APPEAL NO. 130238
FILED MARCH 13, 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 was begun on May 25, 2012,[1] continued on September 18, 2012, and closed on December 28, 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], does not extend to lateral epicondylitis of the right elbow, degenerative disc disease of the cervical spine, multilevel cervical unconvertebral joint arthropathy, and internal derangement of the right shoulder; (2) the appellant (claimant) reached maximum medical improvement (MMI) on April 29, 2011, the statutory MMI date; and (3) the claimant's impairment rating (IR) is two percent.

The claimant appealed the hearing officer's MMI and IR determinations, arguing that the hearing officer erred in adopting an invalid certification of MMI and IR. The respondent (self-insured) responded, urging affirmance.

The hearing officer's determination that the compensable injury of [date of injury], does not extend to lateral epicondylitis of the right elbow, degenerative disc disease of the cervical spine, multilevel cervical unconvertebral joint arthropathy, and internal derangement of the right shoulder was not appealed and has become final pursuant to Section 410.169.

DECISION

Reversed and remanded.

The parties stipulated that: (1) the claimant sustained a compensable injury on [date of injury]; (2) the compensable injury extends to cervical sprain/strain, right elbow strain, and right shoulder strain; and (3) the claimant's date of statutory MMI is April 29, 2011.

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

[1] We note the decision incorrectly identifies that the hearing began on May 15, 2012.

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 130.1(d)(1) states that a certification of MMI and assignment of an IR requires completion, signing and submission of the Report of Medical Evaluation (DWC-69) and a narrative report.

The hearing officer determined the claimant reached MMI on April 29, 2011, the statutory date, and that the claimant's IR is two percent per [Dr. J], the designated doctor. The claimant appealed, contending Dr. J listed an incorrect date as the date of statutory MMI on his DWC-69.

The Division appointed Dr. J as the second designated doctor to determine the claimant's MMI and IR, subsequent to the initial May 25, 2012, hearing. Dr. J examined the claimant on July 20, 2012. Dr. J certified the claimant reached MMI on the statutory date of April 31, 2011, and assigned a two percent IR. In his narrative report dated July 28, 2011, Dr. J explained his choice of MMI as follows: "[t]he basis for my estimation of [the claimant's] MMI date is that she has reached [s]tatutory [MMI]. Therefore [the claimant's] condition has reached statutory [MMI] as of [April 31, 2011]." Dr. J also submitted a DWC-69 certifying the claimant reached MMI on the statutory date of April 30, 2011, with a two percent IR.

On September 25, 2012, the hearing officer sent a letter of clarification to Dr. J notifying him that the statutory dates of MMI contained in his DWC-69s, April 31, 2011, and April 30, 2011, were incorrect, and that the parties had stipulated the correct statutory date of MMI is April 29, 2011. Dr. J responded on October 2, 2012, stating "I will send a corrected [DWC-69] that has the correct statutory date on it." However, Dr. J submitted a DWC-69 certifying the claimant reached MMI on the statutory date of April 29, 2012 (rather than April 29, 2011), with a two percent IR.

In the Background Information section of the decision, the hearing officer commented:

> In a letter of October 2, 2012 [Dr. J] wrote that he would send a corrected [DWC-69] with the correct statutory [MMI] date on it. That letter is sufficient evidence to show that [Dr. J] intended to list the correct statutory

date of [MMI] and that the date he listed [on the DWC-69] was a typographical error.

There are no DWC-69s from Dr. J in evidence with the correct statutory MMI date of April 29, 2011, as agreed to by the parties. Although the hearing officer may be correct that Dr. J intended to certify the claimant reached MMI on the agreed-upon statutory date of April 29, 2011, he did not do so. Further, as Rule 130.1(c)(3) provides an assignment of IR shall be based on the claimant's condition as of the MMI date, Dr. J's two percent IR with the April 29, 2012, MMI date cannot be adopted. We therefore reverse the hearing officer's determination that the claimant reached MMI on April 29, 2011, the statutory date, and that the claimant's IR is two percent.

