APPEAL NO. 100993
FILED SEPTEMBER 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 was held on June 23, 2010. The hearing officer resolved the disputed issues by deciding that: (1) the first certification of maximum medical improvement (MMI) and impairment rating (IR) assigned by (Dr. P) on August 6, 2008, did not become final under Section 408.123; (2) the respondent (claimant) reached MMI on August 6, 2008; and (3) the claimant's IR is 20%.

The appellant (carrier) appealed, disputing the hearing officer's determinations of MMI, IR, and that the first certification assigned by Dr. P did not become final under Section 408.123. The claimant responded, urging affirmance.

DECISION

Affirmed in part and reversed and remanded in part.

The parties stipulated that the claimant sustained a compensable injury on _____. The claimant testified that he injured his low back when he caught a patient that passed out during an x-ray procedure. The parties stipulated that Dr. P performed the impairment evaluations in this case on referral from the treating doctor and that the date of statutory MMI did not occur until after August 6, 2008.

FINALITY UNDER SECTION 408.123

The hearing officer's determination that the first certification of MMI and IR assigned by Dr. P on August 6, 2008, did not become final under Section 408.123 is supported by sufficient evidence and is affirmed.

MMI AND 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 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.

Dispute Resolution Information System notes are in evidence and an entry dated October 22, 2007, indicate that the Division-selected designated doctor, (Dr. S) determined on May 10, 2007, that the claimant had not yet reached MMI. An additional entry dated November 9, 2007, states that the claimant was again scheduled for an examination with the designated doctor on November 20, 2007. However, no certifications or narratives from the designated doctor were admitted into evidence. Therefore, the hearing officer erred in determining that the claimant reached MMI based on Dr. P's certification without any certification from the designated doctor in evidence, either that the claimant reached MMI on a specific date or that the claimant had not yet attained MMI.

In evidence was an operative report dated April 24, 2008, which reflected that the claimant underwent a posterior single-incision 360 fusion at L5-S1 with anterior column stabilization. Dr. P examined the claimant on August 6, 2008, and initially determined that the claimant was not at MMI, noting that the claimant was "only 4 months out of a lumbar fusion." Dr. P noted that the claimant had significant findings in his examination including a 3 cm difference in circumference of the calf. Further, Dr. P noted that the claimant should receive completion of his post-surgical physical therapy.

In another certification, Dr. P, based on his examination of August 6, 2008, certified that the claimant reached statutory MMI on August 3, 2008, with a 10% IR. Dr. P placed the claimant in Diagnosis-Related Estimate (DRE) Lumbosacral Category III: Radiculopathy, of 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) noting the 3 cm atrophy in the claimant's lower extremities. Dr. P did not provide an explanation of a change in his certification of the MMI date, but both his narrative and certification refer to August 3, 2008, as the claimant's statutory date of MMI.

A third certification from Dr. P is in evidence which is also based on his examination of the claimant on August 6, 2008. In the third certification from Dr. P, he certifies that the claimant reached MMI on August 6, 2008, with a 20% IR, placing the claimant in DRE Lumbosacral Category IV: Loss of Motion Segment Integrity. The explanation for the change in the assignment of the claimant's IR is contained in correspondence from Dr. P dated June 23, 2009. Dr. P changed his assigned IR from 10% to 20% based on x-ray films performed on May 29, 2009, which note 8 mm anterior subluxation in the flexed position. In evidence is a report of x-rays performed on May 29, 2009, which note that flexion and extension views were taken and give an impression of grade 1 spondylolisthesis at L5-S1 with 8 mm anterior subluxation of the L5 vertebrae in lumbar flexion. Although Dr. P checks August 6, 2008, as the clinical date that the claimant reached MMI, no explanation is given regarding the change in the

date of MMI certified from his previous position that the claimant needed additional time and therapy to recover from his spinal surgery.

Dr. P in his initial report dated August 6, 2008, explained that he believed that the claimant had not yet attained MMI because he needed additional time and therapy to recover from the spinal surgery performed on April 24, 2008. Although Dr. P later certified that the claimant reached statutory MMI on August 3, 2008, and subsequently in another Report of Medical Evaluation (DWC-69) certified that the claimant reached clinical MMI on August 6, 2008, no explanation was given regarding why Dr. P's opinion would have changed regarding the date that the claimant reached MMI. As previously noted, the parties stipulated that statutory MMI did not occur until after August 6, 2008.

In reviewing a "great weight" challenge, we must examine the entire record to determine if: (1) there is only "slight" evidence to support the finding; (2) the finding is so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust; or (3) the great weight and preponderance of the evidence supports its nonexistence. *See* Cain v. Bain, 709 S.W.2d 175 (Tex. 1986). The hearing officer's determination that the claimant reached MMI on August 6, 2008, is so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust.

Further, as previously noted there are no certifications of MMI/IR in evidence from the designated doctor, Dr. S. Because there is no MMI date that is supported by evidence which can be adopted and no certification (of either an MMI date or that the claimant has not reached MMI) from the Division-appointed designated doctor, we reverse the hearing officer's determination that the claimant reached MMI on August 6, 2008, as certified by Dr. P and we remand the case for further consideration. Because the date of MMI has not yet been determined, we reverse the hearing officer's determination that the claimant's IR is 20% as certified by Dr. P and remand the case for further consideration.

REMAND INSTRUCTIONS

On remand the hearing officer should allow the parties an opportunity to stipulate to the date of statutory MMI. If the parties are unable to stipulate, the hearing officer should take additional evidence to determine the date of statutory MMI. The hearing officer is to determine if Dr. S, the designated doctor previously appointed in this case is still qualified and available to be the designated doctor and if so, request that the designated doctor examine the claimant and certify an MMI date not later than the statutory date and assign an IR on a signed DWC-69 and narrative in accordance with Rule 130.1. If the designated doctor is no longer qualified or available to serve as the designated doctor then another designated doctor is to be appointed pursuant to Rule 126.7(h) to determine MMI and IR for the compensable injury. The parties are to be provided with the hearing officer's letter to the designated doctor and the designated doctor's response and allowed an opportunity to present evidence and respond.

SUMMARY

We affirm the hearing officer's determination that the first certification of MMI and IR assigned by Dr. P on August 6, 2008, did not become final under Section 408.123.

We reverse the hearing officer's determination that the claimant reached MMI on August 6, 2008, with a 20% IR and remand the issues of MMI and IR to the hearing officer for further consideration consistent with this opinion.

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 **STATE FARM FIRE AND CASUALTY COMPANY** and the name and address of its registered agent for service of process is

SHYAMA TERRY, VPO
8900 AMBERGLEN BOULEVARD
AUSTIN, TEXAS 78729-1110.

_____
Margaret L. Turner
Appeals Judge

CONCUR:

_____
Cynthia A. Brown
Appeals Judge

_____
Thomas A. Knapp
Appeals Judge