APPEAL NO. 132062
FILED NOVEMBER 4, 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 July 30, 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 an umbilical hernia; (2) the respondent (claimant) had disability beginning on December 30, 2012, and continuing through and including March 24, 2013; (3) the claimant reached maximum medical improvement (MMI) on March 25, 2013; and (4) the claimant's impairment rating (IR) is two percent.

The appellant (carrier) appealed the hearing officer's MMI, IR, and disability determinations, contending that those determinations are so contrary to the great weight and preponderance of the evidence as to be manifestly unjust. The appeal file does not contain a response from the claimant. The hearing officer's determination that the compensable injury of [date of injury], does not extend to an umbilical hernia was not appealed and has become final pursuant to Section 410.169.

DECISION

Affirmed in part and reversed and remanded in part.

The parties stipulated in part that: (1) the claimant sustained a compensable injury on [date of injury]; (2) the Texas Department of Insurance, Division of Workers' Compensation (Division)-appointed designated doctor for the purpose of MMI and IR was [Dr. F]; and (3) Dr. F certified that the claimant reached MMI on December 29, 2012, and assigned a four percent IR. The claimant testified he was injured on [date of injury], when he was hit by the bucket of a backhoe and pushed into a hole.

DISABILITY

The hearing officer's determination that the claimant had disability beginning on December 30, 2012, and continuing through and including March 24, 2013, 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.

In the Background Information section of the decision, the hearing officer stated:

[Dr. F] gives the date of MMI as December 29, 2012. [Dr. F's] rational is, "[g]iven the nature of the compensable injury of right shoulder sprain/strain and pursuant to [Official Disability Guidelines (ODG)] Best Practices Return to Work guidelines and [Medical Disability Advisor, Workplace Guidelines for Disability Duration, excluding all sections and tables relating to rehabilitation published by the Reed Group, Ltd. (MDG)] including expected treatment/resolution and duration, the [claimant] has reached MMI as of December 29, 2012." It does not appear that [Dr. F] made the determination of MMI based on the medical records and examination of the [c]laimant.

The hearing officer, finding that Dr. F's date of MMI was based solely on the MDG, rejected Dr. F's MMI/IR certification and adopted the MMI/IR certification of [Dr. M], the claimant's treating doctor.

Dr. M examined the claimant on March 25, 2013, and certified in a Report of Medical Evaluation (DWC-69) that the claimant reached clinical MMI on March 25, 2013, with a two percent IR. In an attached narrative report, Dr. M explains that the two percent IR is based on range of motion (ROM) measurements taken of the claimant's right shoulder. In his narrative report Dr. M does not mention or explain in any way the claimant's date of MMI.[1]

Dr. F, the designated doctor, examined the claimant on May 3, 2013, and certified in a DWC-69 that the claimant reached clinical MMI on December 29, 2012, with a four percent IR. Based on ROM measurement of the claimant's right shoulder,

---

[1] We note that Rule 130.1(d)(1) provides that a certification of MMI and assignment of an IR for the compensable injury requires the "completion, signing, and submission of the [DWC-69] and a narrative report." Rule 130.1(d)(1)(B) provides that DWC-69 includes an attached narrative report, and that the narrative report must include the date of MMI.

Dr. F assessed six percent upper extremity impairment, which converts to four percent whole person impairment using Table 3 on page 3/20, of 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). As noted above, the hearing officer rejected Dr. F's MMI/IR certification because he believed Dr. F based his opinion of MMI solely on the MDG.

The Appeals Panel has previously held that the MDG 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. However, we disagree that Dr. F based his opinion solely on the MDG. Regarding MMI Dr. F states:

> Given the nature of the compensable injury of right shoulder sprain/strain and pursuant to [the ODG] and [MDG] including the expected treatment/resolution and duration, the [claimant] has reached MMI as of December 29, 2012.

By finding Dr. F's opinion on MMI to be based solely on the MDG, the hearing officer in this case has misread Dr. F's opinion. In APD 130723, decided May 6, 2013, and APD 130915, decided May 20, 2013, the Appeals Panel reversed the hearing officer's extent-of-injury determination because he had misread the causation letter in evidence. Although the hearing officer in this case could accept or reject in whole or in part the opinion of Dr. F, or any other evidence, the hearing officer misread Dr. F's MMI opinion. Accordingly, we reverse the hearing officer's determinations that the claimant reached MMI on March 25, 2013, with a two percent IR, and we remand the issues of MMI and IR to the hearing officer to fully consider Dr. F's MMI opinion and give it proper weight.

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 **TEXAS MUTUAL INSURANCE COMPANY** and the name and address of its registered agent for service of process is

RICHARD J. GERGASKO
6210 EAST HIGHWAY 290
AUSTIN, TEXAS 78723.

Carisa Space-Beam
Appeals Judge

CONCUR:

Veronica L. Ruberto
Appeals Judge

Margaret L. Turner
Appeals Judge