APPEAL NO. 100152
FILED APRIL 8, 2010

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 January 11, 2010. The hearing officer determined that: (1) the appellant (claimant) reached clinical maximum medical improvement (MMI) on January 9, 2009; (2) the claimant's impairment rating (IR) is 12%;[1] and (3) the MMI and the assigned IR from (Dr. M) on December 15, 2008, was not the first certification of MMI and assigned IR and did not become final under Section 408.123. The claimant appealed all three of the hearing officer's determinations. The respondent (carrier) responded, urging affirmance.

DECISION

Affirmed in part and reversed and rendered in part.

The parties stipulated that on _____, the claimant sustained an injury while performing duties within the course and scope of his employment with the employer.

FINALITY UNDER SECTION 408.123

The hearing officer's determination that the certification of MMI and the assigned IR from Dr. M on December 15, 2008, was not the first certification of MMI and assigned IR and did not become final under Section 408.123 is supported by sufficient evidence and is affirmed.

MMI AND IR

Section 408.1225(c) provides that the report of the designated doctor has presumptive weight, and the Texas Department of Insurance, Division of Workers' Compensation (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. *See* Appeals Panel Decision (APD) 040313-s, decided April 5, 2004.

[1] We note that the hearing officer's Finding of Fact No. 6 and Conclusion of Law No. 4 state that the claimant's IR is 12%, while the decision states that the claimant's IR is 11%.

The Division initially appointed (Dr. Ar) to determine MMI and IR in 2007. Dr. Ar examined the claimant on October 8, 2007, and certified that the claimant reached MMI on that same date with a 14% IR. Dr. Ar did not respond to a letter of clarification (LOC) and subsequently (Dr. Al) was appointed as the second designated doctor. Dr. Al examined the claimant on December 28, 2008, and certified that the claimant had not reached MMI. The treating doctor, Dr. M, examined the claimant on December 15, 2008, and certified that the claimant reached MMI on that date with a 20% IR.

The Division appointed (Dr. C) as the third designated doctor to determine the claimant's MMI, IR, and ability to return to work. Dr. C examined the claimant on January 9, 2009, and determined that the claimant had not yet reached MMI but was expected to do so on or about April 9, 2009. Dr. C opined that the claimant continued to have severe pain and noted that surgery was being considered. An LOC dated April 20, 2009, was sent to Dr. C notifying her that the claimant's statutory date of MMI is March 30, 2009. Dr. C responded on May 4, 2009, certifying that the claimant reached MMI on January 9, 2009, with an 11% IR based on range of motion (ROM) measured on the date of examination 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).

Another LOC dated July 27, 2009, was sent to Dr. C questioning why she went back in time to the date of the January 9, 2009, examination for the date of MMI when she initially anticipated MMI to occur on or about April 9, 2009, and alleging that Dr. C had not performed a full examination. Dr. C responded on July 28, 2009, stating "[a]t the time of my examination, the [claimant] was placed not at MMI pending the possibility of a second surgery." Dr. C noted that the claimant did not have surgery, and he had reached statutory MMI on March 30, 2009.

In APD 010297-s, decided March 29, 2001, the designated doctor examined the claimant and certified that the claimant had reached MMI and assigned an IR. The claimant underwent a series of injections and physical therapy after the certified MMI date and testified at the CCH that his condition improved by 60%. The designated doctor was sent additional medical reports and asked if they changed his opinion. Without physically re-examining the claimant, the designated doctor responded changing his date of MMI and maintaining the IR. The hearing officer gave the designated doctor's amended report presumptive weight and adopted it. We reversed and remanded the case back to the hearing officer because the amended certification of MMI was done without a medical examination in violation of Rule 130.1(b)(4)(B). We find the instant case distinguishable from APD 010297-s because Dr. C did perform an examination of the claimant on January 9, 2009, and her certification of MMI and IR was based on that examination.

Dr. C assessed an 11% whole person IR based on the claimant's right shoulder ROM measurements as follows: 80° flexion for 7% upper extremity (UE) impairment and 40° extension for 1% UE impairment using figure 38, page 3/43; 60° abduction for 6% UE impairment and 30° adduction for 1% UE impairment using figure 41, page 3/44;

and 60° internal rotation for 2% UE impairment and 40° external rotation for 1% UE impairment using figure 44, page 3/45 of the AMA Guides. Dr. C assigned an 18% (7 + 1 + 6 + 1 + 2 + 1) UE impairment which he converted to an 11% whole person IR using Table 3, page 3/20. However, Dr. C mistakenly noted on the Report of Medical Evaluation (DWC-69) dated May 4, 2009, that the claimant's IR is 12%.

The hearing officer found that Dr. C certified the claimant reached MMI on January 9, 2009, and assigned a 12% IR, and that Dr. C's findings, as the properly appointed designated doctor, are entitled to presumptive weight and are not overcome by a preponderance of the medical evidence. The hearing officer noted in the Background Information section of the decision that "[b]ased on his [Dr. C's] evaluation of the [c]laimant and the IR, the 11% constitutes an editorial error," and although the hearing officer's finding of fact and conclusion of law state the claimant's IR is 12%, the decision portion states the claimant's IR is 11%.

The hearing officer's finding that the certification of MMI and assessment of IR by Dr. C, the properly appointed designated doctor, was entitled to presumptive weight and not overcome by the preponderance of the other medical evidence is supported by sufficient evidence. The hearing officer's determination that the claimant reached clinical MMI on January 9, 2009, is supported by sufficient evidence and is affirmed. A review of Dr. C's assessment of IR based on right shoulder ROM measurement as depicted in the May 4, 2009, LOC response, discussed above, reveals that Dr. C correctly applied the AMA Guides to assess an 11% IR. As previously noted, Dr. C mistakenly noted on the DWC-69 that the claimant's IR is 12%. We therefore reverse the hearing officer's decision that the claimant's IR is 12%, and render a new decision that the claimant's IR is 11%.

SUMMARY

We affirm the hearing officer's determination that the MMI/IR certification from Dr. M on December 15, 2008, was not the first certification of MMI/IR and did not become final under Section 408.123. We affirm the hearing officer's determination that the claimant reached clinical MMI on January 9, 2009.

We reverse the hearing officer's determination that the claimant's IR is 12% and render a new decision that the claimant's IR is 11%.

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

RON O. WRIGHT, PRESIDENT
6210 EAST HIGHWAY 290
AUSTIN, TEXAS 78723.

_____
Carisa Space-Beam
Appeals Judge

CONCUR:

_____
Veronica L. Ruberto
Appeals Judge

_____
Margaret L. Turner
Appeals Judge