APPEAL NO. 131978
FILED OCTOBER 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 July 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) had disability from March 28 to August 3, 2012; (2) the first certification of maximum medical improvement (MMI) and assigned impairment rating (IR) from [Dr. K] on March 27, 2012, did not become final under Section 408.123 and 28 TEX. ADMIN. CODE § 130.12 (Rule 130.12); (3) the claimant reached MMI on March 27, 2012; and (4) the claimant's IR is 11%.

The claimant appealed the hearing officer's MMI and IR determinations, arguing that he had not reached MMI on March 27, 2012, because he requires additional surgery for the compensable injury, and that the certification of MMI/IR from Dr. K, the designated doctor, is not 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) (AMA Guides). The respondent (carrier) responds, urging affirmance of the disputed determinations. The hearing officer's determinations that the claimant had disability from March 28 to August 3, 2012, and that the first certification of MMI and assigned IR from Dr. K on March 27, 2012, did not become final under Section 408.123 and Rule 130.12 were not appealed and have become final pursuant to Section 410.169.

DECISION

Reversed and remanded.

The parties stipulated that the claimant sustained a compensable injury to his left shoulder on [date of injury]. The claimant testified that he slipped and caught his shoulder on a piece of old concrete. It was undisputed that the claimant has undergone three surgeries for the compensable injury in this case. The first surgery occurred on September 27, 2010, the second on May 9, 2011, and the third on September 25, 2012. It was undisputed that the designated doctor was not aware of the September 25, 2012, surgery, which occurred after the designated doctor examination on March 27, 2012. In evidence is an operative report dated September 27, 2010, for a left shoulder rotator cuff repair and subacromial decompression; an operative report dated May 9, 2011, for an arthroscopy of the left shoulder with capsular release and revision rotator cuff repair; and an operative report dated September 25, 2012, for a left shoulder arthroscopy with revision rotator cuff repair and graft jacket patch supplementation.

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 Texas Department of Insurance, Division of Workers' Compensation (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.

In Appeals Panel Decision (APD) 012284, decided November 1, 2001, the Appeals Panel noted that the question regarding the date of MMI was not whether the claimant actually recovered or improved during the period at issue, but whether based upon reasonable medical probability, material recovery or lasting improvement could reasonably be anticipated. The Appeals Panel held "it is of no moment that the treatment did not ultimately prove successful in providing material recovery or lasting improvement in the claimant's condition, where, as here, the recovery and improvement could reasonably be anticipated according to the designated doctor." *See also* APD 101746, decided January 24, 2011; APD 101567, decided December 20, 2010.

Dr. K, the designated doctor, examined the claimant on March 27, 2012, to determine the claimant's MMI and IR. In a Report of Medical Evaluation (DWC-69) dated March 27, 2012, Dr. K certified the claimant reached clinical MMI on March 27, 2012, with a 7% IR. In an attached narrative report, Dr. K noted that the claimant underwent left shoulder rotator cuff repair and subacromial decompression on September 27, 2010, and that on May 9, 2011, the claimant underwent arthroscopy of the left shoulder with capsular release, decompression, Mumford procedure, revision rotator cuff repair, and biceps tenodesis. Dr. K also stated that the claimant was "noted to have moderate arthritis, a large rotator cuff tear, two tendons retracted medial to the glenoid, impingement, AC arthritis, biceps tendinitis, and adhesive capsulitis." Dr. K further noted that the claimant reported to him that "he was supposed to have 24 visits of physical therapy [PT], however, workers' comp approved only 8 visits. The [claimant] was receiving [PT] twice a week." Regarding the March 27, 2012, date of MMI, Dr. K stated:

> [The claimant] continued to have pain and restriction of motion which, in my opinion, is not going to change due to underlying osteoarthritis. The initial surgery failed because of separation of the supraspinatus tendon.

> The repeat surgery which repaired the supraspinatus tendon along with the Mumford procedure was successful, however, he continued to have pain and restriction of motion. The [claimant] was able to do all of his day-to-day activities with some discomfort of the left shoulder.

Using the AMA Guides, Dr. K assessed a 12% upper extremity (UE) impairment based on range of motion (ROM) measurements of the claimant's left shoulder, which Dr. K converted to a 7% IR. We note that although Dr. K assessed a 0% impairment for adduction, Dr. K does not list a specific ROM measurement for adduction in his narrative report, nor does he state that the claimant had normal ROM for adduction.

The hearing officer sent Dr. K a letter of clarification on July 10, 2013, after the CCH, notifying Dr. K that the claimant underwent a distal clavicle resection during his second operation on May 9, 2011, and requested Dr. K to include the distal clavicle resection in his IR.

