APPEAL NO. 132148
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 (CCH) was held on August 6, 2013, in [City], Texas, with [hearing officer] presiding as hearing officer. The hearing officer resolved the disputed issues by deciding that: (1) the respondent (claimant) has not reached maximum medical improvement (MMI); and (2) because the claimant has not reached MMI, an impairment rating (IR) is premature.

The appellant (carrier) appealed the hearing officer's MMI and IR determinations. The claimant responded, urging affirmance.

DECISION

Reversed and remanded.

The claimant testified that he sustained a crush injury to his right forearm at work on [date of injury]. The parties stipulated that the claimant sustained a compensable injury on [date of injury], and that the carrier has accepted the diagnosis reported by [Dr. W], the designated doctor appointed by the Texas Department of Insurance, Division of Workers' Compensation (Division). Dr. W's narrative report dated September 27, 2012, states that he diagnosed the claimant with "[r]ight forearm crush injury with post-traumatic pronator syndrome." The claimant had surgery to his right forearm on February 7, 2012, had returned to work on August 20, 2012, and had therapy for his right forearm until November 30, 2012.

There are three certifications of MMI and IR in evidence. The first certification is from Dr. W, the designated doctor, the second certification is from [Dr. M], the doctor selected by the treating doctor acting in place of the treating doctor, and the third certification is from [Dr. B], the treating doctor. We note that all three doctors, Dr. W, Dr. M, and Dr. B, certified that the claimant reached MMI on May 14, 2012.

MMI/IR

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. *See also* Section 401.011(30)(A). 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. *See* 28 TEX. ADMIN. CODE § 130.1(c)(3) (Rule 130.1(c)(3)).

There are three certifications of MMI and IR in evidence. In the Background Information section of the decision, the hearing officer discusses why none of the three certifications of MMI and IR in evidence can be adopted. The hearing officer references a letter dated April 8, 2013, from the claimant's surgeon, [Dr. R], to support his determination that the claimant has not reached MMI. The hearing officer in his decision states that Dr. R believed that the claimant had not reached MMI because the claimant participated in post-surgical physical therapy until August 20, 2012. However, the hearing officer misread Dr. R's letter, because Dr. R clearly states that he is in agreement with Dr. M's certification of MMI and IR performed in January 2013. Dr. R's letter dated April 8, 2013, states:

> The [claimant] did get his MMI redone at [three percent]. There is apparently some dispute regarding the initial MMI done and initial return to work. The [claimant's] initial MMI was done on September 27, 2012. The [claimant], however, did not return back to work full duty until [August 20, 2012]. He continued his therapy until [August 20, 2012]. His second MMI was done in January. After reviewing the notes, I do feel the [claimant] was not at MMI when it was initially performed in September. **Therefore, the second MMI should be his primary MMI to be accepted.** [emphasis added].

In Appeals Panel Decision (APD) 111393, decided November 23, 2011, the Appeals Panel held that a hearing officer can determine that the claimant is not at MMI in the absence of a DWC-69 when the only DWC-69 in evidence certifying a date specific for MMI is contrary to the preponderance of the other medical evidence. We distinguish APD 111393 from the case before us because the hearing officer misread Dr. R's letter dated April 8, 2013. In his letter dated April 8, 2013, Dr. R refers to Dr. M's certification of MMI and IR as the "second MMI," and opines that he agrees with Dr. M's certification of MMI and IR by stating that "the second MMI should be his primary MMI to be accepted." In evidence the only certification of MMI and IR that was done in January was from Dr. M.

Although the hearing officer could accept or reject in whole or in part the opinion of Dr. R, or any other evidence, the hearing officer misread Dr. R's letter dated April 8, 2013, that Dr. R opined that the claimant has not reached MMI. Clearly, Dr. R's letter dated April 8, 2013, states that he agrees with the MMI date of May 14, 2012, as certified by Dr. M, the referral doctor, on January 18, 2013.

Accordingly, we reverse the hearing officer's determination that the claimant has not reached MMI, and because the claimant has not reached MMI, the claimant's IR is premature. In the Background Information section of the decision, the hearing officer discusses why none of the three certifications of MMI and IR in evidence can be adopted.

With regard to Dr. W's certification of MMI and IR, the hearing officer states in the Background Information section of his decision, that Dr. W's MMI date was not based on the claimant's actual medical condition as of that date. However, Dr. W notes in his narrative report that the claimant is diagnosed with a right forearm crush injury with post-traumatic pronator syndrome, which is the diagnosis accepted by the carrier as compensable. Contrary to the hearing officer's comment in the Background Information section, Dr. W notes in his report the claimant's medical history and physical examination.

With regard to Dr. M's certification of MMI and IR, the hearing officer states that he rated a condition that has not been accepted by the carrier and was not at issue in the CCH. Dr. M notes in his narrative report that the claimant's diagnosis is a crush injury to the right forearm and post-traumatic pronator syndrome. As previously mentioned, those conditions have been accepted by the carrier as compensable. The hearing officer does not state what noncompensable condition was rated by Dr. M.

With regard to Dr. B's certification of MMI and IR, the hearing officer correctly states that he provided no analysis for either his date of MMI or his assigned "[n]o [i]mpairment." Also, we note that Dr. B mentioned in his narrative report the claimant's crush injury but he did not mention the post-traumatic pronator syndrome condition.

However since there is more than one certification of MMI and IR in evidence that can be adopted, we do not consider it appropriate to render a decision on the issues of MMI and IR, and we remand to the hearing officer to make a determination on the claimant's MMI and IR consistent with this decision.

SUMMARY

We reverse the hearing officer's decision that the claimant has not reached MMI, and because the claimant has not reached MMI, the claimant's IR is premature. We remand the issues of MMI and IR to the hearing officer to make determinations on MMI and IR that are consistent with this decision.

REMAND INSTRUCTIONS

It is undisputed that the claimant's compensable injury is right forearm crush injury with post-traumatic pronator syndrome. The hearing officer is to make a determination of MMI and IR based on the evidence.

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.

Veronica L. Ruberto
Appeals Judge

CONCUR:

Carisa Space-Beam
Appeals Judge

Margaret L. Turner
Appeals Judge