As previously mentioned, the only other MMI/IR certifications from Dr. J certify that the claimant reached MMI statutorily on April 31, 2011, and April 30, 2011. The hearing officer correctly pointed out in the decision that neither of these dates are correct; the first is an impossible date as April has only 30 days, and the second date is beyond the agreed-upon statutory date of April 29, 2011. Accordingly, neither of these MMI/IR certifications can be adopted.

There are two other MMI/IR certifications in evidence. The first is that of [Dr. F], the treating doctor. Dr. F examined the claimant on July 11, 2012, and certified the claimant reached MMI statutorily on April 29, 2011, with a nine percent IR. However, the evidence does not contain a narrative report from Dr. F, nor any explanation regarding how Dr. F assigned the nine percent IR. Dr. F's certification of MMI and IR cannot be adopted because it does not contain a narrative as required by Rule 130.1(d)(1).

The second MMI/IR certification is from [Dr. C], who was initially appointed by the Division as the designated doctor to determine the claimant's MMI and IR. Dr. C examined the claimant on March 4, 2010, and certified the claimant reached MMI on March 4, 2010, with a one percent IR. In her narrative report dated March 4, 2010, Dr. C states "[w]e stand by our original opinion that as of [November 4, 2009], the [claimant] was not at MMI. On [November 4, 2009], an accurate assessment could not be made due to an acute episode at the time of the exam. Because of this, it was impossible for us to assess the issue of MMI." Dr. C does not explain why she chose an MMI date of March 4, 2010, as listed on the DWC-69.

Dr. C listed diagnoses of cervical strain, shoulder strain, and elbow strain in her narrative report. Dr. C placed the claimant in Diagnosis-Related Estimates (DRE) Cervicothoracic Category I: Complaints or Symptoms and assessed a zero percent for the claimant's cervical spine. Dr. C assigned a one percent upper extremity impairment for the claimant's shoulder per Figure 38, page 3/43 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) (AMA Guides), which converts to a one percent whole person impairment per Table 3 on page 3/20 of the AMA Guides. As previously mentioned, the parties stipulated that the claimant's compensable injury extends to cervical sprain/strain, right elbow strain, and right shoulder strain. Dr. C did not assign any impairment for the claimant's right elbow strain.

Dr. C's certification of MMI and IR cannot be adopted because she failed to rate the entire compensable injury, which included a right elbow strain. *See* Appeals Panel decision (APD) 110267, decided April 19, 2011, and APD 043168, decided January 20, 2005.

As there are no certifications of MMI and IR in evidence that can be adopted, we remand this case to the hearing officer for further action consistent with this decision.

SUMMARY

We reverse the hearing officer's determination that the claimant reached MMI on April 29, 2011, the statutory date.

We reverse the hearing officer's determination that the claimant's IR is two percent.

We remand the issues of MMI and IR to the hearing officer to make a determination on MMI and IR consistent with this decision.

REMAND INSTRUCTIONS

Dr. J is the designated doctor in this case. On remand, the hearing officer is to determine whether Dr. J is still qualified and available to be the designated doctor. If Dr. J is no longer qualified or available to serve as the designated doctor, then another designated doctor is to be appointed to determine the claimant's MMI and IR for the [date of injury], compensable injury.

The hearing officer is to advise the designated doctor that the statutory date of MMI is April 29, 2011, as agreed to by the parties, and that the compensable injury of [date of injury], extends to cervical sprain/strain, right elbow strain, and right shoulder strain, but does not extend to lateral epicondylitis of the right elbow, degenerative disc disease of the cervical spine, multilevel cervical unconvertebral joint arthropathy, and internal derangement of the right shoulder, as administratively determined.

The hearing officer is to request the designated doctor to give an opinion on the claimant's MMI, which can be no later than April 29, 2011, and rate the entire compensable injury, which extends to cervical sprain/strain, right elbow strain, and right shoulder strain, in accordance with the AMA Guides considering the medical record and the certifying examination.

The parties are to be provided with the designated doctor's new certification of MMI and IR and are to be allowed an opportunity to respond. The hearing officer is then to make a determination on 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 **[a self-insured governmental entity]** and the name and address of its registered agent for service of process is

[CPA]
[ADDRESS]
[CITY], TEXAS [ZIP].

Carisa Space-Beam
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Margaret L. Turner
Appeals Judge