APPEAL NO. 150575
FILED MAY 8, 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 December 19, 2014, in Houston, Texas, with [hearing officer] presiding as hearing officer. The hearing officer resolved the disputed issues by deciding that the appellant (claimant) reached maximum medical improvement (MMI) on October 14, 2014, and the claimant's impairment rating (IR) is 13%.

The claimant appealed the hearing officer's MMI and IR determinations, arguing that the decision and order is clearly wrong, manifestly unjust, and goes against the great weight of the evidence. The claimant contends on appeal that she was scheduled for and underwent right shoulder surgery on December 23, 2014, which was four days after the CCH. The claimant states that the hearing officer applied the wrong legal standard in determining MMI and IR, given that she testified and presented evidence that she was preauthorized for surgery. The claimant contends that the certification of MMI/IR adopted by the hearing officer does not consider the preauthorized surgery for her compensable injury.

The respondent (carrier) responded, urging affirmance of the hearing officer's MMI and IR determinations. The carrier states that the certification adopted by the hearing officer rated the entire compensable injury, thus the certification is adoptable. The carrier states that the claimant did not attach an operative report or any other medical evidence to her appeal to show that she actually underwent the surgical procedure that was preauthorized. Furthermore, the carrier states that it is not clear as to whether or not the claimant ever underwent surgery for the right shoulder.

DECISION

Reversed and remanded.

The parties stipulated that the claimant sustained a compensable injury on [date of injury]. The claimant testified that she was carrying some clothes at work when she slipped and fell. The record shows that the claimant sustained injuries to her cervical spine, right shoulder, and right hip, and that she received treatment for her injuries in the form of medication, physical therapy, work hardening, epidural steroid injections, and surgery. The Texas Department of Insurance, Division of Workers' Compensation (Division) appointed (Dr. F) as the designated doctor to determine MMI and IR. The record shows that (Dr. S), is the treating doctor, (Dr. R) is the referral doctor, and (Dr. K) is the surgeon.

Dr. F, the designated doctor, examined the claimant on November 26, 2013, and certified that the claimant reached MMI on September 9, 2013, with a 6% 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. F explained in his narrative report that the claimant had reached MMI on September 9, 2013, the date of her last visit with any physician. Furthermore, Dr. F explained that the claimant reached MMI because she had been provided with all potential reasonable care for her injuries, she was not a candidate for further physical therapy or surgery, and if she were to undergo pain management procedures, it would not provide further material recovery from or lasting improvement to her injury. Dr. F placed the claimant in Diagnosis-Related Estimate (DRE) Cervicothoracic Category II: Minor Impairment for a 5% impairment for the cervical spine, 8% upper extremity (UE) impairment for the right shoulder injury based on range of motion (ROM) measurements, and 0% impairment for the hip injury based on ROM measurements, which combined to a 6% IR.

In a medical report dated January 30, 2014, Dr. S, the treating doctor, states that he disagrees with Dr. F's certification of MMI/IR because the claimant was approved for a work hardening program on October 29, 2013, and she began the program on November 4, 2013. Dr. S states that Dr. F was not aware of her participation in the work hardening program at the time he examined the claimant. In evidence is a preauthorization request for work hardening dated October 13, 2013, from Dr. S, and a preauthorization request approved from the carrier on October 29, 2013. Dr. S opined that the claimant was not at MMI because she was participating in the work hardening program for her compensable injury.

In a medical report dated February 7, 2014, Dr. R, the referral doctor, notes that the claimant completed the work hardening program; however, the claimant had right shoulder and lower neck pain persisting at intolerable levels. In a medical report dated April 7, 2014, Dr. S notes that the claimant had injections on her last visit which have helped resolve her pain for a few weeks, but it has returned and is the same. Dr. S notes that the claimant has had conservative care with medication, rest, injections, and therapy which have all failed, and a request for surgery at this time is medically necessary for the claimant to resolve ongoing pain in her right shoulder.

In evidence is a notification letter dated April 13, 2014, preauthorizing right shoulder surgery. An operative report dated July 8, 2014, from Dr. K shows that the claimant underwent a right shoulder arthroscopy, debridements of the labrum and supraspinatus, subacromial decrompression, and distal clavicle resection. It was recommended that the claimant undergo 24 sessions of post-operative physical therapy.

Dr. F re-examined the claimant on October 14, 2014, and certified that the claimant reached MMI on October 14, 2014, with a 13% IR using the AMA Guides. In his narrative report dated October 14, 2014, Dr. F states that he is rescinding his previous certification of MMI given that the claimant had surgery, which was not a consideration at the time of his previous examination. Dr. F's narrative report indicates that he considered the claimant's July 8, 2014, right shoulder surgery and physical therapy. Also, Dr. F noted that although the claimant "has [2] more therapy visits, these are due to be completed this week and as such, there is no anticipation of further material recovery from or lasting improvement over where she is currently." Furthermore, Dr. F states that no proposed treatment has been recommended or has been scheduled by attending providers.

Dr. F assessed a 13% IR for the claimant's compensable injury. Dr. F placed the claimant in DRE Cervicothoracic Category II: Minor Impairment for a 5% impairment for the cervical spine, 8% UE impairment for the right shoulder injury based on ROM measurements, and 0% impairment for the hip injury based on ROM measurements. Dr. F stated that although the claimant had a right shoulder distal clavicle resection, he did not believe that it substantially provided for any additional impairment other than ROM. Dr. F considered and rated the entire compensable injury.