In a response dated July 16, 2013, Dr. K noted that the claimant had arthroplasty with removal of the distal one-third of the clavicle which amounts to 10% impairment of the UE, which was the surgery performed on May 9, 2011. Dr. K combined the 12% UE impairment he had previously assessed using ROM measurements of the claimant's left shoulder with 10% for the distal clavicle resection to arrive at 19% UE impairment. Dr. K then converted 19% UE impairment to 11% whole person impairment (WPI). However, we note that combining 12% UE impairment with 10% for the distal clavicle resection using the Combined Values Chart on page 322 of the AMA Guides results in 21%, not 19%. Using Table 3 on page 3/20, 21% UE converts to 13% WPI, not 11% WPI as assessed by Dr. K. Dr. K's 11% IR is not in accordance with the AMA Guides.

In evidence are various clinical progress notes from [Dr. S]. On June 30, 2011, Dr. S noted the claimant had swelling over his anterior supraspinatus. On August 11, 2011, Dr. S noted that the claimant "has severe protracted which is not good and halfway swollen right over the front top part of his supraspinatus. . . ." Dr. S also noted swelling over the "revision cuff." On December 12, 2011, Dr. S noted that the carrier had canceled the claimant's therapy and "I am a bit doubtful by this. . . ." On February 13, 2012, Dr. S noted that the claimant was "not well, not ready for release, not at MMI and not receiving medically necessary PT to reach MMI." Dr. S further stated that:

> [The claimant] requires considerable more PT and eventually work conditioning, followed by [functional capacity evaluation] [before] he reaches at [sic] point [for] MMI and release with restrictions. The longer [the claimant] does not receive medically necessary PT, the more his shoulder will [deteriorate] and the less likely it will be that he will return to work. [H]is impairment will continue to increase as appropriate PT is

denied. I will keep requesting the PT and try to help [the claimant] all [I] can despite him not being approved for this reasonable and necessary care.

In a progress note dated April 9, 2012, Dr. S again notes that the claimant "is a REVISION [rotator cuff repair], not a primary and revision surgeries for the [rotator cuff] require twice the normal amount of visits." Dr. S also stated that:

I am not sure today that the disruption in care from the denial of PT has not resulted in some recurrent tearing of the [rotator cuff]. . . . He has a good note from Care PT documenting his improvement and the need for continued PT. . . . [I]t is very necessary for him to continue his therapy for him to have any chance to return to his job. . . .

In a progress note dated June 4, 2012, Dr. S noted that the claimant "still has not had medically necessary PT approved . . ." and that the claimant "needs more medically necessary PT with possible re-tearing of repair due to denial of medically necessary PT."

The hearing officer's finding that the certification of MMI/IR by Dr. K is supported by a preponderance of the evidence is so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust. Accordingly, we reverse the hearing officer's determinations that the claimant reached MMI on March 27, 2012, with an 11% IR.

There is one other MMI/IR certification in evidence, which is from [Dr. T], a doctor selected by the treating doctor to act in his place. Dr. T examined the claimant on April 1, 2013, and in a DWC-69 dated April 2, 2013, certified that the claimant reached MMI statutorily on August 3, 2012. We note that the parties did not stipulate or litigate the date of statutory MMI. The claimant sustained a compensable injury on [date of injury], and if the eighth day of disability was [8th day after date of injury], then the date of statutory MMI under Section 401.011(30)(B) would be no earlier than August 8, 2012. Given that statutory MMI could not be earlier than August 8, 2012, Dr. T's certification that the claimant reached MMI statutorily on August 3, 2012, is legally incorrect.

As there is not a certification of MMI/IR in evidence that can be adopted, we remand the issues of MMI and IR to the hearing officer for further action consistent with this decision.

REMAND INSTRUCTIONS

Dr. K is the designated doctor in this case. On remand, the hearing officer is to determine whether Dr. K is still qualified and available to be the designated doctor. If

Dr. K 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 take a stipulation from the parties on the date of statutory MMI. If the parties are unable to stipulate to the date of statutory MMI, the hearing officer is to make a determination of the date of statutory MMI in order to inform the designated doctor of the date of statutory MMI. The hearing officer should ensure that the treating doctor and insurance carrier send to the designated doctor all of the claimant's medical records that are in their possession relating to the issue to be evaluated by the designated doctor, including the medical records pertaining to the claimant's September 25, 2012, left shoulder surgery.

The hearing officer is to request the designated doctor to give an opinion on the claimant's date of MMI, which cannot be after the date of statutory MMI, and rate the entire compensable injury as of the date of MMI 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 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 **ZURICH 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.

Carisa Space-Beam
Appeals Judge

CONCUR:

Veronica L. Ruberto
Appeals Judge

Margaret L. Turner
Appeals Judge