

APPEAL NO. 152445  
FILED MARCH 03, 2016

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 29, 2015, in Waco, 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), extends to a cervical sprain/strain, right shoulder contusion and right elbow contusion but does not extend to C6-7 spondylosis and osteophyte complex, C4-5 annular disc bulge, C5-6 minimal disc bulge, neurocognitive disorder due to traumatic brain injury (TBI), anxiety disorder or somatic symptom disorder; (2) the appellant/cross-respondent (claimant) reached maximum medical improvement (MMI) on March 29, 2014; (3) the claimant's impairment rating (IR) is zero percent; and (4) the claimant had disability from January 31, 2014, to the date of the CCH resulting from an injury sustained on (date of injury).

The claimant appealed the hearing officer's determinations regarding extent of injury (EOI), MMI and IR, based upon sufficiency of the evidence urging that the compensable injury extends to the claimant's diagnosed C6-7 spondylosis and osteophyte complex, C4-5 annular disc bulge, C5-6 minimal disc bulge, neurocognitive disorder due to TBI, anxiety disorder and somatic symptom disorder and that the designated doctor's certification of MMI and assignment of IR adopted by the hearing officer is contrary to the preponderance of the evidence.

The respondent/cross-appellant (carrier) appealed the hearing officer's determinations regarding EOI and disability urging that the evidence is insufficient to establish that the compensable injury extends to a cervical sprain/strain, right shoulder contusion and right elbow contusion or that the claimant had ongoing disability from January 31, 2014, through the date of the CCH.

DECISION

Affirmed in part and reversed and remanded in part.

The parties stipulated that: (1) the claimant sustained a compensable injury on (date of injury), which included contusions of the head, left shoulder, left forearm and left hand; (2) , was appointed by the Texas Department of Insurance, Division of Workers' Compensation (Division) on June 3, 2014, as a designated doctor to determine MMI, IR, and EOI; and (3) (Dr. S), was appointed by the Division on March 23, 2015, as a designated doctor to determine MMI, IR, and EOI.

The claimant testified that he was working under a 1200 pound commercial mower when the jack stands holding the mower collapsed allowing it to fall onto the claimant, causing the claimed injuries.

### **EXTENT OF INJURY**

The hearing officer's determination that the compensable injury of (date of injury), extends to a cervical sprain/strain, right shoulder contusion and right elbow contusion but does not extend to C6-7 spondylosis and osteophyte complex, C4-5 annular disc bulge, C5-6 minimal disc bulge, neurocognitive disorder due to TBI, anxiety disorder or somatic symptom disorder is supported by sufficient evidence and is affirmed.

### **DISABILITY**

The hearing officer's determination that the claimant had disability from January 31, 2014, to the date of the CCH resulting from an injury sustained on (date of injury), 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.

Dr. S, the second designated doctor in the case, examined the claimant on April 15, 2015, and provided alternate certifications. In the first certification he found the claimant reached MMI on March 29, 2014, with regard to the accepted conditions of head contusion, left shoulder contusion, left forearm contusion and left hand contusion. Alternatively, Dr. S determined that the claimant reached MMI on June 4, 2014, with

regard to both the accepted and disputed conditions. The IR assigned by Dr. S in each scenario was zero percent.

Following the CCH, the hearing officer issued a letter of clarification (LOC) to Dr. S requesting that he provide an amended Report of Medical Evaluation (DWC-69) certifying MMI and assigning an IR only for those conditions found by the hearing officer to be a part of the compensable injury, i.e. the accepted conditions together with a right shoulder contusion, right elbow contusion and cervical sprain/strain. In his response dated November 12, 2015, Dr. S indicated that the combination of conditions determined to be compensable did not "militate any change in the date of [MMI]." Dr. S also indicated the IR remained zero percent. The DWC-69 dated November 12, 2015, submitted by Dr. S with his LOC response certified MMI on June 4, 2014.

In her Finding of Fact No. 5, the hearing officer found:

Dr. [S's] certification that [the] [c]laimant reached MMI on March 29, 2014, with a zero percent [IR] is not contrary to the preponderance of the medical evidence.

Conclusion of Law No. 4 provides:

[the] [c]laimant reached MMI on March 29, 2014.

The only certification of MMI on March 29, 2014, in evidence is that of Dr. S dated June 23, 2015, which certification fails to rate the entire compensable injury by failing to rate the cervical sprain/strain, right shoulder contusion and right elbow contusion. Accordingly, the hearing officer's determination that the claimant reached MMI on March 29, 2014, with a zero percent IR is reversed and the issues of MMI and IR are remanded to the hearing officer for further action consistent with this decision.

There are two certifications in evidence which rate the entire compensable injury. As mentioned earlier, Dr. S issued a DWC-69 and response to the hearing officer's LOC dated November 12, 2015, which rated the entire compensable injury and which certified MMI on June 4, 2014, and assigned an IR of zero percent. This certification is entitled to presumptive weight unless it is found contrary to the other medical evidence in the record. Also in evidence is the DWC-69 and narrative report of Dr. P, the initial designated doctor, who examined the claimant on July 2, 2014, and who determined that the compensable injury included the conditions accepted by the carrier together with a cervical sprain/strain and contusions to the right shoulder and right elbow. In his report, Dr. P certified that the claimant reached MMI on May 23, 2014, and assigned an IR of nine percent based upon range of motion loss in the right and left shoulders.

Since there are two certifications in evidence which rate the entire compensable injury, we do not consider it appropriate to render a decision adopting one or the other. Accordingly, we remand the issues of MMI and IR to the hearing officer for the hearing officer to determine whether the claimant has reached MMI, and if so, to determine the correct IR.

### **SUMMARY**

We affirm the hearing officer's determination that the compensable injury of (date of injury), extends to a cervical sprain/strain, right shoulder contusion and right elbow contusion but does not extend to C6-7 spondylosis and osteophyte complex, C4-5 annular disc bulge, C5-6 minimal disc bulge, neurocognitive disorder due to TBI, anxiety disorder or somatic symptom disorder.

We affirm the hearing officer's determination that the claimant had disability from January 31, 2014, to the date of the CCH resulting from an injury sustained on (date of injury).

We reverse the hearing officer's determination that the claimant reached MMI on March 29, 2014, and remand the issue of MMI to the hearing officer for further action consistent with this decision.

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

### **REMAND INSTRUCTIONS**

On remand, the hearing officer is to make findings of fact, conclusions of law, and a decision regarding the issues of MMI and IR that is consistent with Section 408.1225(c), Section 408.125(c) and this decision. The hearing officer is not to consider additional evidence on remand.

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 **TEXAS MUTUAL INSURANCE COMPANY** and the name and address of its registered agent for service of process is

**RICHARD J. GERGASKO, PRESIDENT  
6210 EAST HIGHWAY 290  
AUSTIN, TEXAS 78723.**

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K. Eugene Kraft  
Appeals Judge

CONCUR:

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Carisa Space-Beam  
Appeals Judge

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Margaret L. Turner  
Appeals Judge