APPEAL NO. 120180
FILED APRIL 2, 2012

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 December 29, 2011, in [City], Texas, with [hearing officer] presiding as hearing officer. The hearing officer resolved the disputed issues by deciding that the appellant (claimant) reached maximum medical improvement (MMI) on December 26, 2010, with an impairment rating (IR) of eight percent as certified by [Dr. B], the designated doctor appointed by the Texas Department of Insurance, Division of Workers' Compensation (Division) to address MMI, IR, ability to return to work, and whether disability is a direct result of the work-related injury. The claimant appealed the hearing officer's MMI and IR determinations, contending that it was crucial to the resolution of the disputed issues to determine whether the compensable injury extends to a malunion greater tuberosity fracture of the right shoulder that requires surgical repair. Although not added as an issue, the parties actually litigated extent of injury as well as the certified issues of MMI and IR. The respondent (self-insured) responded, urging affirmance of the disputed determinations. At the CCH, the self-insured disputed the malunion of the right shoulder was part of the compensable injury and contended that Dr. B rated the entire compensable injury in both of his certifications of MMI/IR. Additionally, in its response to the claimant's appeal, the self-insured also objected to the consideration by the Appeals Panel of a medical report by [Dr. K], dated January 25, 2012, which was attached to the claimant's appeal. This report was not proffered or admitted at the CCH. In her appeal, the claimant stated this addendum report was written by Dr. K after the date of the CCH (December 29, 2011), and clarified Dr. K's earlier February 11, 2011, MRI report on the right shoulder. The claimant contended that the carrier relied on the original MRI report in support of their position at the CCH, and the addendum, created after the CCH, supports the claimant's position on the disputed extent-of-injury condition. The claimant did not include in her appeal a reason why this addendum could not have been obtained upon diligent request or effort by the claimant prior to the CCH.

DECISION

Reversed and remanded.

NEWLY DISCOVERED EVIDENCE

Documents submitted for the first time on appeal are generally not considered unless they constitute newly discovered evidence. *See generally*, Appeals Panel Decision (APD) 091375, decided December 2, 2009; Black v. Wills, 758 S.W.2d 809

(Tex. App.-Dallas 1988, no writ). In determining whether new evidence submitted with an appeal or response requires remand for further 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 review we cannot agree that this January 25, 2012, addendum report by Dr. K meets the requirements of newly discovered evidence and it was not considered.

MMI/IR

The parties stipulated that on [date of injury], the claimant sustained a compensable injury. The claimant testified that she fell at work, injuring her right shoulder, back, and right knee. It was undisputed by the parties that the compensable injury of [date of injury], extends to lumbar disc displacement, contusion and impingement of the right shoulder, rotator cuff syndrome and derangement of the right shoulder as previously administratively determined. Additionally, in evidence is the self-insured's Notice of Disputed Issue(s) and Refusal to Pay Benefits (PLN-11) dated [date of injury], which indicated that the self-insured accepted a right knee injury.

The claimant testified that her current treating doctor, [Dr. W], referred her to [Dr. L], a shoulder specialist. Dr. L's medical record dated August 29, 2011, indicated the claimant was evaluated by him on that date and he obtained new x-rays on her right shoulder. After physically examining the claimant and reviewing the x-rays, Dr. L diagnosed the claimant with "[m]alunion, greater tuberosity fracture, right shoulder" and recommended a surgical option to try and reset the malunited bone fragment arthroscopically and to perform an acromioplasty to improve her range of motion. The claimant testified that she wants the surgery and Dr. L is awaiting authorization to perform the surgery.

There are two certifications of MMI/IR in evidence from the designated doctor, Dr. B. There are no other certifications in evidence.

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. 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.

Dr. B examined the claimant on two different dates, January 25, 2011, and December 15, 2011. After his re-examination of December 15, 2011, Dr. B certified that the claimant reached clinical MMI on December 26, 2010, with eight percent IR.

