APPEAL NO. 130849
FILED MAY 29, 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 8, 2013, in [City], Texas, with [hearing officer] presiding as hearing officer. The hearing officer resolved the disputed issues by deciding that: (1) the appellant (claimant) reached maximum medical improvement (MMI) on July 14, 2012; and (2) the claimant's impairment rating (IR) is 6%.

The claimant appealed the hearing officer's MMI and IR determinations. The claimant contends that the designated doctor's certification of MMI and IR that the hearing officer adopted is not supported by the preponderance of the evidence. The claimant requests that the treating doctor's certification of MMI and IR be adopted. The respondent (self-insured) responded, urging affirmance.

DECISION

Reversed and remanded.

The parties stipulated that: (1) the claimant sustained a compensable injury on [date of injury]; (2) the self-insured has accepted a [date of injury], compensable injury that includes bilateral inguinal hernia; and (3) the Texas Department of Insurance, Division of Workers' Compensation (Division) appointed [Dr. S] as designated doctor to address the issues regarding the claimant's MMI and IR. It is undisputed that the claimant underwent a bilateral herniorrhaphy to repair the bilateral hernia on October 18, 2010.

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.

Dr. S, the designated doctor, examined the claimant on July 27, 2012. In her narrative report dated July 27, 2012, Dr. S references a medical report from [Dr. Sy] dated December 8, 2011, in which Dr. Sy diagnosed the claimant "with persistent pain in both groins and testicles, status post bilateral inguinal hernia repairs, probable mesh intolerance" and Dr. Sy opined that the compensable injury included a "chronic mesh [allodynia] (chronic intolerance to the mesh and pain)." In determining the claimant's MMI, the designated doctor states in her narrative report that:

> The [claimant] has reached statutory MMI. Considering the [sic] injury evaluation provided by [Dr. Sy] on [December 8, 2011], the [claimant] likely has ongoing symptomatology due to chronic mesh intolerance/allodynia, which requires further evaluation. Thus, the [MMI] date has not yet occurred, but [the claimant] has reached the statutory date. At the time of MMI, he was continuing to have significant disability related to the injury and surgery.

As previously stated, the compensable injury is a bilateral inguinal hernia. The condition of chronic mesh allodynia has not been accepted by the self-insured, was not actually litigated at the CCH by the parties, and has not been administratively determined to be part of the compensable injury. Dr. S erroneously based her opinion that the claimant reached MMI on a condition, chronic mesh allodynia, which is not part of the compensable injury. Accordingly, we reverse the hearing officer's determination that the claimant reached MMI on the statutory date of July 14, 2012.

With regard to the claimant's IR, Dr. S assessed a 6% IR based on a nerve injury. In her narrative report dated July 27, 2012, Dr. S states that the claimant is assigned a 6% IR 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) based on Table 68, Impairments for Nerve Deficits, on page 3/89. Dr. S states that she selected Table 68 because the claimant has "pain syndrome that is mediated by nerve injury" and that Table 68 "does not list a rating for the specific nerve(s) involved, but using the ratings provided for surrounding nerves for dysesthesia (femoral and lateral femoral cutaneous)" and assessed a 3% impairment for each side of the hernia, to reach a 6% whole person impairment.

Dr. S states that the claimant's general physical examination showed "[b]ilateral groin reveals well-healed inguinal hernias, firm tissue subcutaneous, markedly tender

bilaterally, no obvious swellings or hernias, no erythema." Although Dr. S discusses the bilateral hernia in the general physical examination section of her report, she does not discuss whether the claimant does or does not have palpable defect to provide a rating for the compensable injury under the AMA Guides. *See* Appeals Panel Decision (APD) 072253-s, decided March 3, 2008, where the Appeals Panel discussed that a rating for a hernia-related impairment requires a palpable defect in the supporting structures of the abdominal wall in conjunction with other criteria under the AMA Guides, Table 7, page 10/247. *See also* APD 111177, decided October 6, 2011. Dr. S did not rate the accepted compensable bilateral inguinal hernia. Dr. S determined the claimant's IR based on "pain syndrome that is mediated by nerve injury" which has not been has not been accepted by the self-insured, was not actually litigated at the CCH by the parties, and has not been administratively determined to be a compensable injury. Accordingly, we reverse the hearing officer's determination that the claimant's IR is 6%.

There is one other MMI/IR certification in evidence from the treating doctor, [Dr. P]. Dr. P examined the claimant on July 19, 2012, and certified that the claimant reached MMI on July 14, 2012, with a 10% IR, based on Table 7, page 10/247.

The hearing officer's Finding of Fact No. 4 states:

> No palpable defect was documented in Dr. [P's] July 19, 2012, examination, and the AMA Guides require a palpable defect for an impairment to be awarded for a hernia under Table 7 of the AMA Guides; therefore, Dr. [P's] IR of 10% was not performed in accordance with the [AMA Guides].

The hearing officer's Finding of Fact No. 4 is supported by sufficient evidence.

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 reverse the hearing officer's determination that the claimant reached MMI on the statutory date of July 14, 2012, with a 6% IR, and we remand the MMI and IR issues to the hearing officer for further action consistent with this decision.

REMAND INSTRUCTIONS

Dr. S is the designated doctor in this case. On remand, the hearing officer is to determine whether Dr. S is still qualified and available to be the designated doctor. If Dr. S 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 bilateral inguinal hernia. 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 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 certified self-insured)** 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.

Veronica L. Ruberto
Appeals Judge

CONCUR:

Carisa Space-Beam
Appeals Judge

Margaret L. Turner
Appeals Judge