APPEAL NO. 131095
FILED JULY 11, 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 originally set for January 10, 2013, but was reset to and held on April 3, 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 [hearing officer], does not extend to the right shoulder rotator cuff tear; (2) the appellant (claimant) reached maximum medical improvement (MMI) on February 26, 2012; and (3) the claimant's impairment rating (IR) is five percent. The claimant appealed all of the hearing officer's determinations. The respondent (self-insured) responded, urging affirmance.

DECISION

Affirmed in part and reversed and rendered in part.

The parties stipulated that the claimant sustained a compensable injury in the form of a lumbar sprain and right shoulder sprain on [date of injury]; on December 23, 2011, the Texas Department of Insurance, Division of Workers' Compensation (Division) appointed [Dr. Pr] as designated doctor to determine MMI, IR, and extent of the compensable injury; on January 26, 2012, Dr. Pr certified the claimant had not reached MMI; on May 23, 2012, the Division appointed [Dr. P] as designated doctor to determine MMI and IR; on June 11, 2012, Dr. P certified the claimant reached MMI on February 26, 2012, and assigned a five percent IR. The claimant testified that she was injured on [date of injury], when the wringer on her mop bucket broke and she fell.

EVIDENTIARY RULING

At the CCH the claimant sought to admit a medical report from [Dr. G] dated and received on April 3, 2013, the date of the second setting of the CCH, to support her position on the extent-of-injury issue. The self-insured objected on the grounds that the report had not been timely exchanged. The hearing officer denied the exhibit, finding no good cause for the untimely exchange. To obtain a reversal of a judgment based on the hearing officer's abuse of discretion in the admission or exclusion of evidence, an appellant must first show the admission or exclusion was in fact an abuse of discretion, and also that the error was reasonably calculated to cause and probably did cause the rendition of an improper judgment. Hernandez v. Hernandez, 611 S.W.2d 732 (Tex. Civ. App.-San Antonio 1981, no writ). In determining whether there has been an abuse of discretion, the Appeals Panel looks to see whether the hearing officer acted without reference to any guiding rules or principles. Appeals Panel Decision (APD) 043000,

decided January 12, 2005; APD 121647, decided October 24, 2012; Morrow v. H.E.B., Inc., 714 S.W.2d 297 (Tex. 1986). We hold that the hearing officer did not abuse her discretion in denying the claimant's exhibit.

EXTENT OF INJURY

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

The hearing officer determined the claimant reached MMI on February 26, 2012, with a five percent IR per Dr. P, the second designated doctor appointed to determine the claimant's MMI and IR.

Dr. P examined the claimant on June 11, 2012, and in a Report of Medical Evaluation (DWC-69) and narrative report dated that same date certified the claimant reached clinical MMI on February 26, 2012, with a five percent IR. In his narrative report Dr. P lists impressions of resolved right shoulder rotator cuff tear and lumbar spine pain with paraspinal spasm and facet syndrome. Regarding MMI, Dr. P stated:

"[T]he [claimant's] MMI is going to be set at [February 26, 2012]. This date was reached as her right shoulder received an injection which was highly therapeutic for her

and resolved her shoulder pain symptoms by that date and the lumbar spine strain/sprain only merits approximately 46 days to recovery based on the Official Disability Guidelines for lumbar spine strain."

Dr. P assessed a zero percent impairment for the claimant's right shoulder based on range of motion (ROM) measurements, and placed the claimant in Diagnosis-Related Estimate (DRE) Lumbosacral Category II: Minor Impairment for five percent impairment. In his narrative Dr. P notes that he "reviewed findings of the right shoulder gadolinium injection performed by CT arthrogram revealing a less than one cm full thickness rotator cuff tear with osteoarthritic changes. . . ."

As previously mentioned, the hearing officer's determination that the compensable injury does not extend to the right shoulder rotator cuff tear is supported by sufficient evidence and has been affirmed. Dr. P's narrative shows that he considered the right rotator cuff tear in assessing the claimant's MMI and IR. As such, his MMI/IR certification considers an injury not determined to be a part of the compensable injury and cannot be adopted. *See* APD 110463, decided June 13, 2011; and APD 101567, decided December 20, 2010. Accordingly, we reverse the hearing officer's determinations that the claimant reached MMI on February 26, 2012, with a five percent IR.

Dr. Pr was the first designated doctor appointed to determine the claimant's MMI and IR, as well as the extent of the compensable injury. Dr. Pr examined the claimant on January 26, 2012, and in a DWC-69 and narrative report dated that same date certified that the claimant had not reached MMI but was expected to do so on or about March 26, 2012.

[Dr. W], a doctor selected by the treating doctor to act in the treating doctor's place, examined the claimant on June 14, 2012, and in a DWC-69 and narrative report dated that same date certified that the claimant had not reached MMI but was expected to do so on or about October 14, 2012. Dr. W noted in his narrative report that he did not agree with Dr. P's MMI/IR certification because "[i]t is my belief that [the claimant] has suffered a more serious injury than just a strain/sprain to her lumbar spine." Dr. W further noted that "[a] concentric disc bulge is a vertical tear in the disc and is mostly like (sic) caused by a torsion trauma . . . and would be the same type of torsion injury that [the claimant] suffered. . . ." Nothing in the evidence established that the compensable injury includes a concentric disc bulge, nor did the parties litigate this condition at the hearing. Dr. W's certification that the claimant has not reached MMI is based on a condition not considered part of the compensable injury, and as such it cannot be adopted. APD 110463, *supra*, and APD 101567, *supra*.

[Dr. H], a post-designated doctor required medical examination doctor, examined the claimant on April 23, 2012, and in a DWC-69 dated May 1, 2012, and an accompanying narrative report dated April 23, 2012, certified the claimant reached clinical MMI on January 26, 2012, with a one percent IR. In his narrative report Dr. H stated:

[T]here is no question that [the claimant] has not incurred any significant injury (damage or harm) to either the right shoulder or lumbar spine that would require any additional diagnostic measures or treatment. Therefore, she is at a point of reasonable stability.

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It is my opinion that the extent of injury was nothing more than a sprain of the shoulder, and perhaps a soft tissue lumbar sprain without radiculopathy.

Dr. H assessed a two percent upper extremity impairment based on ROM measurements of the claimant's right shoulder, which converts to a one percent whole person impairment, and placed the claimant in DRE Lumbosacral Category I: Complaints or Symptoms for zero percent impairment.

Dr. H considered the entire compensable injury, awhich as previously discussed includes a lumbar sprain and right shoulder sprain. Accordingly, we render a new decision that the claimant reached MMI on January 26, 2012, with a one percent IR.

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 reverse the hearing officer's determinations that the claimant reached MMI on February 26, 2012, with a five percent IR, and we render a new decision that the claimant reached MMI on January 26, 2012, with a one percent IR.

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

SUPERINTENDENT
[ADDRESS]
[CITY], TEXAS [ZIP CODE].

Carisa Space-Beam
Appeals Judge

CONCUR:

Veronica L. Ruberto
Appeals Judge

Margaret L. Turner
Appeals Judge