In his narrative report dated December 15, 2011, Dr. B listed the claimant's diagnoses as right shoulder sprain, lumbar spine sprain, and right knee sprain. However, as mentioned above, it had been previously determined, that the compensable injury of [date of injury], extends to lumbar disc displacement, contusion and impingement of the right shoulder, rotator cuff syndrome and derangement of the right shoulder.

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* APD 040313-s, decided April 5, 2004.

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).

Because Dr. B failed to rate the entire compensable injury, which included the previously determined lumbar disc displacement, contusion and impingement of the right shoulder, rotator cuff syndrome and derangement of the right shoulder, the hearing officer's finding that a preponderance of the evidence is not contrary to Dr. B's certification of MMI and IR is so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust.

The only other certification of MMI/IR is Dr. B's initial certification. Dr. B examined the claimant on January 25, 2011, and certified that the claimant reached MMI on November 15, 2010, with zero percent IR. That certification of MMI/IR cannot be adopted because the designated doctor only rated a lumbar spine and right shoulder sprain and did not consider the right knee or the other conditions administratively determined to be part of the compensable injury. Therefore, there are no certifications of MMI/IR in evidence that can be adopted.

The Appeals Panel has held that an extent-of-injury issue is a threshold issue that must be resolved before 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 110854, decided August 15, 2011. In this case, with the parties litigating whether the compensable injury of [date of injury], extends to malunion greater tuberosity of fracture of the right shoulder, the hearing officer erred in failing to add the issue of the extent of the compensable injury regarding the claimed condition and to make any finding of fact and conclusion of law regarding the extent of the compensable injury regarding the claimed condition.

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.

Accordingly, we reverse the hearing officer's determination that the claimant reached MMI on December 26, 2010, with eight percent IR and remand the case to the hearing officer to add the issue of whether the compensable injury of [date of injury], extends to malunion greater tuberosity fracture of the right shoulder and to make determinations on extent of injury, MMI and IR consistent with this decision.

REMAND INSTRUCTIONS

On remand, the hearing officer should ensure that the treating doctor and insurance carrier shall send to the designated doctor all of the claimant's medical records that are in their possession relating to the issues to be evaluated by the designated doctor.

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 127.5(c) to determine MMI and IR for the compensable injury. The hearing officer is to advise the designated doctor that it has been administratively determined that the compensable injury of [date of injury], extends to lumbar disc displacement, contusion and impingement of the right shoulder, rotator cuff syndrome and derangement of the right shoulder; that the self-insured has

accepted a right knee injury; and that the condition of malunion greater tuberosity fracture of the right shoulder is in dispute. The designated doctor is then to be requested to give an opinion on MMI (which cannot be after the statutory MMI date) and to provide alternative certifications of IR that take into account the administratively determined conditions (lumbar disc displacement, contusion and impingement of the right shoulder, rotator cuff syndrome and derangement of the right shoulder), a right knee injury, and the disputed right shoulder condition (malunion greater tuberosity fracture). The parties are to be provided with the hearing officer's letter to the designated doctor and the designated doctor's response. The parties are to be allowed an opportunity to respond.

On remand, the hearing officer is to add the issue of whether the compensable injury of [date of injury], extends to malunion greater tuberosity fracture of the right shoulder.

The hearing officer is then to make determinations on the extent of the compensable injury of [date of injury], MMI, and IR consistent with 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 **STATE OFFICE OF RISK MANAGEMENT (a self-insured governmental entity)** and the name and address of its registered agent for service of process is

For service in person the address is:

JONATHAN D. BOW, EXECUTIVE DIRECTOR
STATE OFFICE OF RISK MANAGEMENT
300 W. 15TH STREET
WILLIAM P. CLEMENTS, JR. BUILDING, 6TH FLOOR

AUSTIN, TEXAS 78701.

For service by mail the address is:

JONATHAN D. BOW, EXECUTIVE DIRECTOR
STATE OFFICE OF RISK MANAGEMENT
PO BOX 13777
AUSTIN, TEXAS 78711-3777.

Cynthia A. Brown
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Margaret L. Turner
Appeals Judge