APPEAL NO. 130228
FILED MARCH 18, 2013

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 11, 2012, and continued on December 4, 2012, in [City], Texas, with [hearing officer] presiding as hearing officer. The hearing officer resolved the disputed issues by deciding that: (1) the compensable injury of [date of injury], extends to a cervical sprain/strain, right shoulder sprain/strain, and concussion without loss of consciousness; (2) the appellant (claimant) had disability from October 28, 2011, and continuing through July 20, 2012; (3) the claimant reached maximum medical improvement (MMI) on December 8, 2011; and (4) the claimant's impairment rating (IR) is zero percent. The claimant appealed, disputing the hearing officer's determinations of MMI and IR. The claimant argues that it was error for the hearing officer to send the claimant back to a designated doctor instructing him to consider all the conditions and provide alternative ratings. The respondent (carrier) responded, urging affirmance of the disputed MMI and IR determinations.

The hearing officer's determinations that the compensable injury of [date of injury], extends to a cervical sprain/strain, right shoulder sprain/strain, and concussion without loss of consciousness; and that the claimant had disability from October 28, 2011, and continuing through July 20, 2012, were not appealed and have become final pursuant to Section 410.169.

DECISION

Affirmed in part and reversed and remanded in part.

The parties stipulated that: the claimant sustained a compensable lumbar contusion injury on [date of injury]; [Dr. T] was appointed as the first designated doctor by the Texas Department of Insurance, Division of Workers' Compensation (Division) to evaluate the claimant for the compensable injury of [date of injury], to determine MMI and IR; and [Dr. M] was appointed as the second designated doctor by the Division to evaluate the claimant for the compensable injury of [date of injury], to determine MMI, IR and the extent of the compensable injury.

MMI/IR

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.

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.

Rule 127.20(c) provides that the Division, at its discretion, may also request clarification from the designated doctor on issues the Division deems appropriate.

During the initial setting of the CCH, September 11, 2012, two certifications of MMI/IR were in evidence. Dr. T, the first designated doctor, examined the claimant on April 18, 2012, and certified that the claimant reached MMI on December 16, 2011, with a zero percent IR. When discussing MMI in his narrative report, Dr. T stated "[t]here is evidence to suggest, at most [the claimant] had a self-limiting sprain/strain injury of the lumbar spine as a result of the worker's injury of issue." Dr. T 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), placed the claimant in Diagnosis-Related Estimate (DRE) Lumbosacral Category I: Complaints or Symptoms and certified zero percent IR. Dr. T did not provide a rating for a cervical sprain/strain; a right shoulder sprain/strain; or a concussion without loss of consciousness. As previously stated, the parties stipulated that the compensable injury was a lumbar contusion not a lumbar sprain/strain.

A second certification of MMI/IR in evidence was from [Dr. W], a doctor selected by the treating doctor to act in his place. Dr. W examined the claimant on July 24, 2012, and certified that the claimant reached MMI on July 20, 2012, with a five percent IR. Dr. W assessed zero percent impairment for the claimant's cervical spine, placing the claimant in DRE Cervicothoracic Category I: Complaints or Symptoms; five percent for the claimant's lumbar spine, placing the claimant in DRE Lumbosacral Category II: Minor Impairment; and zero percent impairment for loss of range of motion (ROM) of the claimant's right shoulder. Dr. W noted that the CT scan of the head and neck was negative and there are "no outward signs of concussion signs and symptoms." However, he did not specifically state that the concussion was resolved nor did he provide any impairment, including zero percent for the concussion. The hearing

officer at the conclusion of the September 11, 2012, CCH setting over the claimant's objection, determined that the designated doctor should provide alternative certifications for the conditions in dispute.

The claimant argues on appeal that it was error for the hearing officer to send the claimant back to a designated doctor instructing him to consider all the disputed conditions. As previously noted, Rule 127.20(c) provides that the Division, at its discretion, may also request clarification from the designated doctor on issues the Division deems appropriate. Dr. T's certification did not consider all of the conditions which were part of the compensable injury. Dr. W's report did not specifically rate the concussion without loss of consciousness which was determined to be part of the compensable injury. Under the facts of this case, we cannot hold that the hearing officer erred as a matter of law in deciding that the designated doctor should provide alternative certifications for the conditions in dispute.

It was undisputed that Dr. M was appointed as the second designated doctor to evaluate the claimant for the compensable injury of [date of injury], to determine MMI and IR. Dr. M examined the claimant on November 15, 2012, and certified that the claimant reached MMI on December 8, 2011, with a zero percent impairment. The hearing officer determined that the claimant reached MMI on December 8, 2011, with a zero percent IR as certified by Dr. M. The hearing officer's determination that the claimant reached MMI on December 8, 2011, is supported by sufficient evidence and is affirmed.

Dr. M assessed zero percent impairment for the concussion without loss of consciousness; zero percent impairment for the cervical sprain/strain; zero percent impairment for the contusion of the lumbar spine; and zero percent impairment for the right shoulder sprain/strain. However, Dr. M's narrative noted that the claimant had 120° of flexion for his right shoulder. Figure 38 of the AMA Guides on page 3/43 notes that a ROM measurement for flexion of 120° would result in upper extremity impairment of four percent, which would then convert to two percent impairment of the whole person using Table 3 on page 3/20 of the AMA Guides. Dr. M stated that the extension, abduction, adduction, internal rotation and external rotation ROM measurements were all within normal limits but did not report the actual measurements in his narrative report. Dr. M did not invalidate his ROM measurements but rather stated that the claimant "had an essentially unremarkable physical exam at his initial exam; therefore, there are no issues such as [ROM]. . . ." Dr. M did not explain why he did not assess impairment for the right shoulder based on the results of his physical examination. Accordingly, we reverse the hearing officer's determination that the claimant's IR is zero percent. There is no other certification of IR in evidence with the MMI date of December

8, 2011. Consequently, we remand the IR issue to the hearing officer for further action consistent with this decision.

SUMMARY

We affirm the hearing officer's determination that the claimant reached MMI on December 8, 2011.

We reverse the hearing officer's determination that the claimant's IR is zero percent and remand the IR issue to the hearing officer for further action consistent with this decision.

REMAND INSTRUCTIONS

Dr. M is the designated doctor in this case. On remand, the hearing officer is to determine whether Dr. M is still qualified and available to be the designated doctor and if so, advise Dr. M that the IR for the current compensable injury (a cervical sprain/strain, a right shoulder sprain/strain, a concussion without loss of consciousness, and a lumbar contusion) must be based on the claimant's condition as of the MMI date, December 8, 2011, considering the medical record and the certifying examination according to the rating criteria of the AMA Guides and the provisions of Rule 130.1(c)(3). Dr. M should specifically explain why he did not assess impairment for loss of ROM based on the measurements taken of the claimant's right shoulder during his physical examination. If Dr. M is no longer qualified or available to serve as the designated doctor, then another designated doctor is to be appointed to determine IR. The parties must be given an opportunity to respond to any report of the designated doctor. The hearing officer must then make a decision regarding the claimant's IR date based on the evidence.

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 **THE STANDARD FIRE INSURANCE COMPANY** and the name and address of its registered agent for service of process is

CORPORATION SERVICE COMPANY
D/B/A CSC-LAWYERS INCORPORATING SERVICE COMPANY
211 EAST 7TH STREET, SUITE 620
AUSTIN, TEXAS 78701-3218.

Margaret L. Turner
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Carisa Space-Beam
Appeals Judge