APPEAL NO. 100766
FILED AUGUST 16, 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 February 22, 2010, continued to April 8, 2010, with the record closing on May 17, 2010. The issues before the hearing officer were:

(1) What is the maximum medical improvement (MMI) date?

(2) Has the appellant/cross-respondent (carrier) underpaid temporary income benefits (TIBs) for the period from July 12 through December 22, 2008?

(3) Has the respondent/cross-appellant (claimant) had disability from "December 12, 2008, through the date of MMI?" [1]

The hearing officer determined that: (1) the MMI date is December 15, 2008; (2) the carrier underpaid TIBs for the period from July 12 through December 15, 2008, in the amount of $979.74; the carrier is not liable for TIBs for the period of December 16 through December 22, 2008; and (3) the claimant had disability from December 12, 2008, through the date of MMI, December 15, 2008.

The carrier appealed the hearing officer's TIBs determination, and the claimant did not respond to the carrier's appeal. The claimant cross-appealed the hearing officer's MMI and disability determinations and the carrier responded, urging affirmance. Additionally, the claimant cross-appealed the hearing officer's evidentiary ruling on the admission of evidence.

DECISION

Reversed and remanded.

NEWLY DISCOVERED EVIDENCE

The carrier attached to its appeal a document purported to be the carrier's financial records of TIBs payments to the claimant's attorney. Documents submitted for the first time on appeal are generally not considered unless they constitute newly discovered evidence. *See* generally, Appeals Panel Decision (APD) 93111, decided March 29, 1993; Black v. Wills, 758 S.W.2d 809 (Tex. App.-Dallas 1988, no writ). In determining whether new evidence submitted with an appeal requires remand for further

[1] At the CCH, the hearing officer correctly states that the disability issue in dispute is from December 23, 2008, through (the date of MMI is in dispute), as reported out of the benefit review conference (BRC) report; however, the hearing officer incorrectly states in her decision that the disability period begins on "December 12, 2008," rather than December 23, 2008.

consideration, the Appeals Panel considers whether the evidence came to the knowledge of the party after the hearing, whether it is cumulative of other evidence of record, whether it was not offered at the hearing due to a lack of diligence, and whether it is so material that it would probably result in a different decision. *See* APD 051405, decided August 9, 2005. Upon our review, we cannot agree that the evidence meets the requirements of newly discovered evidence and will not be considered.

EVIDENTIARY RULING

At the CCH, the carrier offered into evidence a deposition on written questions to the designated doctor document. The claimant objected to its admission into evidence on the basis that the deposition on written questions was an improper communication by the carrier with the designated doctor, pursuant to 28 TEX. ADMIN. CODE § 126.7(l)(2) (Rule 126.7(l)(2)). To obtain reversal of a decision based upon error in the admission or exclusion of evidence, it must be shown that the evidentiary ruling was in fact error, and that the error was reasonably calculated to cause, and probably did cause the rendition of an improper decision. *See* APD 051705, decided September 1, 2005. Even if the admission of this document could be considered error under the facts of this case, any error was harmless, because the hearing officer did not render a decision based on this document, and it does not amount to reversible error.

DATE OF MMI

At issue was the claimant's MMI date. 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. The parties stipulated that the claimant sustained a compensable injury on _____. It is undisputed that (Dr. P) was appointed as the designated doctor to determine the claimant's MMI, impairment rating (IR) and ability to return to work. The evidence reflects that Dr. P examined the claimant on May 11, 2009, and certified that the claimant reached MMI on May 11, 2009, with a zero percent IR. Without physically re-examining the claimant, Dr. P twice amended his prior certification of MMI/IR to July 15, 2008, with a zero percent IR and to July 29, 2009, with a zero percent IR. The Appeals Panel has held that an amended certification of MMI done without a medical examination is a violation of Rule 130.1(b)(4)(B); which requires the certifying doctor to perform a complete medical examination of the injured employee for the explicit purpose of determining MMI. *See* APD 100152, decided April 8, 2010; *See also* APD 010297-s, decided March 29, 2001.

In evidence are Report(s) of Medical Evaluation (DWC-69) for each certification of MMI/IR from Dr. P for the MMI dates of May 11, 2009, July 15, 2008, and July 29, 2009, with a zero percent IR for each. Further, the evidence shows that Dr. P examined the claimant only once, on May 11, 2009, when he certified and subsequently amended his certification of MMI. The hearing officer determined that Dr. P's "certification that

[the] [c]laimant's date of MMI was July 29, 2009, is invalid as it is a date after the doctor examined [the] [c]laimant and it is not supported by a preponderance of the evidence." In the Background Information section of her decision, the hearing officer states that the certification of MMI/IR is a prospective MMI date and invalid. We disagree with the hearing officer's rationale that Dr. P's certification of MMI is a prospective date of MMI,[2] however, Dr. P's certification of MMI of July 29, 2009, cannot be adopted because Dr. P amended his certification of MMI without an examination in violation of Rule 130.1(b)(4)(B). Therefore, the only valid and adoptable certification from Dr. P is the certification that the claimant reached MMI on May 11, 2009, with a zero percent IR.

