APPEAL NO. 132185
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 8, 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) reached maximum medical improvement (MMI) on July 16, 2012; and (2) the claimant's impairment rating (IR) is five percent. The appellant (carrier) appealed the hearing officer's determination of the MMI date and the IR, contending that the certification performed by [Dr. H], a doctor selected by the treating doctor to act in his place, was not valid and that the evidence does not support the hearing officer's determinations. The claimant responded, urging affirmance. The claimant contends that the carrier's appeal was not timely filed.

DECISION

Affirmed.

We find no merit in the claimant's contention in their response that the carrier's appeal was untimely filed. We note that Tuesday, August 27, 2013, was a Lyndon Baines Johnson Day, a state holiday excluded from the computation of the 15-day period to file an appeal. *See* Government Code § 662.003(b). Additionally, Monday, September 2, 2013, was Labor Day, a national holiday listed in Government Code § 662.003(a) and Thursday, September 5, 2013, and Friday, September 6, 2013, were Rosh Hashanah listed as optional holidays in Government Code § 662.003(c) and excluded from the computation of the 15-day period to file an appeal. *See* Labor Code § 410.202(d).

Section 410.203(b) was amended effective September 1, 2011, to allow the Appeals Panel to affirm the decision of a hearing officer as prescribed in Section 410.204(a-1). Section 410.204(a) provides, in part, that the Appeals Panel may issue a written decision on an affirmed case as described in subsection (a-1). Subsection (a-1) provides that the Appeals Panel may only issue a written decision in a case in which the panel affirms the decision of a hearing officer if the case: (1) is a case of first impression; (2) involves a recent change in law; or (3) involves errors at the CCH that require correction but does not affect the outcome of the hearing. This case is a situation that requires correction but does not affect the outcome of the hearing.

The parties stipulated that the claimant sustained a compensable injury on [date of injury]; [Dr. P] was appointed by the Texas Department of Insurance, Division of Workers' Compensation (Division) for the purpose of MMI and IR; and the claimant's

statutory MMI date is July 16, 2012. The claimant testified that he injured his right shoulder while drilling a hole in concrete. A prior CCH determined that the compensable injury of [date of injury], extends to right shoulder impingement. In evidence is an operative report dated November 1, 2012, which reflects the claimant underwent a right shoulder rotator cuff/subacromial bursa debridement and right shoulder subacromial decompression. The operative report reflects a pre-operative diagnosis of right shoulder impingement.

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.

Dr. P, the designated doctor, examined the claimant on April 21, 2012, and certified that the claimant reached MMI on December 14, 2011, with a three percent IR, using 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). Dr. P noted that the claimant completed physical therapy and work hardening on November 3, 2011, and on December 14, 2011, the claimant requested restrictions to be modified "due to [his] functional improvement since last evaluation so he can pursue current job opportunities." The three percent impairment assessed was based on loss of range of motion (ROM) in the claimant's right shoulder. The single diagnosis given in Dr. P's narrative was shoulder sprain/strain. After the claimant's November 1, 2012, surgery a letter of clarification (LOC) was sent to Dr. P notifying Dr. P that right shoulder impingement was part of the compensable injury. In a response dated March 19, 2013, Dr. P stated ". . . his MMI date and his [IR] does not change. Everything stays the same, except impingement becomes part of the compensable injury." Dr. P submitted an amended Report of

Medical Evaluation (DWC-69) but again certified that the claimant reached MMI on December 14, 2011, with a three percent IR.

Dr. H examined the claimant on October 16, 2012, and certified that the claimant reached MMI statutorily on July 16, 2012, noting that on that date "as noted by several orthopedic surgeons [the claimant] requires surgical intervention to correct the impingement syndrome." Dr. H assessed five percent impairment based on loss of ROM of the right shoulder.

The hearing officer found that the July 16, 2012, date of MMI and five percent IR certified by Dr. H is supported by a preponderance of the evidence. The carrier contends on appeal that the certification submitted by Dr. H is invalid because the DWC-69 reflects that the date of exam was May 9, 2012, which would make the July 16, 2012, date of MMI prospective. However, the narrative from Dr. H states that the examination of the claimant for purposes of MMI and IR took place on October 16, 2012. The prior CCH that determined that right shoulder impingement was part of the compensable injury was held on October 4, 2012. The claimant testified that he remembered being examined by Dr. H after the CCH on the extent of injury and thought that October 16, 2012, "sounds like the right date." The evidence reflects that Dr. H examined the claimant on October 16, 2012, rather than May 9, 2012, the date he incorrectly noted on the DWC-69. We note that the date of the DWC-69 is October 16, 2012. *See* Appeals Panel Decision 100636-s, decided July 16, 2010.

The hearing officer noted in the Background Information portion of his decision that the evidence presented at the CCH clearly indicates that the claimant had material improvement in the condition of his right shoulder after the surgery. However, the hearing officer in the next sentence states "[b]ased on this evidence, Dr. [P's] certified [MMI] date of December 14, 2011, is persuasive and reasonable." The hearing officer then states that the certification from Dr. H is legally correct and should be adopted.

The evidence establishes that the surgery the claimant underwent on November 1, 2012, improved the claimant's condition and was performed for a condition, right shoulder impingement, which was part of the compensable injury. When Dr. P received a [LOC] regarding the claimant's surgery, Dr. P simply stated that the claimant's certification of MMI and IR would not change but gave no explanation of why the subsequent surgery for right shoulder impingement would not change the MMI date. The hearing officer was persuaded that the evidence indicated that the claimant had material improvement in the condition of his right shoulder after the surgery but mistakenly referred to the certification of Dr. P in his Background Information. The hearing officer's determination that the claimant reached MMI on July 16, 2012, with a five percent IR as certified by Dr. H is supported by sufficient evidence and is affirmed.

The true corporate name of the insurance carrier is **OLD REPUBLIC GENERAL INSURANCE CORPORATION** and the name and address of its registered agent for service of process is

CORPORATION SERVICE COMPANY
211 EAST 7TH STREET, SUITE 620
AUSTIN, TEXAS 78701-3218.

Margaret L. Turner
Appeals Judge

CONCUR:

Veronica L. Ruberto
Appeals Judge

Carisa Space-Beam
Appeals Judge