APPEAL NO. 101539
FILED DECEMBER 27, 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 September 14, 2010, with the record closing on September 22, 2010. With regard to the two issues before her, the hearing officer determined that the respondent (claimant) reached maximum medical improvement (MMI) on February 1, 2010, with a 17% impairment rating (IR). The appellant (carrier) appealed the hearing officer's determinations on MMI and IR, contending that the hearing officer erred in not adopting the certification of MMI/IR of the Texas Department of Insurance, Division of Workers' Compensation (Division)-appointed designated doctor, (Dr. B). In the alternative, the carrier contends that the case should be remanded to the hearing officer to send a letter of clarification (LOC) to Dr. B if there is a question concerning whether or not Dr. B rated the entire compensable injury. The appeal file does not contain a response from the claimant.

DECISION

Reversed and remanded.

The parties stipulated that the claimant sustained a compensable injury on _____. It was undisputed that the claimant underwent surgery for carpal tunnel syndrome in both wrists.

In this case, the issues before the hearing officer are MMI and IR. There is no agreement between the parties as to the extent of the compensable injury nor is there a prior determination by the Division as to extent of injury. There are three certifications of MMI/IR in evidence, one from the designated doctor and two from referral doctors of the treating doctor.

Dr. B, the designated doctor, appointed to determine MMI and IR, examined the claimant on May 21, 2010, and certified that the claimant reached MMI on that date with a 0% IR. Dr. B diagnosed and rated a left elbow and bilateral wrists injury as the compensable injury.

(Dr. P), a referral doctor, examined the claimant on November 2, 2009, and determined that the claimant had not yet reached MMI as of that date but anticipated that the claimant would reach MMI on or about January 2, 2010. Dr. P diagnosed and considered a left elbow, bilateral wrists, and cervical spine injury as the compensable injury.

(Dr. T), a referral doctor, examined the claimant on March 19, 2010, and certified that the claimant reached MMI on February 1, 2010, with a 17% IR. Dr. T diagnosed

and rated an injury to the bilateral wrists and to the cervical spine as the compensable injury.[1]

Prior to the CCH, the claimant had requested a LOC be sent to the designated doctor, attaching additional medical records concerning additional treatment to her hands, wrists, and cervical spine subsequent to the date of the designated doctor's exam and asking whether the records would change Dr. B's opinion on MMI or IR. That request for a LOC was denied by the Division.

The hearing officer rejected the certification of MMI and IR by the designated doctor because she stated in her discussion that the claimant sustained "a cervical spine and bilateral wrist injuries" on _____, and the designated doctor did not consider the entire compensable injury in his assignment of MMI and IR. Although the hearing officer had held the record open to consider the claimant's request for a LOC to the designated doctor, she closed the record, stating that "a review of the administrative record did not indicate that the matter required further correspondence with or examination by the designated doctor." The hearing officer then adopted Dr. T's certification of MMI/IR; however, Dr. T improperly rated the upper extremities based on Figure 29, page 3/38 of the AMA Guides. *See* footnote 1.

The Appeals Panel has held that an extent-of-injury issue is a threshold issue that must be resolved before issues of MMI and IR can be resolved and that the resolution of the MMI and IR issues will flow from the resolution of the extent issue. *See* APD 032171, decided September 23, 2003.

28 TEX. ADMIN. CODE § 130.6(b)(5) (Rule 130.6 (b)(5)) provides:

> When the extent of the injury may not be agreed upon by the parties (based upon documentation provided by the treating doctor and/or insurance carrier or the comments of the employee regarding his/her injury), the designated doctor shall provide multiple certifications of MMI and [IRs] that take into account the various interpretations of the extent of the injury so that when the Division resolves the dispute, there is already an applicable certification of MMI and [IR] from which to pay benefits as required by the Act.

In APD 002675, decided December 21, 2000, the sole issue before the hearing officer was IR. There were multiple certifications of MMI/IR in which differing body parts were rated as the compensable injury. There was no prior Division determination of the extent of the compensable injury or agreement by the parties. In that case, the Appeals

[1] We note that Dr. T's assigned IR of 17% cannot be adopted because he failed to properly use 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) in arriving at his IR. In assessing an impairment for the claimant's bilateral wrists, Dr. T improperly utilized Figure 29, on page 3/38 of the AMA Guides, by failing to round the measurements of radial deviation and ulnar deviation of the wrist to the nearest 10 degrees to determine the upper extremity impairment. *See* Appeals Panel Decision (APD) 022504-s, decided November 12, 2002.

Panel held that while a designated doctor appointed to determine MMI and IR can state an opinion whether a certain condition is or is not part of the injury, the doctor's opinion on extent of injury is not entitled to presumptive weight and ultimately it is the Division (the hearing officer) that determines what should and should not be rated. The Appeals Panel reversed the hearing officer's decision on IR and remanded the case for the hearing officer to first determine the extent of injury and then for the designated doctor to be advised what the extent of the injury was and to be requested to rate only the compensable injury as determined by the hearing officer. The Appeals Panel further held that whenever the issue is an IR, by necessity the extent of injury is subsumed in that issue.

With the issues of MMI and IR before her and with the certifications of MMI/IR in evidence differing as to the extent of the compensable injury, we reverse the hearing officer's determination that the claimant reached MMI on February 1, 2010, with a 17% IR. There was no stipulation by the parties as to the extent of the compensable injury. Although the hearing officer made statements in her Background Information section of her decision that the claimant sustained "a cervical spine and bilateral wrist injuries" on _____, the hearing officer erred in failing to add the issue of the extent of the compensable injury and to make any finding of fact and conclusion of law regarding the extent of the compensable injury. As previously discussed, whenever the issue is an IR, by necessity the extent of injury is subsumed in that issue. Accordingly, we remand the case to the hearing officer for the hearing officer to first determine which body parts are in dispute as to the extent of the compensable injury. Then the hearing officer must advise the designated doctor which body parts are in dispute and request the designated doctor to provide multiple certifications of MMI/IR that take into account the various interpretations of the extent of the compensable injury, sending to the designated doctor those medical records in evidence of the additional treatment to the claimant's hands, left elbow, bilateral wrists, and cervical spine subsequent to the date of the designated doctor's exam.

REMAND INSTRUCTIONS

Dr. B is the designated doctor in this case. On remand, the hearing officer is to determine whether Dr. B is still qualified and available to be the designated doctor. If Dr. B 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 the IR for the compensable injury. The hearing officer is then to advise the designated doctor which body parts are in dispute as to the compensable injury and request the designated doctor to give multiple certifications of MMI/IR. The parties are to be provided with the hearing officer's letter to the designated doctor, the designated doctor's response, and allowed an opportunity to respond. The hearing officer is to add the issue of extent of injury to the disputed issues before her and make determinations on extent of injury, MMI, and IR consistent with this decision.

We reverse the hearing officer's decision that the claimant reached MMI on February 1, 2010, with an IR of 17% and remand this case 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 **INDEMNITY INSURANCE COMPANY OF NORTH AMERICA** and the name and address of its registered agent for service of process is

CT CORPORATION SYSTEM
350 NORTH ST. PAUL STREET
DALLAS, TEXAS 75201.

_____
Cynthia A. Brown
Appeals Judge

CONCUR:

_____
Thomas A. Knapp
Appeals Judge

_____
Margaret L. Turner
Appeals Judge