APPEAL NO. 141200
FILED JULY 22, 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 25, 2014, with the record closing on April 25, 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], , extends to a cervical sprain/strain; (2) the appellant (claimant) reached maximum medical improvement (MMI) on April 16, 2012; and (3) the claimant's impairment rating (IR) is 11%. The claimant appealed, disputing the hearing officer's determinations of MMI and IR. The claimant argues that the hearing officer's determinations of MMI and IR are so against the great weight and preponderance of the evidence that they are manifestly wrong and unjust. The claimant additionally appeals the hearing officer's finding that March 2, 2013, is the statutory date of MMI because the parties did not agree on this statutory MMI date as noted by the hearing officer in her discussion. The respondent (carrier) responded, urging affirmance of the disputed MMI and IR determinations.

The hearing officer's determination that the compensable injury of [date of injury], extends to a cervical spine sprain/strain was not appealed and has become final pursuant to Section 410.169.

DECISION

Reversed and remanded.

The parties stipulated that: (1) the claimant sustained a compensable injury, in the form of a left shoulder sprain and left shoulder rotator cuff tear on [date of injury], ; (2) the Texas Department of Insurance, Division of Workers' Compensation (Division) appointed (Dr. S) to serve as the designated doctor for MMI and IR; (3) on April 16, 2012, Dr. S certified that the claimant reached MMI on April 16, 2012, and assigned a 6% IR; and (4) on April 12, 2013, (Dr. E), a referral doctor acting in place of the treating doctor, certified that the claimant reached MMI on March 4, 2013, the date he believed to be the statutory MMI date, and assigned a 19% IR. A letter of clarification (LOC) was sent to the designated doctor, Dr. S, after the CCH, and he amended the IR he assigned to 11%.

The hearing officer found that the determination of the designated doctor, Dr. S, that the claimant reached MMI on April 16, 2012, with an 11% IR is supported by the preponderance of the evidence. The hearing officer additionally found that the statutory date of MMI is March 2, 2013. In the Discussion portion of her decision, the hearing

officer stated that the parties agreed that the statutory MMI date is March 2, 2013. In her appeal, the claimant contends that the parties did not agree to the date of statutory MMI. As previously noted, the hearing officer sent an LOC to the designated doctor and he responded, amending his certification of MMI and IR. The hearing officer admitted the LOC and the doctor's amended response as hearing officer exhibits. Additional correspondence took place after the CCH, between the hearing officer and the attorneys for the claimant and the carrier. Although this correspondence is contained in the appeal file, the hearing officer failed to admit the additional correspondence as hearing officer exhibits. In correspondence dated March 25, 2014, the claimant's attorney specifically argued that the correct statutory date of MMI is March 4, 2013, the date Dr. E certified that the claimant reached MMI. There is no evidence in the record of the appeal file that the parties agreed to the date of statutory MMI in this claim. In her discussion of the evidence, the hearing officer stated in part, "[s]ince Dr. [E]'s MMI date is after the March 2, 2013, statutory date, it cannot be adopted." Additionally, the hearing officer noted that Dr. E's calculation of the IR is flawed, precluding adoption of his report. However, the hearing officer failed to specifically identify the flaw in Dr. E's calculation.

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.

In the Discussion portion of her decision, the hearing officer stated that the evidence was not sufficient to overcome the presumptive weight of the designated doctor's certification. However, her decision was based in part on her mistaken belief that the parties agreed to the date of statutory MMI. Accordingly, we reverse the hearing officer's determination that the claimant reached MMI on April 16, 2012, with an

11% IR and remand the issues of MMI and IR to the hearing officer for further action consistent with this decision.

REMAND INSTRUCTIONS

On remand the hearing officer is to admit into the evidence the correspondence that took place between the parties and the hearing officer after the date of the CCH. Additionally, the hearing officer is to make a determination based on the evidence of the statutory MMI date. If the hearing officer does not have enough evidence in the record to make that determination she is to obtain additional evidence to allow her to make that determination. On remand, the hearing officer should also specifically identify any "flaws" in the IRs in evidence. The hearing officer is then to make a determination of MMI and IR based on the existing evidence in the record.

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* Appeals Panel Decision 060721, decided June 12, 2006.

The true corporate name of the insurance carrier is **HARTFORD UNDERWRITERS INSURANCE COMPANY** and the name and address of its registered agent for service of process is

CT CORPORATION SYSTEM
350 NORTH ST. PAUL STREET, SUITE 2900
DALLAS, TEXAS 75201.

Margaret L. Turner
Appeals Judge

CONCUR:

Veronica L. Ruberto
Appeals Judge

Carisa Space-Beam
Appeals Judge