APPEAL NO. 142675
FILED JANUARY 28, 2015

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 October 27, 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 full-thickness complete tear of the supraspinatus tendon with associated tendinosis, retraction, and muscular fatty atrophy; (2) the appellant (claimant) reached maximum medical improvement (MMI) on August 10, 2013; and (3) the claimant's impairment rating (IR) is zero percent.

The claimant appealed all of the hearing officer's determinations, contending that the evidence established the compensability of the claimed conditions, and as such the MMI/IR certification adopted by the hearing officer failed to rate the entire compensable injury. The respondent (carrier) responded, urging affirmance of the hearing officer's determinations.

DECISION

Affirmed as reformed.

Section 410.203(b) was amended effective September 1, 2011, to allow the Appeals Panel to affirm the decision of a hearing officer as prescribed in Section 410.204(a-1). Section 410.204(a) provides in part that the Appeals Panel may issue a written decision on an affirmed case as described in subsection (a-1). Subsection (a-1) provides that the Appeals Panel may only issue a written decision in a case in which the panel affirms the decision of a hearing officer if the case: (1) is a case of first impression; (2) involves a recent change in law; or (3) involves errors at the CCH that require correction but do not affect the outcome of the hearing. This case is a situation that requires correction but does not affect the outcome of the hearing.

The parties stipulated that the claimant sustained a compensable injury in the form of a left forearm contusion, right knee contusion, right hip contusion, and right shoulder grade one strain as the result of a fall. The claimant testified that she tripped and fell onto her right side. The claimant also testified that she did not fall onto her left side but that she did strike her left forearm.

EXTENT OF INJURY

The hearing officer's determination that the compensable injury of [Date of Injury], does not extend to the full-thickness complete tear of the supraspinatus tendon with associated tendinosis, retraction, and muscular fatty atrophy 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 Texas Department of Insurance, Division of Workers' Compensation (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 hearing officer determined that the claimant reached MMI on August 10, 2013, with a zero percent IR. The hearing officer found in Finding of Fact No. 5 that the MMI/IR certification of (Dr. W), the designated doctor appointed by the Division to determine MMI, IR, and extent of injury, certifying the claimant reached MMI on August 10, 2013, with a zero percent IR is not contrary to the preponderance of the evidence.

Dr. W initially examined the claimant on September 23, 2013, and certified that the claimant reached MMI on August 10, 2013, with a zero percent IR. Dr. W based his MMI/IR certification on the diagnoses of a left wrist contusion, left shoulder sprain/strain, and a left knee contusion. Dr. W makes clear in his narrative report that he assessed the zero percent IR based on range of motion (ROM) measurements taken of the claimant's left wrist, left shoulder, and left knee.

Dr. W subsequently examined the claimant on October 6, 2014, and again certified that the claimant reached MMI on August 10, 2013, with a zero percent IR. Dr. W again based his MMI/IR certification on the diagnoses of a left wrist contusion, a left shoulder sprain/strain, and a left knee contusion. Dr. W makes clear in his narrative

report that he again assessed zero percent IR based on ROM taken of the claimant's left wrist, left shoulder, and left knee.

However, as discussed above, the parties stipulated that the claimant sustained a compensable injury in the form of a left forearm contusion, right knee contusion, right hip contusion, and right shoulder grade one strain. Dr. W considered and rated a left wrist contusion, left shoulder sprain/strain, and a left knee contusion. Neither of Dr. W's MMI/IR certifications rate the actual compensable injury as stipulated to by the parties and as such cannot be adopted. The hearing officer's finding that Dr. W's MMI/IR certification is not contrary to the preponderance of the evidence is so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust. Accordingly, we reverse Finding of Fact No. 5.

The hearing officer noted in the Discussion portion of his decision that the certification of (Dr. D), the post-designated doctor required medical examination doctor, is supported by a preponderance of the other medical evidence. Dr. D examined the claimant on January 2, 2014, and certified that the claimant reached MMI on August 10, 2013, with a zero percent IR. Dr. D noted diagnoses of a shoulder sprain/strain, forearm contusion, knee contusion, and hip contusion. Dr. D pointed out in his narrative report that Dr. W performed a designated doctor evaluation on September 23, 2013, and opined that the claimant reached MMI on August 10, 2013, with a zero percent IR based on a "'left wrist contusion, left shoulder sprain, and left knee contusion' although the records support the right shoulder, right knee, and right hip were injured." Dr. D's report makes clear that the zero percent IR is based on ROM measurements taken of the claimant's right shoulder, left arm, right knee, and right hip. Dr. D considered and rated the entire compensable injury as stipulated to by the parties.

The hearing officer makes clear in his decision that he considered Dr. D's certification that the claimant reached MMI on August 10, 2013, with a zero percent IR to be supported by a preponderance of the evidence, and a review of the record reveals this is correct. Because an MMI date of August 10, 2013, and an IR of zero percent are supported by the evidence, based on the report of Dr. D rather than the report of Dr. W, the hearing officer's determination that the claimant reached MMI on August 10, 2013, with a zero percent IR is affirmed but reformed to reflect that the claimant reached MMI on August 10, 2013, with a zero percent IR per the report of Dr. D.

The true corporate name of the insurance carrier is **AMERICAN ZURICH INSURANCE COMPANY** 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 78701-3232.

Carisa Space-Beam
Appeals Judge

CONCUR:

Cristina Beceiro
Appeals Judge

Margaret L. Turner
Appeals Judge