

APPEAL NO. 160959  
FILED JULY 20, 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 was held on April 7, 2016, 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 the loose body within the left elbow, mild edema and thickening of the ulnar nerve extending into the cubital tunnel with no adjacent mass lesion or mass affect, osteoarthritis of the medial and lateral joint compartments with sclerosis and marginal osteophytes, small intra-articular ossified body in the anterior and posterior aspects of the medial compartment, and small intra-articular ossified body in the radial capitellar compartment measuring up to 5mm in length; (2) the compensable injury of (date of injury), does extend to partial tear of the left biceps muscle, common extensor tendon inflammatory tendinosis, and partial thickness tear of the extensor tendon at the lateral epicondylar origin; (3) the appellant (claimant) reached maximum medical improvement (MMI) on June 23, 2015; and (4) the claimant's impairment rating (IR) is one percent.

The claimant appealed the hearing officer's determinations on all disputed issues arguing that the claimant has not reached MMI as determined by. (Dr. S), the designated doctor appointed by the Texas Department of Insurance, Division of Workers' Compensation (Division), and that the hearing officer's extent-of-injury determination is contrary to the preponderance of the evidence.

The respondent (carrier) responded, urging affirmance.

## DECISION

Affirmed in part and reversed and remanded in part.

The parties stipulated that the carrier has accepted as compensable a left elbow strain. The claimant was injured on (date of injury), while pulling heavy cable back into a sewer cleaning machine.

## EXTENT OF INJURY

The hearing officer's determination that the compensable injury of (date of injury), extends to a partial tear of the left biceps muscle, common extensor tendon inflammatory tendinosis and a partial thickness tear of the extensor tendon at the lateral epicondylar origin but does not extend to a loose body within the left elbow, mild edema and thickening of the ulnar nerve extending into the cubital tunnel with no adjacent mass lesion or mass affect, osteoarthritis of the medial and lateral joint compartments

with sclerosis and marginal osteophytes, small intra-articular ossified body in the anterior and posterior aspects of the medial compartment, and small intra-articular ossified body in the radial capitellar compartment measuring up to 5mm in length 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 claimant reached MMI on June 23, 2015, according to the certification dated July 2, 2015, from (Dr. R), a referral of the treating doctor. The hearing officer further determined that the claimant’s IR was one percent derived from a two percent upper extremity impairment due to abnormal left elbow range of motion as assigned by Dr. R.

In his narrative report, Dr. R noted that the claimant’s orthopedic surgeon, (Dr. H), had assessed left elbow loose bodies, osteoarthritis and cubital tunnel syndrome and that Dr. H had twice sought pre-authorization for left elbow arthroscopic surgery for debridement, capsulotomy and ulnar nerve decompression to treat such conditions. Because the carrier denied the requests for surgery, Dr. H referred the claimant for a MMI evaluation on June 23, 2015, indicating that no further treatment was available through the workers’ compensation system and that the claimant would pursue the recommended surgical intervention through his private health care insurance. Dr. R’s certified MMI date is not based upon the earliest date after which further material recovery from or lasting improvement to the compensable left elbow strain, partial tear of the left biceps muscle, common extensor tendon inflammatory tendinosis and partial thickness tear of the extensor tendon at the lateral epicondylar origin can no longer

reasonably be anticipated. Rather Dr. R's MMI date is the date the claimant's surgeon determined not to further pursue left elbow arthroscopy, a procedure recommended for treatment of conditions determined by the hearing officer not to be compensable. Finally Dr. R listed the claimant's diagnoses as left elbow sprain/strain and osteoarthritis of the medial and lateral elbow compartments, a condition not part of the compensable injury, and considered such condition in assigning IR. Because Dr. R considered conditions determined by the hearing officer not to be compensable in certifying MMI and assigning an IR, his certification cannot be adopted. Accordingly, we reverse the hearing officer's determinations that the claimant reached MMI on June 23, 2015, with an IR of one percent.

The only other certifications of MMI/IR in evidence are those of Dr. S, the designated doctor, dated October 19, 2015, and the certification from (Dr. B), a referral of the treating doctor, dated May 20, 2015. Each of these doctors determined that the claimant has not reached MMI due to his need for left elbow arthroscopy. Because such treatment is recommended for conditions determined by the hearing officer not to be part of the compensable injury, neither certification can be adopted.

Since there is no certification in evidence that can be adopted, we remand the issues of MMI and IR to the hearing officer for further action consistent with this decision.

## **SUMMARY**

We affirm the hearing officer's determination that the compensable injury (date of injury), extends to a partial tear of the left biceps muscle, common extensor tendon inflammatory tendinosis and a partial thickness tear of the extensor tendon at the lateral epicondylar origin but does not extend to a loose body within the left elbow, mild edema and thickening of the ulnar nerve extending into the cubital tunnel with no adjacent mass lesion or mass affect, osteoarthritis of the medial and lateral joint compartments with sclerosis and marginal osteophytes, small intra-articular ossified body in the anterior and posterior aspects of the medial compartment, and small intra-articular ossified body in the radial capitellar compartment measuring up to 5mm in length.

We reverse the hearing officer's determinations that the claimant reached MMI on June 23, 2015, with an IR of one percent and remand the issues of MMI/IR to the hearing officer.

## **REMAND INSTRUCTIONS**

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

Dr. S is no longer qualified or is not available to serve as the designated doctor, then another designated doctor is to be appointed to determine the claimant's MMI/IR for the (date of injury), compensable injury.

The hearing officer is to instruct the designated doctor that the compensable injury of (date of injury), extends to a left elbow strain, a partial tear of the left biceps muscle, common extensor tendon inflammatory tendinosis, and partial thickness tear of the extensor tendon at the lateral epicondylar origin but does not extend to loose body within the left elbow, mild edema and thickening of the ulnar nerve extending into the cubital tunnel with no adjacent mass lesion or mass affect, osteoarthritis of the medial and lateral joint compartments with sclerosis and marginal osteophytes, small intra-articular ossified body in the anterior and posterior aspects of the medial compartment, and small intra-articular ossified body in the radial capitellar compartment measuring up to 5mm in length.

The hearing officer should request that the designated doctor give an opinion on MMI and IR of the compensable injury based on the claimant's condition as of the MMI date certified, considering the medical record and the certifying examination in accordance with Rule 130.1(c)(3) and 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).

The parties are to be provided with the designated doctor's new certification of MMI and assignment of IR and are to be allowed an opportunity to respond. The hearing officer is then to make a determination concerning MMI/IR consistent with the evidence and 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 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