APPEAL NO. 162437
FILED JANUARY 26, 2017

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 17, 2016, in (city), Texas, with (hearing officer) presiding as hearing officer. The hearing officer resolved the disputed issues by deciding that: (1) the appellant (claimant) had disability from September 10, 2015, through May 1, 2016; (2) the claimant reached maximum medical improvement (MMI) on September 9, 2015; and (3) the claimant's impairment rating (IR) is 6%.

The claimant appealed the hearing officer's MMI and IR determinations, contending that those determinations are not supported by the evidence. The claimant also contended that the MMI/IR certification by (Dr. A), the designated doctor appointed by the Texas Department of Insurance, Division of Workers' Compensation (Division) to determine MMI and IR and adopted by the hearing officer was not performed 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) (AMA Guides). The respondent (self-insured) responded, urging affirmance of the hearing officer's determinations.

The hearing officer's determination that the claimant had disability from September 10, 2015, through May 1, 2016, was not appealed and has become final pursuant to Section 410.169.

DECISION

Reformed in part and reversed and remanded in part.

The parties stipulated in part that the claimant sustained a compensable injury on (date of injury), in the form of a right shoulder sprain, a right elbow sprain, a right wrist contusion, and a right shoulder lip labrum tear. We note that Finding of Fact No. 1.D. incorrectly omits "right" from right wrist contusion. Accordingly, we reform Finding of Fact No. 1.D. to state "right wrist contusion" to conform with the condition as stipulated by the parties at the CCH.

The claimant testified he was injured when he lifted a large instrument weighing approximately 60 pounds from the ground to a counter approximately four feet high.

MMI

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.

The hearing officer determined that the claimant reached MMI on September 9, 2015, with a 6% IR as certified by Dr. A, the designated doctor.

Dr. A initially examined the claimant on September 22, 2015, and certified that the claimant had not reached MMI but was expected to do so on or about January 1, 2016. In his attached narrative report Dr. A noted that the claimant had had a right shoulder arthroscopic debridement, acromial decompression, and distal clavicle resection of the right shoulder on April 9, 2015. Dr. A opined that the claimant's recovery had been complicated by a delay in surgical intervention, that active symptomatology and examination findings persist but slow improvement had been noted, and that "substantive improvement can be anticipated."

Dr. A next examined the claimant on April 25, 2016, and certified that the claimant reached MMI on September 9, 2015, with a 6% IR. Dr. A noted that he had previously examined the claimant on September 22, 2015, for MMI and IR purposes, and that he had at that time opined that the claimant had not reached MMI. Dr. A stated in his narrative report that at the time of his previous examination on September 22, 2015, active symptomatology and examination findings persisted but slow improvement had been noted, and that "substantive improvement could be anticipated." Dr. A explained that he chose the September 9, 2015, date of MMI because the claimant had completed 21 physical therapy sessions after his surgery, there were no records indicating further treatment, and no further material recovery was anticipated.

In Appeals Panel Decision (APD) 012284, decided November 1, 2001, the Appeals Panel noted that the question regarding the date of MMI was not whether the claimant actually recovered or improved during the period at issue, but whether based upon reasonable medical probability, material recovery or lasting improvement could reasonably be anticipated. The Appeals Panel held that it is of no moment that the treatment did not ultimately prove successful in providing material recovery or lasting improvement in the claimant's condition if improvement could reasonably be anticipated. *See also* APD 110670, decided July 8, 2011; APD 120071, decided March 9, 2012.

