APPEAL NO. 161082
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 (CCH) was held on April 28, 2016, in Houston, Texas, with the record closing on May 10, 2016, with (hearing officer) presiding as hearing officer. The hearing officer resolved the disputed issues by deciding that: (1) the Texas Department of Insurance, Division of Workers' Compensation (Division) does not have jurisdiction to revisit the issue of disability for the period from November 19 through November 26, 2013; (2) the appellant (claimant) reached maximum medical improvement (MMI) on November 23, 2015, with a 7% impairment rating (IR); (3) the claimant did not have disability from November 27, 2013, through April 3, 2014; and (4) the claimant had disability from November 24, 2015, through April 1, 2016.

The claimant appealed the hearing officer's determinations, arguing that the preponderance of the evidence is contrary to the MMI and IR certified by (Dr. C), the Division-selected designated doctor, and adopted by the hearing officer and that the hearing officer erred in finding she had no jurisdiction to revisit the issue of disability for the period from November 19 through November 26, 2013.

The respondent (carrier) responded, urging affirmance.

DECISION

Affirmed in part and reversed and remanded in part.

The parties stipulated that the claimant sustained a compensable injury on (date of injury), in the form of DeQuervain's syndrome of the left thumb and tenosynovitis of the left thumb.

DISABILITY

The hearing officer's determinations that the Division does not have jurisdiction to revisit the issue of disability for the period from November 19 through November 26, 2013, since such disputed issue was resolved at a previous CCH; that the claimant did not have disability from November 27, 2013, through April 3, 2014; and that the claimant had disability from November 24, 2015, through April 1, 2016, are supported by sufficient evidence and are 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. C, the designated doctor in this case, examined the claimant on January 29, 2016, and determined that the claimant reached MMI on the statutory date of November 23, 2015. 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. C issued two alternate certifications but in each he assigned a whole person IR of 7% based upon a 14% IR for range of motion (ROM) loss of the left thumb together with a 10% IR for sensory impairment for the left thumb partial radial nerve and 3% IR for muscle weakness of the median nerve below mid forearm. We note that in one certification, Dr. C provided an IR for a sprain of the interphalangeal joint of the left thumb together with trigger thumb, left thumb status post trigger thumb release. In his alternate certification, Dr. C considered the additional conditions of sesamoiditis of the metacarpophalangeal joint of the left thumb, a compression injury of the radial digital nerve of the left thumb requiring subsequent sesamoidectomy and RDN neurolysis of the left thumb/wrist/hand. Dr. C failed to provide an IR for the compensable left thumb DeQuervain's syndrome and tenosynovitis, and in certifying MMI and assigning an IR, considered radial and median nerve conditions that are not part of the compensable injury. For such reason, neither of Dr. C's certifications of MMI and assignment of IR can be adopted. We accordingly reverse the hearing officer's determination that the claimant reached MMI on November 23, 2015, with a 7% IR.

There is one other certification of MMI/IR in evidence. The post-designated doctor required medical examination doctor, (Dr. D), who examined the claimant on January 21, 2016, certified that the claimant reached MMI on the statutory date of November 23, 2015, with a whole person IR of 2%, resulting from a 3% upper extremity impairment for ROM of the left thumb. In certifying MMI on the statutory date, Dr. D points out that the claimant underwent a surgical procedure subsequent to the statutory MMI date which would result in further improvement of her condition; however, we note that such surgery was for a left thumb sesamoidectomy and left hand neurolysis radial digital nerve of the thumb, neither of which conditions is part of the compensable injury. Furthermore, Dr. D assigns his IR for left thumb arthrofibrosis and specifically states in his report that "DeQuervain's syndrome accrues no specific impairment" and ". . . tenosynovitis [is] not currently present and, as such, accrue[s] no impairment." Dr. D's certification of MMI and assignment of IR does not rate the compensable injury and is not adoptable.

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 Division does not have jurisdiction to revisit the issue of disability for the period from November 19 through November 26, 2013; that the claimant did not have disability from November 27, 2013, through April 3, 2014; and that the claimant had disability from November 24, 2015, through April 1, 2016.

We reverse the hearing officer's determination that the claimant reached MMI on November 23, 2015, with a 7% IR and remand the issues of MMI/IR to the hearing officer.

REMAND INSTRUCTIONS

Dr. C is the designated doctor in this case. On remand, the hearing officer is to determine whether Dr. C is still qualified and available to be the designated doctor. If Dr. C 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 DeQuervain's syndrome of the left thumb and tenosynovitis of the left thumb. The hearing officer should request that the designated doctor give an opinion on MMI (informing the designated doctor of the correct statutory date and that the MMI date can be no later than the statutory date) 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 AMA Guides. The hearing officer is to request that the parties stipulate to the date of statutory MMI applicable to this case, or if not, take evidence from the parties so the hearing officer can determine the correct date of statutory MMI.

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 **ACE AMERICAN INSURANCE COMPANY** and the name and address of its registered agent for service of process is

CT CORPORATION SYSTEM
1999 BRYAN STREET, SUITE 900
DALLAS, TEXAS 75201-3136.

K. Eugene Kraft
Appeals Judge

CONCUR:

Carisa Space-Beam
Appeals Judge

Margaret L. Turner
Appeals Judge