The report of the designated doctor has presumptive weight. The hearing officer did not determine whether Dr. P's certification of MMI, as of the date of May 11, 2009, had presumptive weight. Rather, the hearing officer adopted (Dr. H)'s, the post-designated doctor required medical examination doctor, certification of MMI/IR. Dr. H examined the claimant on February 9, 2010, and certified that the claimant reached MMI on December 15, 2008. The hearing officer did not determine whether the preponderance of the evidence is contrary to the designated doctor's other certifications of MMI/IR prior to adopting Dr. H's certification of MMI/IR. Accordingly, we reverse the hearing officer's determination that the claimant's MMI date is December 15, 2008, and we remand the MMI issue to the hearing officer.

The designated doctor in this case is Dr. P. On remand, the hearing officer is to determine whether Dr. P is still qualified and available to be the designated doctor, and if so, request that Dr. P provide a DWC-69 and narrative report certifying when the claimant reached MMI based on the compensable injury, considering the medical record and certifying examination(s). The hearing officer is to provide the letter of clarification and the designated doctor's response to the parties and allow the parties an opportunity to respond and then make a determination regarding the MMI date. If Dr. P is no longer qualified and available to serve as the designated doctor, then another designated doctor is to be appointed pursuant to Rule 126.7(h) to determine the claimant's MMI date.

TIBS

Section 408.103(a) provides that subject to Sections 408.061 and 408.062, the amount of a TIBs is equal to: (1) 70% of the amount computed by subtracting the employee's weekly earnings after the injury from the employee's average weekly wage (AWW); or (2) for the first 26 weeks, 75% of the amount computed by subtracting the employee's weekly earnings after the injury from the employee's AWW if the employee earns less than $8.50 an hour. Rule 129.3(d) provides that the carrier shall calculate the employee's lost wages by subtracting the post-injury earnings from the AWW.

[2] *See* APD 100636-s, decided July 16, 2010, in which the Appeals Panel states that a date of MMI becomes prospective if it is projected to occur at some time after the certification of MMI is made.

At issue was whether the carrier underpaid TIBs for the period of July 12 through December 22, 2008. The parties stipulated that the claimant's AWW is $350.62;[3] however, the hearing officer based her TIBs determination on an incorrect AWW of $365.45. Additionally, in evidence is the claimant's check stubs from March 30 to July 5, 2008, which show that the claimant earned less than $8.50 per hour; however, the hearing officer misapplied the TIBs rate based on the claimant's hourly earnings, pursuant to Section 408.103.

Given that we have reversed and remanded the MMI issue to the hearing officer to determine the claimant's MMI date, and the hearing officer has calculated the amount of TIBs based on an incorrect AWW of $365.45 and misapplied the TIBs rate based on the claimant's hourly earnings, to determine whether that the carrier is liable for TIBs for the period of July 12 through December 22, 2008, the hearing officer's TIBs determination is legally incorrect. Accordingly, we reverse the hearing officer's determination that the carrier underpaid TIBs for the period from July 12 through December 15, 2008, in the amount of $979.74; the carrier is not liable for TIBs for the period of December 16 through December 22, 2008, and we remand the TIBs issue to the hearing officer.

On remand, the hearing officer is to apply the correct AWW amount and TIBs rate to determine whether the carrier underpaid TIBs for the period of July 12 through December 22, 2008.

DISABILITY

In evidence is a prior Decision and Order dated December 23, 2008, in which the hearing officer determined that the claimant had disability from July 12 and continuing to the date of the CCH, December 22, 2008.[4] In the instant case, the disability issue reported from the BRC is whether the claimant had disability for the period of December 23, 2008, through the MMI date, July 29, 2009.

The hearing officer determined that the claimant had disability from December 12 through December 15, 2008, a disability period that had been decided in a prior Decision and Order dated December 23, 2008. The hearing officer's decision is incomplete because she did not make findings of fact, conclusions of law or a decision on the disability period in dispute. Accordingly, we reverse the hearing officer's disability determination by striking the hearing officer's determination that the "[c]laimant had disability from December 12, 2008, through December 15, 2008," and we remand the disability issue to the hearing officer.

On remand, the hearing officer is to determine whether the claimant had disability for the period of December 23, 2008, through the MMI date.

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[3] We note that the hearing officer incorrectly states in her decision that the parties stipulated to an AWW of $364.45 (and also lists in her decision an AWW of $365.45), and based the TIBs issue on an incorrect amount of AWW.

[4] Division records show that the hearing officer's decision became final on March 7, 2009.

SUMMARY

We reverse the hearing officer's determination that the claimant's MMI date is December 15, 2008, and we remand the MMI issue to the hearing officer.

We reverse the hearing officer's determination that the carrier underpaid TIBs for the period from July 12 through December 15, 2008, in the amount of $979.74; the carrier is not liable for TIBs for the period of December 16 through December 22, 2008, and we remand the TIBs issue to the hearing officer.

We reverse by striking the hearing officer's determination that the claimant had disability from December 12 through December 15, 2008, and we remand the disability issue to the hearing officer.

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 **ILLINOIS NATIONAL INSURANCE COMPANY** and the name and address of its registered agent for service of process is

CORPORATION SERVICE COMPANY
211 EAST 7TH STREET, SUITE 620
AUSTIN, TEXAS 78701-3232.

_____
Veronica L. Ruberto
Appeals Judge

CONCUR:

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Cynthia A. Brown
Appeals Judge

_____
Thomas A. Knapp
Appeals Judge