APPEAL NO. 130739
FILED MAY 7, 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 held on February 4, 2013, in [City], Texas, with [hearing officer] presiding as hearing officer. The hearing officer resolved the disputed issues by deciding that: (1) the compensable injury does not extend to lumbar disc bulges in the lumbar spine at T12-L1, L1-2, L2-3, L3-4, L4-5 and L5-S1 with mild to moderate left foraminal stenosis; (2) the appellant (claimant) reached maximum medical improvement (MMI) on December 5, 2011; and (3) the claimant's impairment rating (IR) is zero percent.

The claimant appealed the hearing officer's extent of injury, MMI and IR determinations. The respondent (self-insured) responded, urging affirmance.

DECISION

Affirmed in part and reversed and remanded in part.

It is undisputed that the claimant sustained a compensable injury on [date of injury]. The claimant testified that she was employed as a home health provider and that as a result of lifting a patient she sustained an injury to her right shoulder, right hip and lower back on [date of injury].

In a Request for Designated Doctor Examination (DWC-32) dated December 29, 2011, the self-insured accepted as the compensable injury a "contusion of lateral aspect right shoulder, contusion lateral aspect right hip and soft tissue myofascial strain of the paravertebral musculature of the lumbar region of the spine." The Texas Department of Insurance, Division of Workers' Compensation (Division) appointed [Dr. P] as the designated doctor to determine the claimant's MMI, IR, ability to return to work, extent of injury and whether disability is a direct result of the work-related injury. Dr. P examined the claimant on January 28, 2012, and opined that the claimant's extent of injury is to include "Right Shoulder Contusion/Strain, Right Hip Contusion and Lumbar Sprain/Strain." In a Notice of Disputed Issue(s) and Refusal to Pay Benefits (PLN-11) dated July 9, 2012, based on a peer review dated June 27, 2012, by [Dr. L], the self-insured accepted as the compensable injury a "right shoulder and right hip strain/sprain and contusion and soft tissue strain of lumbar spine." The self-insured's response to the claimant's appeal states the compensable injury is limited to a right shoulder sprain, right hip contusion and lumbar spine strain/sprain.

In evidence are two certifications of MMI/IR from Dr. P, the designated doctor, and [Dr. M], the treating doctor. With regard to Dr. P's certification of MMI/IR, there is

an internal inconsistency as to the date of MMI listed on his narrative report and the Report of Medical Evaluation (DWC-69). Dr. P's narrative report dated February 17, 2012, states the claimant reached clinical MMI on December 5, 2012, with a zero percent IR, however the DWC-69 states the claimant reached MMI on January 28, 2012, with a zero percent IR. The treating doctor, Dr. M, certified that the claimant reached MMI on May 3, 2012, with a nine percent IR.

EXTENT OF INJURY

The hearing officer's determination that the compensable injury does not extend to lumbar disc bulges in the lumbar spine at T12-L1, L1-2, L2-3, L3-4, L4-5 and L5-S1 with mild to moderate left foraminal stenosis 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 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.

With regard to the MMI date, Dr. P, the designated doctor, examined the claimant on January 28, 2012. Dr. P considered and rated the right shoulder contusion/sprain, right hip contusion and lumbar sprain/strain. Dr. P's narrative report dated February 17, 2012, states that Dr. P examined the claimant on January 28, 2012, and certified that the claimant reached clinical MMI on "12-05-2012" (December 5, 2012). Dr. P states that the rationale for the MMI date is that the "[Official Disability Guidelines-Treatment in Workers' Compensation published by Work Loss Data Institute (ODG)] recommends about 60 days recovery time for Lumbar Sprains and Strains with extra time allowed for the Hip and Shoulder Contusions." Dr. P's DWC-69 states that he examined the claimant on January 28, 2012, and certified that the claimant reached clinical MMI on

"01/28/2012" (January 28, 2012). Dr. P's DWC-69 and narrative report are internally inconsistent regarding the date the claimant reached MMI.

