APPEAL NO. 131655
FILED SEPTEMBER 3, 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 held on June 3, 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) had disability resulting from an injury sustained on [date of injury], for the period of October 2, 2012, to the date of the CCH; (2) the claimant reached maximum medical improvement (MMI) on January 10, 2012; and (3) the claimant's impairment rating (IR) is eight percent.

The claimant appealed, disputing the hearing officer's determinations of MMI and IR. The claimant contends that a prior decision and order from a CCH held on October 1, 2012, found the claimant was not at MMI and therefore the hearing officer cannot now find that he was at MMI nine months earlier (January 10, 2012). The respondent (carrier) responded, urging affirmance of the disputed MMI and IR determinations.

The hearing officer's determination that the claimant had disability from an injury sustained on [date of injury], for the period of October 2, 2012, to the date of the CCH was not appealed and has become final pursuant to Section 410.169.

DECISION

Reversed and remanded.

The parties stipulated that the claimant sustained a compensable injury on [date of injury]. It was undisputed that the compensable injury included a right hip injury. A decision and order from a prior CCH held on October 1, 2012, was in evidence. Issues to be decided at the October 1, 2012, CCH included: (1) whether the compensable injury of [date of injury], extends to the lumbar spine and degenerative joint disease of the right hip; (2) MMI; and (3) IR. The hearing officer determined in the prior October 1, 2012, CCH that the compensable injury of [date of injury], extends to degenerative joint disease of the right hip but does not extend to the lumbar spine; the claimant had not reached MMI; and because the claimant has not reached MMI, there is no IR at this time. Texas Department of Insurance, Division of Workers' Compensation (Division) records indicate that the decision and order issued as a result of the October 1, 2012, CCH was not appealed.

The hearing officer noted in Background Information section of the prior decision and order that [Dr. F], a designated doctor appointed by the Division, examined the claimant on April 27, 2012, and provided alternate IRs, one based upon the diagnosis of

a hip strain only and one based on the diagnosis of a hip fracture. The hearing officer further noted that Dr. F certified that the claimant had reached MMI on January 10, 2012, if the injury was confined to a right hip strain, and assigned an eight percent IR due to a loss of range of motion (ROM) of the right hip. Additionally, the hearing officer noted in part, that in the alternative certification, Dr. F opined the claimant had not yet reached MMI noting the claimant had severe degenerative changes of the right hip joint.

Dr. F re-examined the claimant on December 4, 2012, and certified that the claimant reached MMI on January 10, 2012, and assigned an eight percent 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). Dr. F placed the claimant in Lumbosacral Diagnosis-Related Estimate (DRE) Category I for the lumbar spine, assigning zero percent impairment and stated that "[t]he right hip [ROM] findings today are again as previously noted and fall into the severe category per [T]able 40 of the [AMA Guides]," assessing eight percent impairment for the right hip. As previously noted, a prior CCH found that the compensable injury does not extend to the lumbar spine.

In evidence was correspondence dated April 10, 2013, from the claimant's treating doctor, [Dr. A]. Dr. A stated that the claimant "will require a total hip replacement for his compensable injury. It is protocol for replacement surgery to be put off as long as possible. The reason it is best to wait as long as possible to have the surgery is it will reduce the risk of a revision total hip replacement in the future." Dr. A additionally stated that the claimant should not be rushed into surgery before it is necessary and that he tells his patients to wait until they cannot tolerate the pain any more. Dr. A further stated that "[s]ince there is further treatment that will improve his condition, I do not believe he is at MMI."

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.

In his re-examination of the claimant on December 4, 2012, Dr. F noted that the claimant "[has] significant degenerative changes of the right hip and has an option of trying to deal with the pain, living with the hip as is, or having a total hip arthroplasty." Dr. F went on to note the claimant has elected to defer the surgery for as long as

possible. Dr. F concluded the claimant was at MMI since no significant change or treatment has been rendered since he last rendered an opinion on MMI so the date of January 10, 2012, **remains** (emphasis added) appropriate. However, a review of the evidence reflects that the date of January 10, 2012, initially assigned by Dr. F was for a hip strain only. As previously discussed, it has been administratively determined that the compensable injury extends to degenerative joint disease of the right hip. At the time of the prior examination, April 27, 2012, Dr. F opined that further material recovery from or lasting improvement to the claimant's hip injury, could be anticipated considering the claimant's severe degenerative changes of the right hip joint. Additionally, as previously noted Dr. A opined that further treatment is anticipated to improve the claimant's condition. Further, the hearing officer determined in the prior CCH held on October 1, 2012, that the claimant was not at MMI. The hearing officer specifically found in the CCH held on October 1, 2012, that "Dr. F found if the claimant's injury included the aggravation of the pre-existing right hip degenerative joint disease, the claimant has not reached [MMI]." As previously noted, this finding of fact was not appealed. The hearing officer determined in the prior CCH that the compensable injury of [date of injury], extends to degenerative joint disease of the right hip. Accordingly, the hearing officer's determination that the claimant reached MMI on January 10, 2012, is so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust. The preponderance of the other medical evidence is contrary to the MMI date certified by Dr. F. We reverse the hearing officer's determination that the claimant reached MMI on January 10, 2012, and remand the issue of MMI to the hearing officer for further action consistent with this decision.

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. Given that we have remanded the MMI issue to the hearing officer, we also reverse the hearing officer's determination that the claimant's IR is eight percent and remand the IR issue to the hearing officer for further action consistent with this decision.

REMAND INSTRUCTIONS

The hearing officer is to determine whether Dr. F is still qualified and available to be the designated doctor. If Dr. F is no longer qualified or available to serve as the

designated doctor, then another designated doctor is to be appointed pursuant to Rule 127.5(c) to determine MMI, and the IR.

The MMI date cannot be later than the statutory date of MMI (s*ee* Section 401.011(30)) or earlier than April 27, 2012, the date of the prior examination of Dr. F on which the hearing officer based his unappealed finding of fact (from the October 1, 2012, CCH) that the claimant was not at MMI.

The hearing officer is to give the parties the opportunity to stipulate as to the statutory date of MMI. If the parties cannot agree as to the date of statutory MMI, the hearing officer is to determine the date of statutory MMI based on the evidence in the case. The hearing officer is to request that the designated doctor re-examine the claimant and to give a certification of MMI and IR for the claimant's compensable injury of [date of injury], based on the claimant's condition as of the MMI date, which can be no later than date of statutory MMI considering the claimant's medical record and the certifying examination.

The hearing officer is to request from the designated doctor a certification of MMI and IR based on the entire compensable injury. The hearing officer is to inform the designated doctor that the compensable injury of [date of injury], includes degenerative joint disease of the right hip but does not include the lumbar spine.

The hearing officer is to ensure that the designated doctor has all the pertinent medical records. The parties and their representatives are: to be provided with the hearing officer's letter to the designated doctor; to be provided the designated doctor's response; to be allowed an opportunity to respond to the designated doctor's response; and to be allowed to present additional evidence. The hearing officer is to make determinations on the issues of MMI and IR which are supported by the evidence and 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* Appeals Panel Decision 060721, decided June 12, 2006.

The true corporate name of the insurance carrier is **ACE AMERICAN INSURANCE COMPANY** 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.

Margaret L. Turner
Appeals Judge

CONCUR:

Veronica L. Ruberto
Appeals Judge

Carisa Space-Beam
Appeals Judge