In his September 22, 2015, report, Dr. A specifically noted that substantive improvement could be anticipated at that time. However, in his April 25, 2016, report,

Dr. A placed the claimant at MMI as of September 9, 2015, prior to his September 22, 2015, certification that the claimant had not reached MMI, because the claimant had completed 21 physical therapy sessions after his surgery, there were no records indicating further treatment, and no further material recovery is anticipated. Dr. A's reports regarding MMI are inconsistent. Dr. A did not explain why he placed the claimant at MMI on September 9, 2015, when he had previously opined on September 22, 2015, that substantive improvement could be anticipated; Dr. A merely indicated that the claimant's condition had not improved after September 9, 2015. Dr. A did not base his September 9, 2015, date of MMI on the definition of MMI set out in Section 401.011(31)(A). Therefore, the hearing officer's determination that the claimant reached MMI on September 9, 2015, is against the great weight and preponderance of the evidence. Accordingly, we reverse the hearing officer's determination that the claimant reached MMI on September 9, 2015. Because we have reversed the hearing officer's determination of MMI, we also reverse the hearing officer's determination that the claimant's IR is 6%.

There is one other MMI/IR certification in evidence, which is from (Dr. R), a referral doctor selected by the treating doctor. Dr. R examined the claimant on July 13, 2016, and certified that the claimant reached MMI on May 1, 2016, with a 13% IR based on a diagnosis of a superior glenoid labrum lesion of the right shoulder. As noted above, the parties stipulated that the claimant sustained a compensable injury in the form of a right shoulder sprain, right elbow sprain, right wrist contusion, and right shoulder lip labrum tear. Dr. R's MMI/IR certification does not consider and rate the compensable injury in this case and as such it cannot be adopted.

There are no other MMI/IR certifications in evidence. Accordingly, we remand the issues of MMI and IR to the hearing officer for further action consistent with this decision. Pursuant to Section 410.203(c), the Appeals Panel may not remand a case more than once. Because the remanded issues of MMI and IR must be addressed by a designated doctor and Dr. A is the designated doctor in this case, we note that there are inconsistencies regarding the range of motion (ROM) measurements contained in Dr. A's September 22, 2015, report. Dr. A noted diminished ROM measurements of the claimant's left shoulder and of the claimant's left forearm; however, it is undisputed that the injury was to the claimant's right shoulder and elbow and not his left shoulder and elbow.

SUMMARY

We reform Finding of Fact No. 1.D. to state "right wrist contusion" to confirm with the condition as stipulated by the parties at the CCH.

We reverse the hearing officer's determination that the claimant reached MMI on September 9, 2015, and we 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 6%, and we remand the issue of IR to the hearing officer for further action consistent with this decision.

REMAND INSTRUCTIONS

Dr. A is the designated doctor in this case. On remand, the hearing officer is to determine whether Dr. A is still qualified and available to be the designated doctor. If Dr. A 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 IR for the (date of injury), compensable injury.

The parties did not stipulate to the date of statutory MMI, nor did the hearing officer make a finding on the statutory date of MMI. The hearing officer is to ask the parties to stipulate to the date of statutory MMI or make a finding regarding the date of statutory MMI. The hearing officer is to inform the designated doctor that the (date of injury), compensable injury extends to a right shoulder sprain, right elbow sprain, right wrist contusion, and right shoulder lip labrum tear, and the date of statutory MMI.

If Dr. A is still qualified and available to serve as the designated doctor, the hearing officer is to advise Dr. A of the date of statutory MMI, and that the compensable injury extends to a right shoulder sprain, right elbow sprain, right wrist contusion, and right shoulder lip labrum tear. The hearing officer is also to instruct Dr. A that MMI is 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, and does not require actual improvement. The hearing officer is also to confirm with Dr. A that the diminished ROM measurements taken of the claimant's shoulders and forearms for which he bases the claimant's IR correspond to the correct compensable injuries. The hearing officer is then to request Dr. A rate the entire compensable injury, which cannot be after the statutory date of MMI, in accordance with the Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association.

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 MMI and 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* APD 060721, decided June 12, 2006.

The true corporate name of the insurance carrier is **EL PASO INDEPENDENT SCHOOL DISTRICT (a self-insured governmental entity)** and the name and address of its registered agent for service of process is

JUAN CABRERA, SUPERINTENDENT
6531 BOEING DRIVE
EL PASO, TEXAS 79925.

Carisa Space-Beam
Appeals Judge

CONCUR:

K. Eugene Kraft
Appeals Judge

Margaret L. Turner
Appeals Judge