

APPEAL NO. 142339
FILED DECEMBER 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 was held on August 7, 2014, with the record closing on September 29, 2014, in San Antonio, Texas, with [hearing officer] presiding as hearing officer. The hearing officer resolved the disputed issues by deciding that: (1) the respondent (claimant) reached maximum medical improvement (MMI) on December 13, 2013; and (2) the claimant's impairment rating (IR) is nine percent. We note that the decision and order contains an incorrect zip code for the address of the appellant's (carrier) registered agent for service of process.

The carrier appealed the hearing officer's determinations, contending that the evidence does not support those determinations. The appeal file does not contain a response from the claimant to the carrier's appeal.

DECISION

Affirmed in part and reversed and remanded in part.

The parties stipulated that the claimant sustained a compensable injury on [Date of Injury], in the form of a hernia while breaking free a bolt. It is undisputed that the date of statutory MMI is December 13, 2013. The claimant testified he has had two surgeries to repair the hernia. The first surgery occurred on January 27, 2012, and the second surgery occurred on July 30, 2014.

MMI

The hearing officer's determination that the claimant reached MMI on December 13, 2013, is supported by sufficient evidence and is affirmed.

IR

Section 408.125(c) provides that the report of the designated doctor shall have presumptive weight, and the Texas Department of Insurance, Division of Workers' Compensation (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 hearing officer determined that the claimant's IR is nine percent as assigned by (Dr. K), the designated doctor appointed by the Division to determine MMI and IR.

Dr. K examined the claimant on February 4, 2014, and certified that the claimant reached MMI statutorily on December 13, 2013, with a nine percent 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). Dr. K explained the basis of his IR as follows:

As far as an [IR] [the claimant] does have a problem with the frequent discomfort with any heavy lifting but has no limitation in normal activity. **He does not have a palpable defect in the abdominal wall** [emphasis added]. He does not have an occlusion through the defect. As per table 7 on page [10/247 of the AMA Guides], classes of hernia-related impairment, he would probably be a [nine percent] based as per Class I.

The hearing officer sent Dr. K a letter of clarification (LOC) on August 26, 2014, requesting Dr. K to submit an amended report with a definite conclusion regarding the claimant's IR as of the December 13, 2013, date of MMI. Dr. K responded on September 15, 2014, as follows:

After careful review . . . I have no changes to make to my original assessment of MMI date as [December 13, 2013] statutorily with [nine percent IR]. **As stated in my original report. . . . [The claimant] did have a palpable defect in the abdominal wall** [emphasis added], which qualified him a class 1 category with [nine percent] whole person impairment as per table 7 on page [10/247], classes of hernia-related impairment.

The Appeals Panel has held that the AMA Guides require a palpable defect for an impairment to be awarded for a hernia under Table 7. Appeals Panel Decision (APD) 072253-s, decided March 3, 2008. See also APD 111177, decided October 6, 2011. In this case there is an inconsistency between Dr. K's February 4, 2014, narrative report, and his September 15, 2014, LOC response as to whether the claimant actually had a palpable defect in the abdominal wall, which is required for an impairment to be awarded for a hernia. Because Dr. K's narrative and LOC response are conflicting as to whether the claimant had a palpable defect in the abdominal wall, we reverse the hearing officer's determination that the claimant's IR is nine percent.

There is no other MMI/IR certification in evidence with the affirmed MMI date of December 13, 2013. Accordingly, we remand the issue of IR to the hearing officer for further action consistent with this decision.

SUMMARY

We affirm the hearing officer's determination that the claimant reached MMI on December 13, 2013.

We reverse the hearing officer's determination that the claimant's IR is nine percent, and we remand the issue of IR to the hearing officer for further action consistent with this decision.

REMAND INSTRUCTIONS

Dr. K is the designated doctor in this case. On remand, the hearing officer is to determine whether Dr. K is still qualified and available to be the designated doctor. If Dr. K 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 IR for the [Date of Injury], compensable injury as of [Date of injury] , the date of MMI in this case.

On remand the hearing officer is to send a LOC to Dr. K, if he is still qualified and available to serve as the designated doctor, informing him that to assess impairment for a hernia-related injury under Table 7 of the AMA Guides there must be a palpable defect in the supporting structures of the abdominal wall. The hearing officer is to request Dr. K to resolve the inconsistency between his February 4, 2014, narrative report and his September 15, 2014, LOC response, and clarify whether or not the claimant had a palpable defect.

The hearing officer is to notify the designated doctor that the date of MMI in this case is December 13, 2013, and is to request the designated doctor to assign an IR based on the December 13, 2013, date of MMI considering the medical records and the certifying examination. A copy of the designated doctor's response and IR is to be provided to both parties and the parties are to be given an opportunity to respond. The hearing officer is then to make a determination on IR as of the December 13, 2013, date of MMI that is supported by the evidence.

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 **OLD REPUBLIC GENERAL INSURANCE** and the name and address of its registered agent for service of process is

**CORPORATION SERVICE COMPANY
211 EAST 7TH STREET, SUITE 620
AUSTIN, TEXAS 78701-3218.**

Carisa Space-Beam
Appeals Judge

CONCUR:

Cristina Beceiro
Appeals Judge

Margaret L. Turner
Appeals Judge