APPEAL NO. 142708
FILED FEBRUARY 23, 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 March 6, 2014, with the record closing on November 17, 2014, in Houston, Texas, with [hearing officer] presiding as hearing officer. The hearing officer resolved the issues before her by determining that: (1) the [Date of Injury], compensable injury does not extend to right trapezius strain and headaches; (2) the [Date of Injury], compensable injury extends to cervical radiculitis, right shoulder impingement syndrome, and right shoulder rotator cuff tear; (3) the respondent/cross-appellant (claimant) reached maximum medical improvement (MMI) on June 5, 2013; (4) the claimant's impairment rating (IR) is seven percent; and (5) the claimant had disability only beginning on January 6, 2013, and continuing through July 10, 2013, but the claimant did not have disability from July 11, 2013, and continuing through the date of the CCH.

The appellant/cross-respondent (carrier) appealed the hearing officer's extent-of-injury determination adverse to it, as well as the hearing officer's MMI, IR, and disability determinations adverse to it. The carrier contended that the claimant did not meet her burden of proof on those issues. The claimant responded to the carrier's appeal, urging affirmance for the issues on which she prevailed. The claimant also filed a cross-appeal on the issues of MMI, IR, and the disability portion adverse to her, contending that the evidence did not support the determinations. The carrier responded to the claimant's cross-appeal, urging affirmance for the issues on which it prevailed.

The hearing officer's determination that the [Date of Injury], compensable injury does not extend to right trapezius strain and headaches was not appealed and has become final pursuant to Section 410.169.

DECISION

Reformed in part, affirmed in part, and reversed and remanded in part.

The parties stipulated that the claimant sustained a compensable injury at least in the form of a cervical strain on [Date of Injury]. The claimant testified that she injured her neck and right shoulder and arm when she had to pull and jerk to unlock a trailer truck tandem for approximately 15 to 20 minutes.

ISSUE STATEMENT 1

The Benefit Review Conference (BRC) report lists the following extent-of-injury issue:

Does the [[Date of Injury]] compensable injury extend to and include cervical radiculitis, right shoulder impingement syndrome, right shoulder rotator cuff tear, right trapezius strain and headaches?

At the CCH the parties agreed to Issue Statement 1, the extent-of-injury issue, as stated on the BRC report. However, the hearing officer's decision lists Issue Statement 1, the extent-of-injury issue, as follows:

Does the [Date of Injury], compensable injury extend to and include cervical radiculitis, right shoulder impingement syndrome, right shoulder tot

Issue Statement 1 as listed in the decision and order is incomplete. We reform the hearing officer's decision to state the following to reflect the actual issue as stated on the BRC report and agreed to by the parties at the CCH:

1. Does the [Date of Injury], compensable injury extend to cervical radiculitis, right shoulder impingement syndrome, right shoulder rotator cuff tear, right trapezius strain, and headaches?

EXTENT OF INJURY

The hearing officer's determination that the [Date of Injury], compensable injury extends to cervical radiculitis, right shoulder impingement syndrome, and right shoulder rotator cuff tear 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. Rule 130.1(d)(1) states that a certification of MMI and assignment of an IR requires completion, signing, and submission of the Report of Medical Evaluation (DWC-69) and a narrative report.

(Dr. K) was initially appointed by the Division to determine MMI and IR. Dr. K examined the claimant on May 23, 2013, and certified that the claimant reached MMI on January 5, 2013, with a zero percent IR based on a cervical sprain/strain 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). We note that Dr. K did not discuss cervical radiculitis, right shoulder impingement syndrome, or a right shoulder rotator cuff tear, all of which are conditions we have affirmed as being part of the compensable injury.

Dr. K was subsequently appointed by the Division to determine the extent of the claimant's compensable injury, as discussed above. On March 18, 2014, the hearing officer sent Dr. K a letter of clarification regarding Dr. K's opinion on the extent of the compensable injury and MMI and IR. Dr. K responded on March 27, 2014, requesting a re-examination of the claimant. The Division then appointed (Dr. A) as the designated doctor to perform the claimant's re-examination. Dr. A examined the claimant on July 26, 2014, and certified that the claimant reached MMI on June 5, 2013, with a seven percent IR. Dr. A noted diagnoses of a cervical sprain/strain, cervical radiculitis, a right shoulder rotator cuff tear, and right shoulder impingement syndrome in her narrative report. Using the AMA Guides, Dr. A placed the claimant in Diagnosis-Related Estimate (DRE) Cervicothoracic Category II: Minor Impairment for five percent impairment for the claimant's cervical spine. Dr. A also assessed two percent whole person impairment based on range of motion measurements taken of the claimant's right shoulder. Dr. A did not sign her DWC-69.

