APPEAL NO. 142108
FILED DECEMBER 4, 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 August 19, 2014, in Houston, 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 C4-5 disc protrusion, C5-6 disc protrusion, left shoulder sprain/strain, erectile dysfunction, ilioinguinal neuralgia, and L3-4 radiculopathy; (2) the appellant (claimant) reached maximum medical improvement (MMI) on July 24, 2013; and (3) the claimant's impairment rating (IR) is 5%.

The claimant appealed the hearing officer's extent-of-injury determination based on sufficiency of the evidence. Also, the claimant states that there is no Report of Medical Evaluation (DWC-69) in evidence for the hearing officer to consider with the MMI date of July 24, 2013, with a 5% IR by (Dr. S), the doctor selected by the treating doctor to act in place of the treating doctor, and that the hearing officer must be reversed as a matter of law on the determinations of MMI and IR because it violates 28 TEX. ADMIN. CODE § 130.1 (Rule 130.1). The respondent (carrier) responded, urging affirmance. The carrier states that a DWC-69 is not in evidence for the MMI and IR, however that is a clerical error by the hearing officer. The carrier states that the hearing officer apparently documented the wrong date of MMI, and that the correct date of MMI is July 24, 2014, with a 5% IR as certified by Dr. S, the referral doctor. The carrier is requesting reformation of the hearing officer's decision to correct the clerical error in reference to the MMI date, because the medical evaluation is in evidence to support the correction.

DECISION

Affirmed in part and reversed and remanded in part.

The claimant testified that as he was driving a golf cart at work, he swerved to avoid a backhoe and he came into contact with a pole gate hitting him and puncturing his abdomen. The claimant testified that the impact of being injured by the pole gate caused him to be projected from the golf cart, and land on the ground.

The parties stipulated that on [Date of Injury], the claimant sustained a compensable injury at least in the form of an L3-4 fracture, traumatic hernia, herniated bowel loop, and a punctured abdomen; the Texas Department of Insurance, Division of Workers' Compensation (Division)-selected designated doctor, (Dr. W), certified that the claimant reached MMI on November 5, 2012, with a 0% IR; the referral doctor, Dr. S,

certified that the claimant reached MMI on January 21, 2014, and assigned a 33% IR; the post-designated doctor required medical examination (RME) doctor, (Dr. S), certified that the claimant reached MMI on November 5, 2012, with a 5% IR; statutory MMI is January 21, 2014; and the Division-selected designated doctor, (Dr. C), was appointed to opine on the extent of the compensable injury.

EXTENT OF INJURY

The hearing officer's determination that the [Date of Injury], compensable injury does not extend to C4-5 disc protrusion, C5-6 disc protrusion, left shoulder sprain/strain, erectile dysfunction, ilioinguinal neuralgia, and L3-4 radiculopathy 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. 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. Rule 130.1(d)(1) states that a certification of MMI and assignment of an IR requires completion, signing and submission of the DWC-69 and a narrative report.

The hearing officer determined that the claimant reached MMI on July 24, 2013, with a 5% IR per Dr. S's certification. Review of the record indicates that there is only a narrative report from Dr. S, and there is no DWC-69 in evidence that shows that Dr. S certified that the claimant reached MMI on July 24, 2013, with a 5% IR. Although Dr. S's narrative report dated July 7, 2014, is in evidence and indicates that he opined that the claimant reached MMI on July 24, 2013, and assessed a 5% IR for the compensable injury, there is no DWC-69 in evidence as required by Rule 130.1(d) for

the hearing officer to consider and adopt.[1] Given that there is no DWC-69 in evidence that certifies the claimant reached MMI on July 24, 2013, with a 5% IR, as required by Rule 130.1(d), we reverse the hearing officer's determination that the claimant reached MMI on July 24, 2013, with a 5% IR.

