

APPEAL NO. 131056
FILED JUNE 21, 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 April 1, 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 of [date of injury], does not extend to a right shoulder rotator cuff tear; (2) the appellant (claimant) reached maximum medical improvement (MMI) on October 10, 2011; (3) the claimant's impairment rating (IR) is five percent; and (4) the claimant did not have disability resulting from the compensable injury at any time. The claimant appealed all of the hearing officer's determinations. The respondent (carrier) responded, urging affirmance.

DECISION

Affirmed in part and reversed and remanded in part.

The parties stipulated that the claimant sustained a compensable injury on [date of injury], that includes a right shoulder sprain/strain, and that [Dr. T] is the designated doctor appointed by the Texas Department of Insurance, Division of Workers' Compensation (Division) for MMI and IR. The claimant testified that she injured her right shoulder when she under-hand tossed a bag of saline onto a chair at work on [date of injury].

EXTENT OF INJURY

The hearing officer's determination that the compensable injury of [date of injury], does not extend to a right shoulder rotator cuff tear is supported by sufficient evidence and is affirmed.

DISABILITY

The hearing officer's determination that the claimant did not have disability resulting from the compensable injury at any time is supported by sufficient evidence and is affirmed.

MMI/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. T, the designated doctor, examined the claimant on November 5, 2012. In a Report of Medical Evaluation (DWC-69) and narrative report dated November 5, 2012, Dr. T certified the claimant reached clinical MMI on October 10, 2011, with a five percent IR. Regarding the claimant's MMI, Dr. T stated that:

The date of MMI according to the [Medical Disa/bility Advisor, Workplace Guidelines for Disability Duration, excluding all sections and tables relating to rehabilitation published by the Reed Group, Ltd. (MDA)] for heavy work return to work after conservative treatment [sic] is twelve weeks and from the date of her injury which was on [date of injury] this would be [October 10, 2011].

Dr. T's certification that the claimant reached MMI on October 10, 2011, with a five percent IR cannot be adopted. The Appeals Panel has previously held that the MDA cannot be used alone, without considering the claimant's physical examination and medical records, in determining a claimant's date of MMI. See Appeals Panel Decision (APD) 130191, decided March 13, 2013, APD 130187, decided March 18, 2013. In this case, Dr. T based his date of MMI solely on the MDA without considering the claimant's physical examination and medical records. Accordingly, we reverse the hearing officer's determination that the claimant reached MMI on October 10, 2011.

Given that the MMI determination is reversed, we must also reverse the hearing officer's IR determination because it was based on a date of MMI of October 10, 2011. The IR must be assessed as of the date of MMI. See Rule 130.1(c)(3). Because the MMI must be re-assessed, so must the IR. Accordingly, we reverse the hearing officer's determination that the claimant's IR is five percent.

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

SUMMARY

We affirm the hearing officer's determination that the compensable injury of [date of injury], does not extend to a right shoulder rotator cuff tear.

We affirm the hearing officer's determination that the claimant did not have disability resulting from the compensable injury at any time.

We reverse the hearing officer's determinations that the claimant reached MMI on October 10, 2011, with a five percent IR, and we remand the issues of MMI and IR to the hearing officer for further action consistent with this decision.

REMAND INSTRUCTIONS

Dr. T is the designated doctor in this case. On remand, the hearing officer is to determine whether Dr. T is still qualified and available to be the designated doctor. If Dr. T 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 a right shoulder sprain/strain. The hearing officer is also to advise the designated doctor that the [date of injury], compensable injury does not include a right shoulder rotator cuff tear. 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 MMI/IR certification 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 **NEW HAMPSHIRE INSURANCE COMPANY** and the name and address of its registered agent for service of process is

**CORPORATION SERVICE COMPANY
211 EAST 7TH STREET, SUITE 620
AUSTIN, TEXAS 78701-3232.**

Veronica L. Ruberto
Appeals Judge

CONCUR:

Carisa Space-Beam
Appeals Judge

Margaret L. Turner
Appeals Judge