M based on her examination of January 16, 2013, Dr. M certified that the claimant had not yet reached MMI considering the conditions of right wrist volar ganglion cyst and left lateral epicondylitis. Subsequently, as described below, Dr. M certified on August 7, 2013, that the claimant was at MMI for these same conditions.

As noted above, Dr. M examined the claimant on August 7, 2013, and certified that the claimant reached MMI on August 7, 2013, with a 4% IR based on loss of range of motion (ROM) of the right wrist. This certification rated and considered the right wrist volar ganglion cyst and the left lateral epicondylitis. Dr. M noted in her narrative report that the ROM of the left elbow resulted in 0% impairment and that there was no indication of permanent injury resulting from the accepted epicondylitis.

Dr. M noted the following ROM measurements for the claimant's ROM of the right wrist: 35° flexion; 35° extension; 15° radial deviation; and 15° ulnar deviation. Dr. M assigned impairment for both flexion and extension using Figure 26 on page 3/36, of the AMA Guides. We note that to assess upper extremity impairment for flexion and extension of the wrist, the AMA Guides provide that you round the measurements to the nearest 10°. Dr. M assessed 3% upper extremity impairment for 35° of flexion which using Figure 26 indicates that he rounded the measurement taken to 40°. However, Dr. M assessed 2% upper extremity impairment for extension.

On page 3/36 of the AMA Guides, the directions for rating flexion and extension of the wrist, the measurements are to be rounded to the nearest 10°. Further, Figure 26 on page 3/36, which is used to rate impairment based upon these measurements, does not provide a specific impairment for 35° but rather provides impairment due to the loss of extension of 30° would be 5% UE impairment and impairment due to the loss of extension of 40° would be 4%. Therefore, Dr. M did not properly calculate the claimant's right wrist extension under Figure 26 because she failed to properly round the extension ROM to the nearest 10°. The hearing officer found that Dr. M's assigned IR and MMI date are not supported by a preponderance of the evidence. That finding is supported by sufficient evidence.

Dr. M provided an alternative certification based on her examination date of August 7, 2013, which assessed impairment for a right wrist volar ganglion cyst, left lateral epicondylitis, and right wrist CTS. In the alternative certification, Dr. M certified that the claimant reached MMI on August 7, 2013, with a 14% IR. As previously noted, the hearing officer's determination that the compensable injury of [date of injury], does not extend to right wrist CTS has been affirmed. The alternative certification rates a condition that has been determined not to be part of the compensable injury and cannot be adopted.

The hearing officer found that Dr. O's certification of MMI and IR were made in accordance with the AMA Guides and are supported by the evidence. Dr. O examined the claimant on October 10, 2013, and certified that the claimant reached MMI on November 3, 2012, with a 0% IR. In his narrative report dated October 10, 2013, Dr. O stated: "[b]ased on [the Medical Disability Advisor, Workplace Guidelines for Disability Duration, excluding all sections and tables relating to rehabilitation published by the Reed Group, Ltd. (MDG)] Internet Version 6, the [claimant] would be at [MMI] on November 3, 2012."

The Appeals Panel has previously held that the MDG cannot be used alone, without considering the claimant's physical examination and medical records, in determining a claimant's date of MMI. See Appeals Panel Decision (APD) 130191, decided March 13, 2013, and APD 130187, decided March 18, 2013. In this case, Dr. O based his date of MMI solely on the MDG without considering the claimant's physical examination and medical records. Accordingly, we reverse the hearing officer's determination that the claimant reached MMI on November 2, 2012. We note that the parties stipulated that Dr. O certified that the claimant reached MMI on November 3, 2012, and the evidence reflects that Dr. O certified that the claimant reached MMI on November 3, 2012. However, the hearing officer mistakenly determined that the claimant reached MMI on November 2, 2012. There is no certification in evidence from any doctor that certified the claimant reached MMI on November 2, 2012.

Given that the MMI determination is reversed, we must also reverse the hearing officer's IR determination because it was based on a date of MMI of November 3, 2012. The IR must be assessed as of the date of MMI. See Rule 130.1(c)(3). Because the MMI must be re-assessed, so must the IR. Accordingly, we reverse the hearing officer's determination that the claimant's IR is 0%.

There are no certifications of MMI/IR in evidence that can be adopted. Accordingly, 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 right CTS.

We reverse the hearing officer's determination that the claimant reached MMI on November 2, 2012, and that the claimant's IR is 0% and remand the MMI and IR issues 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], includes a right wrist volar ganglion cyst and left lateral epicondylitis. The hearing officer is also to advise the designated doctor that the [date of injury], compensable injury does not extend to right CTS. The hearing officer is to request the designated doctor to give an opinion on the claimant's MMI and rate the entire compensable injury in accordance with the AMA Guides considering the medical record and the certifying examination. The hearing officer is to seek an opinion from the designated doctor consistent with the holding in this case.

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 **TEXAS MUTUAL INSURANCE COMPANY** and the name and address of its registered agent for service of process is

**RICHARD J. GERGASKO, PRESIDENT
6210 EAST HIGHWAY 290
AUSTIN, TEXAS 78723.**

Margaret L. Turner
Appeals Judge

CONCUR:

Veronica L. Ruberto
Appeals Judge

Carisa Space-Beam
Appeals Judge