Finding of Fact No. 7 states that Dr. P found the claimant to be at MMI on "December 5, 2011," with an IR of zero percent. Conclusion of Law No. 4 and the Decision states that the claimant reached MMI on "December 5, 2011." The hearing officer determined that the claimant reached MMI on December 5, 2011; however, neither Dr. P's DWC-69 or narrative report certify that the claimant reached MMI on December 5, 2011.

The self-insured states in its response to the claimant's appeal that:

> [w]hile it is true the designated doctor's finding regarding MMI date on his DWC-69 was January 28, 2012, as stated on [self-insured's] Exhibit E, page 6, and the [designated] doctor's report states the MMI date is December 5, 2012, this discrepancy would not result in additional indemnity benefits to the claimant, as [Dr. P] found the claimant could return to work full duty as of December 5, 2011, and obviously has his return to work full duty dates and MMI dates mixed up in his report. In addition, the MMI date mentioned in his report of December 5, 2012, is obviously a clerical error as it is not even the return to work full duty date given of December 5, 2011.

Dr. P's narrative report references a date of December 5, 2011; however, that date relates to the beginning date of the claimant's disability, not the date the claimant reached MMI. Further, because the narrative report and DWC-69 list completely different dates regarding when the claimant reached MMI, we do not consider that internal inconsistency to be a clerical error that can be corrected. The hearing officer's determination that the claimant reached MMI on December 5, 2011, is reversed.

With regard to the IR, Rule 130.1(c)(3) provides an assignment of IR shall be based on the claimant's condition as of the MMI date. Given that we have reversed the hearing officer's MMI determination, we reverse the hearing officer's determination that the claimant's IR is zero percent.

The only other MMI/IR certification in evidence is from Dr. M, the treating doctor. Dr. M examined the claimant on May 4, 2012, and certified that the claimant reached clinical MMI on May 3, 2012, with a nine percent IR. Dr. M's May 4, 2012, narrative report lists diagnoses of "lumbar discopathy" and "shoulder rotator cuff syndrome." As previously discussed the compensable injury includes a right shoulder contusion/sprain/strain, right hip contusion and lumbar sprain/strain. Dr. M's certification of MMI and IR cannot be adopted because he failed to rate the entire

compensable injury. *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 the MMI and IR issues back to the hearing officer for further action consistent with this decision.

SUMMARY

We affirm the hearing officer's determination that the compensable injury does not extend to lumbar disc bulges in the lumbar spine at T12-L1, L1-2, L2-3, L3-4, L4-5 and L5-S1 with mild to moderate left foraminal stenosis.

We reverse the hearing officer's determination that the claimant reached MMI on December 5, 2011, with a zero percent IR, and we remand the MMI and IR issues to the hearing officer for further action consistent with this decision.

REMAND INSTRUCTIONS

Dr. P is the designated doctor in this case. On remand, the hearing officer is to determine whether Dr. P is still qualified and available to be the designated doctor. If Dr. P 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 compensable injury of [date of injury], includes the right shoulder contusion/sprain/strain, right hip contusion and lumbar sprain/strain, but does not extend to lumbar disc bulges in the lumbar spine at T12-L1, L1-2, L2-3, L3-4, L4-5 and L5-S1 with mild to moderate left foraminal stenosis, as administratively determined.

The hearing officer is to request the designated doctor to give an opinion on the claimant's MMI, and rate the entire compensable injury, in accordance with 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) 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 through TEXAS COUNCIL RISK MANAGEMENT FUND)** and the name and address of its registered agent for service of process is

PROGRAM EXECUTIVE
[ADDRESS]
[CITY], TEXAS [ZIP CODE].

Veronica L. Ruberto
Appeals Judge

CONCUR:

Carisa Space-Beam
Appeals Judge

Margaret L. Turner
Appeals Judge