The claimant contended in her appeal that she only received an unsigned copy of Dr. A's report, and that she did not receive notice of the date the record closed nor was she given time to file additional arguments, evidence, or objections. However, in evidence is a letter dated October 17, 2014, in which the hearing officer notified the parties that Dr. A had been designated as the designated doctor on re-examination, and that a copy of Dr. A's MMI/IR certification was attached. The hearing officer notified the parties that Dr. A's MMI/IR certification would be admitted into evidence, that the record will close, and that a decision will be issued. The hearing officer also notified the parties that if either party wished to offer any additional evidence in response to Dr. A's report, or request another CCH, the request must be made in writing no later than October 27, 2014, at 5:00 p.m. The letter includes the correct address for both the claimant and her

attorney. The claimant's mere assertion that she did not receive notice of the date the record closed and that she was not given time to file additional arguments, evidence, or objections is insufficient to establish that she did not receive the hearing officer's letter dated October 17, 2014, along with Dr. A's unsigned MMI/IR certification.

The hearing officer determined that the claimant reached MMI on June 5, 2013, with a seven percent IR as certified by Dr. A, the second designated doctor appointed by the Division. The evidence does not contain a DWC-69 signed by Dr. A. Rule 130.1(d)(1) provides that a certification of MMI and assignment of an IR for the compensable injury requires the "completion, signing, and submission of the [DWC-69] and a narrative report." *See* Appeals Panel Decision (APD) 100510, decided June 24, 2010, APD 101734, decided January 27, 2011, and APD 141332, decided August 11, 2014. Because the DWC-69 was not signed by Dr. A, it was error for the hearing officer to adopt her certification. Consequently, we reverse the hearing officer's determinations that the claimant's MMI date is June 5, 2013, and that the claimant's IR is seven percent.

As mentioned above, Dr. K, the first designated doctor appointed by the Division, certified that the claimant reached MMI on January 5, 2013, with a zero percent IR. Using the AMA Guides, Dr. K placed the claimant in DRE Cervicothoracic Category I: Complaints or Symptoms for zero percent impairment of the claimant's cervical spine. Dr. K did not discuss cervical radiculitis, right shoulder impingement syndrome, or a right shoulder rotator cuff tear, all of which are conditions we have affirmed as being part of the compensable injury. Dr. K did not consider and rate the entire compensable injury, and as such that MMI/IR certification cannot be adopted.

(Dr. V) examined the claimant on July 10, 2013, and certified that the claimant reached MMI on July 10, 2013, and that the claimant did not have any permanent impairment as a result of the compensable injury. However, there is no narrative report from Dr. V regarding his MMI/IR certification. 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. See APD 131085, decided June 27, 2013. Accordingly, Dr. V's MMI/IR certification cannot be adopted.

There are also multiple certifications from (Dr. G) certifying that the claimant has not reached MMI. The first certification considers a cervical sprain, a right shoulder rotator cuff tear, and right shoulder impingement syndrome. The second certification considers a cervical sprain, cervical radiculitis, a right shoulder rotator cuff tear, and right shoulder impingement syndrome. The third certification considers a cervical sprain and cervical radiculitis. The fourth certification considers a cervical sprain. As previously mentioned, the parties stipulated that the compensable injury is at least a

cervical strain, and we have affirmed the hearing officer's determination that the compensable injury extends to cervical radiculitis, right shoulder impingement syndrome, and a right shoulder rotator cuff tear.

However, we note that the parties did not stipulate or litigate the date of statutory MMI. Although we have affirmed that portion of the hearing officer's determination that the claimant had disability beginning on January 6, 2013, there was no evidence that January 6, 2013, was the eighth day of disability. In evidence are medical records restricting the claimant from work beginning November 8, 2012, so the eighth day of disability in this case could have been as early as November 15, 2012, and the claimant testified that she has never returned to work. Based on the evidence in this case it appears the date of statutory MMI has passed; however, we do not have sufficient evidence of that date. The Appeals Panel has previously held that it is legal error to determine a claimant has not reached MMI in a decision and order dated after the date of statutory MMI. *See* APD 131554, decided September 3, 2013. Accordingly, we remand the issues of MMI and IR to the hearing officer for further action consistent with this decision.

