APPEAL NO. 150717
FILED JUNE 18, 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 was held on February 10, 2015, with the record closing on March 10, 2015, in Houston, Texas, with (hearing officer) as hearing officer. The hearing officer resolved the disputed issues by deciding that: (1) the compensable injury of (date of injury), extends to a cervical sprain/strain, thoracic radiculitis, a right ankle sprain/strain, a right knee sprain/strain, and a lumbar sprain/strain, but does not extend to the right distal clavicle; (2) the respondent (claimant) has not reached maximum medical improvement (MMI); and (3) because the claimant has not reached MMI, an impairment rating (IR) would not be appropriate.

The appellant (carrier) appealed that portion of the hearing officer's extent-of-injury determination that was favorable to the claimant, as well as the MMI and IR determinations, arguing that they are so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust. The appeal file does not contain a response from the claimant.

The hearing officer's determination that the compensable injury of (date of injury), does not extend to the right distal clavicle was not appealed and has become final pursuant to Section 410.169.

DECISION

Affirmed in part and reversed and remanded in part.

The parties stipulated that on (date of injury), the claimant sustained a compensable injury, and the compensable injury includes a right shoulder sprain/strain. It is undisputed that the Texas Department of Insurance, Division of Workers' Compensation (Division) appointed (Dr. I) as the designated doctor for purposes of MMI, IR, and extent of injury.

EXTENT OF INJURY

That portion of the hearing officer's determination that the compensable injury of (date of injury), extends to a cervical sprain/strain, thoracic radiculitis, a right ankle sprain/strain, a right knee sprain/strain, and a lumbar sprain/strain 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. 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 designated doctor opined that the claimant is not at MMI. As previously mentioned, the compensable injury is a right shoulder sprain/strain, and the compensable injury extends to a cervical sprain/strain, thoracic radiculitis, a right ankle sprain/strain, a right knee sprain/strain, and a lumbar sprain/strain, as affirmed in this decision

The designated doctor, Dr. I, examined the claimant on May 17, 2014, and certified that same date that the claimant had not reached MMI. Dr. I's narrative report dated May 17, 2014, states that the examination reveals that the claimant has ongoing right shoulder problems, with limited range of motion and weakness associated to his work-related injury. Dr. I opined that the claimant is not at MMI because he needs surgery to the right shoulder, however the right shoulder injury is limited to a sprain/strain. Dr. I considered a surgical procedure for a non-compensable injury to determine that the claimant had not reached MMI. That certification is not adoptable.

Dr. I re-examined the claimant on September 20, 2014, and certified that the claimant had not reached MMI. Dr. I's narrative report dated September 20, 2014, states that the claimant has failed conservative treatment with regard to his right shoulder strain/sprain impingement and recommends surgery. Dr. I opined that because the claimant has not had right shoulder surgery, the claimant has not reached MMI. Again, Dr. I considered a surgical procedure for a non-compensable injury to determine that the claimant had not reached MMI. That certification is not adoptable.

Given that the compensable injury to the right shoulder is limited to a right shoulder sprain/strain, the hearing officer's determination that the claimant is not at MMI based on Dr. I's opinion that the claimant needs further surgery is not supported by the evidence.

In reviewing a "great weight" challenge, we must examine the entire record to determine if: (1) there is only "slight" evidence to support the finding; (2) the finding is so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust; or (3) the great weight and preponderance of the evidence supports its nonexistence. *See Cain v. Bain*, 709 S.W.2d 175 (Tex. 1986).

In applying this standard to the facts of this case, the hearing officer's determination that the claimant has not reached MMI, and because the claimant has not reached MMI, an IR would not be appropriate, is so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust. Accordingly, we reverse the hearing officer's determination that the claimant has not reached MMI, and because he has not reached MMI, IR would not be appropriate.

There are three certifications of MMI and IR from the post-designated doctor required medical examination doctor, (Dr. K). The hearing officer explained in his decision why each of the three certifications were not adoptable. First, Dr. K examined the claimant on November 21, 2014, and certified on December 9, 2014, that the claimant reached MMI on November 21, 2014, with a zero percent IR considering only the right shoulder sprain/strain. That certification cannot be adopted because it does not consider the entire compensable injury. Second, Dr. K certified that the claimant reached MMI on November 21, 2014, with a zero percent IR considering cervical sprain/strain, thoracic radiculitis, myofascitis, right ankle sprain/strain, right knee sprain/strain, lumbar sprain/strain, impingement syndrome, and bilateral wrists. That certification cannot be adopted because it considers conditions that are not part of the compensable injury. Third, Dr. K re-examined the claimant on July 14, 2014, and certified on July 24, 2014, that the claimant reached MMI on December 10, 2013, with a four percent IR. Dr. K's narrative report lists the claimant's diagnosis as right shoulder sprain/strain superimposed on pre-existing unrelated degenerative arthritis of the right AC joint. That certification cannot be adopted because it does not consider the entire compensable injury.

There are no other certifications of MMI/IR in evidence that can be adopted. Accordingly, we remand the issues of MMI and IR to the hearing officer for further action consistent with this decision.

SUMMARY

We affirm that portion of the hearing officer's determination that the compensable injury of (date of injury), extends to a cervical sprain/strain, thoracic radiculitis, a right ankle sprain/strain, a right knee sprain/strain, and a lumbar sprain/strain.

We reverse the hearing officer's determination that the claimant has not reached MMI, and because the claimant has not reached MMI, an IR is not appropriate, and we remand the issues of MMI and IR to the hearing officer for further action consistent with this decision.

REMAND INSTRUCTIONS

Dr. I is the designated doctor in this case. On remand, the hearing officer is to determine whether Dr. I is still qualified and available to be the designated doctor. If Dr. I 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.

The hearing officer is to advise the designated doctor that the compensable injury of (date of injury), is a right shoulder sprain/strain, cervical sprain/strain, thoracic radiculitis, a right ankle sprain/strain, a right knee sprain/strain, and a lumbar sprain/strain. The hearing officer is to advise the designated doctor that the compensable injury of (date of injury), does not extend to a right distal clavicle.

The hearing officer is to request the designated doctor to rate the entire compensable injury in accordance with 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) considering the medical record and the certifying examination.

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 the claimant's MMI and IR for the (date of injury), compensable injury.

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* Appeals Panel Decision 060721, decided June 12, 2006.

The true corporate name of the insurance carrier is **NEW HAMPSHIRE 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 78701-3218.

Veronica L. Ruberto
Appeals Judge

CONCUR:

Carisa Space-Beam
Appeals Judge

Margaret L. Turner
Appeals Judge