There are several certifications of MMI/IR in evidence. First, Dr. W, the designated doctor examined the claimant on February 27, 2013, and certified that the claimant had not reached MMI because the claimant had cervical radicular symptoms and some left shoulder joint pathology which had not been adequately evaluated. In evidence is a response to a letter of clarification dated March 27, 2013, in which Dr. W states that he has been informed that the claimant's compensable injury extends to a puncture of the abdomen, herniated bowel loop, traumatic hernia, and lumbar sprain/strain. Dr. W certified that the claimant reached MMI on November 5, 2012, with a 0% IR, based on the compensable injury. The hearing officer states in the Discussion portion of the decision that Dr. W has shown bias against the claimant. The hearing officer did not adopt Dr. W's certification of MMI/IR. The hearing officer made a finding of fact that the November 5, 2012, date of MMI and 0% IR certified by Dr. W are contrary to the preponderance of the evidence. That finding of fact is supported by sufficient evidence.

Next, Dr. S, the referral doctor examined the claimant on July 7, 2014, and certified that the claimant reached MMI on January 21, 2014, with a 33% IR. We note that Dr. S assigned a 33% IR which includes conditions that are not part of the compensable injury. Dr. S's certification that the claimant reached MMI on January 21, 2014, with a 33% IR cannot be adopted because it considers and rates conditions that are not part of the compensable injury.

Dr. S, the RME doctor, examined the claimant on May 29, 2014, and certified that the claimant reached MMI on November 5, 2012, with a 5% IR.[2] The hearing officer states in the Discussion of the decision that the claimant received additional treatment for the lumbar spine after the November 5, 2012, date of MMI. In evidence is a medical report dated July 11, 2013, from (Dr. Ch), in which he opines that the claimant has not reached MMI and recommends treatment at L3-4. The hearing officer states

[1] We note that the appeal file contains a copy of the claimant's exchange and within those documents there is a copy of Dr. S's DWC-69 dated July 7, 2014, which certifies that the claimant reached MMI on "July 24, 2014" with a 5% IR. We note that Dr. S's DWC-69 certified an MMI date that is: (1) internally inconsistent with the narrative report (*See* Appeals Panel Decision (APD) 140237, decided April 11, 2014); (2) post-statutory MMI (*See* Section 401.011(30)); and (3) prospective (*See* Rule 130.12(c)).
[2] We note that Dr. S amended his certification to include four diagnosis codes, however his certification of MMI and IR remained the same, in that he certified the claimant reached MMI on November 5, 2012, with a 5% IR.

that Dr. S's certification of MMI/IR is not supported by the preponderance of the evidence. Dr. S's certification cannot be adopted.

As there are no certifications of MMI and IR 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 [Date of Injury], compensable injury does not extend to C4-5 disc protrusion, C5-6 disc protrusion, left shoulder sprain/strain, erectile dysfunction, ilioinguinal neuralgia, and L3-4 radiculopathy.

We reverse the hearing officer's determination that the claimant reached MMI on July 24, 2013, with a 5% IR, and we remand the MMI and IR issues to the hearing officer for further action consistent with this decision.

REMAND INSTRUCTIONS

Dr. W is the designated doctor in this case on the issues of MMI and IR. Dr. C is the designated doctor in this case on the issue of extent of injury. On remand, the hearing officer is to determine whether Dr. W is still qualified and available to be the designated doctor. If Dr. W 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, in accordance with Section 408.0041 and applicable Division rules.

The hearing officer is to advise the designated doctor that the compensable injury is a L3-4 fracture, traumatic hernia, herniated bowel loop, and a punctured abdomen. The hearing officer is to advise the designated doctor that the compensable injury of [Date of Injury], does not extend to C4-5 disc protrusion, C5-6 disc protrusion, left shoulder sprain/strain, erectile dysfunction, ilioinguinal neuralgia, and L3-4 radiculopathy.

The hearing officer is to request that the designated doctor give an opinion on the claimant's MMI and rate the entire compensable injury 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) and the provisions of Rule 130.1(c)(3).

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 **SENTINEL INSURANCE COMPANY** 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.

Veronica L. Ruberto
Appeals Judge

CONCUR:

Carisa Space-Beam
Appeals Judge

Margaret L. Turner
Appeals Judge