DISABILITY

Disability means the inability to obtain and retain employment at wages equivalent to the pre-injury wage because of a compensable injury. Section 401.011(16). The claimant has the burden to prove that she had disability as defined by Section 401.011(16). Disability is a question of fact to be determined by the hearing officer. *See* APD 042097, decided October 18, 2004. Disability can be established by a claimant's testimony alone, even if contradictory of medical testimony. APD 041116, decided July 2, 2004. The claimant need not prove that the compensable injury was the sole cause of his disability; only that it was a producing cause. APD 042097, *supra*.

The hearing officer determined that the claimant had disability beginning on January 6, 2013, and continuing through July 10, 2013, but the claimant did not have disability from July 11, 2013, and continuing through the date of the CCH. That portion of the hearing officer's determination that the claimant had disability beginning on January 6, 2013, the beginning date in dispute, and continuing through July 10, 2013, is supported by sufficient evidence and is affirmed.

The hearing officer discussed the disability issue in the Discussion portion of her decision as follows:

> [the] [c]laimant testified that she is entitled to disability because she has not been able to work from January 6, 2013, through the present due to the compensable injury. However, persuasive evidence in the record

indicates that on July 10, 2013, [the] [c]laimant's treating physician, [Dr. V], released her to return to work without restrictions.

In evidence are Work Status Reports (DWC-73) from Dr. V. In a DWC-73 dated July 10, 2013, Dr. V released the claimant to work without restrictions as of July 10, 2013, based on a neck sprain. Also in evidence is a DWC-73 from Dr. V dated June 5, 2013, in which he released the claimant to work without restrictions as of June 5, 2013, based on a neck sprain, and another DWC-73 from Dr. V dated May 15, 2013, in which he released the claimant to work without restrictions as of May 15, 2013, based on a neck sprain. However, as mentioned above we have affirmed the hearing officer's determination that the compensable injury extends to cervical radiculitis, right shoulder impingement syndrome, and a right shoulder rotator cuff tear. Dr. V's DWC-73s show that he only considered a neck sprain when he released the claimant to work without restrictions. Accordingly, we reverse that portion of the hearing officer's determination that the claimant did not have disability from July 11, 2013, through the date of the CCH, and we remand the issue of disability from July 11, 2013, through the date of the CCH to the hearing officer for further action consistent with this decision.

SUMMARY

We reform the hearing officer's decision to state the following to reflect the actual issue as stated on the BRC report and agreed to by the parties at the CCH:

1. Does the [Date of Injury], compensable injury extend to cervical radiculitis, right shoulder impingement syndrome, right shoulder rotator cuff tear, right trapezius strain, and headaches?

We affirm the hearing officer's determination that the [Date of Injury], compensable injury extends to cervical radiculitis, right shoulder impingement syndrome, and right shoulder rotator cuff tear.

We reverse the hearing officer's determinations that the claimant reached MMI on June 5, 2013, and that the claimant's IR is seven percent, and we remand the issues of MMI and IR to the hearing officer for further action consistent with this decision.

We affirm that portion of the hearing officer's determination that the claimant had disability beginning on January 6, 2013, and continuing through July 10, 2013.

We reverse that portion of the hearing officer's determination that the claimant did not have disability from July 11, 2013, and continuing through the date of the CCH, and we remand the issue of disability from July 11, 2013, through the date of the CCH to the hearing officer for further action consistent with this decision.

REMAND INSTRUCTIONS

Dr. A is the designated doctor in this case. The hearing officer is to determine whether Dr. A is still qualified and available to be the designated doctor. If Dr. A is no longer qualified or available to serve as the designated doctor, then another designated doctor is to be appointed.

The hearing officer is also to take a stipulation from the parties on the date of statutory MMI. If the parties are unable to stipulate to the date of statutory MMI, the hearing officer is to make a determination of the date of statutory MMI in order to inform the designated doctor of the date of statutory MMI.

The hearing officer is to advise the designated doctor that the [Date of Injury], compensable injury extends to a cervical strain, cervical radiculitis, right shoulder impingement syndrome, and a right shoulder rotator cuff tear. The hearing officer is further to advise the designated doctor the date of statutory MMI.

The hearing officer is to request the designated doctor to give an opinion on the claimant's date of MMI and rate the entire compensable injury in accordance with the AMA Guides considering the medical record and the certifying examination. The date of MMI cannot be after the date of statutory MMI.

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, IR, and disability considering the DWC-73s in evidence and 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 **LIBERTY INSURANCE CORPORATION** and the name and address of its registered agent for service of process is

CORPORATION SERVICES COMPANY
211 EAST 7TH STREET, SUITE 620
AUSTIN, TEXAS 78701.

Carisa Space-Beam
Appeals Judge

CONCUR:

Cristina Beceiro
Appeals Judge

Margaret L. Turner
Appeals Judge