

APPEAL NO. 141444
FILED AUGUST 28, 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 was held on May 28, 2014, in Fort Worth, 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 bilateral shoulder supraspinatus sprain/strains and bilateral shoulder impingement syndrome; (2) the appellant (claimant) reached maximum medical improvement (MMI) on July 13, 2013; and (3) the claimant's impairment rating (IR) is zero percent. We note that the Decision and Order reflects a different address of the respondent's (carrier) registered agent for service of process than the one listed on the carrier information sheet in evidence.

The claimant appealed all of the hearing officer's determinations on a sufficiency of the evidence point of error. The carrier responded, urging affirmance of the hearing officer's determinations.

DECISION

Affirmed in part and reversed and remanded in part.

The parties stipulated that the claimant sustained a compensable injury on [date of injury], and (Dr. K) is the designated doctor appointed by the Texas Department of Insurance, Division of Workers' Compensation (Division) to address MMI, IR, and extent of injury. The claimant testified she was injured while cleaning and restocking airplanes.

EXTENT OF INJURY

The hearing officer's determination that the compensable injury of [date of injury], does not extend to bilateral shoulder supraspinatus sprain/strains and bilateral shoulder impingement syndrome is supported by sufficient evidence and is affirmed.

MMI/IR

The hearing officer determined the claimant reached MMI on July 13, 2013, with a zero percent IR as certified by (Dr. N), the post-designated doctor required medical examination doctor. The hearing officer stated in the Discussion portion of the decision that:

Designated [d]octor [Dr. K] certified [the] [c]laimant was not at MMI. However, his opinion is not based upon the compensable injury and includes conditions that are not compensable.

Dr. N noted in his narrative report that Dr. K opined on October 30, 2013, that the claimant had not reached MMI. However, the only record in evidence from Dr. K is a narrative report dated February 26, 2014, in which Dr. K notes that the purpose of his examination on February 15, 2014, was only to determine the claimant's extent of injury. Dr. K makes no reference to MMI or IR in this report.

Section 408.0041 provides in part that at the request of the carrier, injured employee, or on the commissioner's own order, the commissioner may order a designated doctor examination to resolve any question about the claimant's MMI and 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 1989 Act makes clear that a designated doctor's MMI and IR is given presumptive weight when the designated doctor has been appointed to determine MMI and IR, and that the Division shall base the claimant's MMI and IR on the designated doctor's report unless the preponderance of the medical evidence contradicts the designated doctor's report.

The hearing officer found that Dr. K's certification that the claimant is not at MMI is contrary to the preponderance of the evidence, and that Dr. N's MMI/IR certification is supported by a preponderance of the evidence. However, there is no record in evidence from Dr. K that the claimant is not at MMI, or any other record from Dr. K discussing MMI and IR. Because there is no record in evidence from Dr. K, the designated doctor appointed to determine MMI and IR, regarding his opinion on MMI and IR, a review of whether his certification that the claimant has not reached MMI is or

is not supported by a preponderance of the evidence cannot be conducted.¹ Accordingly, we reverse the hearing officer's determination that the claimant reached MMI on July 13, 2013, with a zero percent IR, and 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 of [date of injury], does not extend to bilateral shoulder supraspinatus sprain/strains and bilateral shoulder impingement syndrome.

We reverse the hearing officer's determinations that the claimant reached MMI on July 13, 2013, with a zero percent IR, and we 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 Dr. K's October 30, 2013, report and any other report from Dr. K that discusses MMI and IR. The parties are to be provided with Dr. K's October 30, 2013, report, as well as any other report from Dr. K admitted by the hearing officer, and allowed an opportunity to respond. The hearing officer is then to make a determination on MMI and IR consistent with this decision.

On remand the hearing officer is also to determine the correct address of the carrier's registered agent for service of process.

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.

¹ We note that the Appeals Panel has held that a hearing officer can determine that the claimant is not at MMI in the absence of a Report of Medical Evaluation (DWC-69) when the only DWC-69 in evidence certifying a specific date for MMI is contrary to the preponderance of the other medical evidence. See Appeals Panel Decision (APD) 111393, decided November 23, 2011. As discussed above, there is no record from Dr. K, either a narrative report or a DWC-69, that the claimant is not at MMI.

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.**

Carisa Space-Beam
Appeals Judge

CONCUR:

Veronica L. Ruberto
Appeals Judge

Margaret L. Turner
Appeals Judge