At the December 19, 2014, CCH the claimant argued that she was not at MMI because she was preauthorized for additional right shoulder surgery scheduled on December 23, 2014. In evidence is a notification letter from the carrier dated November 11, 2014, preauthorizing right shoulder surgery. The claimant argued that Dr. F's certification of MMI and IR cannot be adopted because it does not consider the pending additional right shoulder surgery and that she is not at MMI.

MMI AND IR

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. Rule

127.20(c) provides that the Division, at its discretion, may also request clarification from the designated doctor on issues the Division deems appropriate.

The issues in dispute were whether the claimant reached MMI, and if so what is the claimant's IR; however, the crux of the MMI dispute was whether the claimant reached MMI given that the claimant's preauthorization request for additional right shoulder surgery for the compensable injury had been approved and scheduled for December 23, 2014. The claimant argued that she was not at MMI given the pending surgery for her compensable injury, therefore there is a reasonable anticipation of further material recovery from or lasting improvement to her compensable injury.

In discussing the preauthorization for surgery and the claimant's testimony, the hearing officer states that:

> The problem with [the November 11, 2014, preauthorization letter] and the claimant's testimony is that they are no guarantee that the claimant will actually undergo the surgery. This [h]earing [o]fficer is cognizant of the fact that surgeries are often preauthorized and scheduled, but then cancelled at the last minute because of a last minute extent-of-injury dispute or because the claimant opts not to have the surgery. In light of this fact, the preauthorization letter and the claimant's testimony are not persuasive on the issue of MMI.

The hearing officer included a footnote in his decision that the claimant did not request that the record be held open, pending performance of the surgery and receipt of the operative report. The hearing officer found that the preponderance of the other medical evidence is not contrary to the designated doctor's opinion on MMI and IR and adopted Dr. F's MMI/IR certification.

Section 401.011(30) defines MMI to mean the earlier of: (A) 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; (B) the expiration of 104 weeks from the date on which income benefits begin to accrue; or (C) the date determined as provided by Section 408.104. *See also* Rule 130.1(b). The Appeals Panel has noted that MMI does not mean there will not be a need for some further or future medical treatment, and that the need for additional or future medical treatment does not mean that MMI was not reached at the time it was certified. *See* Appeals Panel Decision (APD) 122627, decided February 19, 2013; APD 020834, decided May 16, 2002; APD 991932, decided October 25, 1999; and APD 941488, decided December 16, 1994.

In this case, the hearing officer clearly states in his decision that he based his MMI determination on his belief that there is "no guarantee that the claimant will actually undergo the surgery" rather than on the statutory definition that the date of MMI is the earliest date after which, based on reasonable medical probability, further material recovery from or lasting improvement to the injury can no longer reasonably be anticipated. The hearing officer applied the wrong legal standard in determining MMI. Accordingly, we reverse the hearing officer's MMI determination that the claimant reached MMI on October 14, 2014, and remand the MMI issue to the hearing officer to determine MMI using the proper legal standard consistent with this decision.

Given that we are reversing the hearing officer's MMI determination, we also reverse the hearing officer's determination that the claimant's IR is 13%, and remand the IR issue to the hearing officer to determine the IR, after he makes a determination of the MMI issue.

SUMMARY

We reverse the hearing officer's determination that the claimant reached MMI on October 14, 2014, and remand the MMI issue to the hearing officer to determine MMI using the proper legal standard consistent with this decision.

We reverse the hearing officer's determination that the claimant's IR is 13%, and we remand the IR issue to the hearing officer to determine the IR consistent with this decision.

REMAND INSTRUCTIONS

The hearing officer is to apply the proper legal standard in determining MMI, as defined in Section 401.011(30), and determine the claimant's IR, consistent with this decision.

In this case, Dr. F is the designated doctor for purposes of determining MMI and IR. On remand:

(1) The hearing officer is to determine whether Dr. F is still qualified and available to be the designated doctor. If Dr. F is no longer qualified or available to serve as the designated doctor, then another designated doctor is to be appointed pursuant to Rule 127.5(c) to determine MMI and the IR.

(2) The hearing officer is to give the parties the opportunity to stipulate as to the date of statutory MMI. If the parties cannot agree as to the date of statutory MMI, the hearing officer is to determine the date of statutory MMI based on

the evidence in the case. The hearing officer is to inform the designated doctor of the date of statutory MMI.

(3) The hearing officer is to ensure that the designated doctor has all the pertinent medical records, including any preauthorization letters and operative reports that were not available or provided to the designated doctor previously.

(4) The hearing officer is to request that the designated doctor rate the entire compensable injury in accordance with Rule 130.1(c)(3). The certification of MMI and IR shall be based on the claimant's condition as of the MMI date, which can be no later than date of statutory MMI, considering the claimant's medical record and the certifying examination.

The parties are to be provided with the hearing officer's letter to the designated doctor and the designated doctor's response. The parties are to be allowed an opportunity to respond. The hearing officer is then to make determinations on MMI and IR supported by the evidence and consistent with this decision. The report of the designated doctor has presumptive weight. *See* Section 408.125(c).

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 **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.

Veronica L. Ruberto
Appeals Judge

CONCUR:

Carisa Space-Beam
Appeals Judge

Margaret L. Turner
Appeals Judge