APPEAL NO. 132838
FILED FEBRUARY 3, 2014

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 25, 2013, and continued on October 17, 2013, in [City], Texas, with [hearing officer] presiding as hearing officer. With regard to the three issues before him, the hearing officer determined that: (1) the compensable injury of [date of injury], does not extend to cervical radiculopathy from C4 through C7; (2) the appellant/cross-respondent (claimant) has not reached maximum medical improvement (MMI); and (3) because the claimant has not reached MMI, no impairment rating (IR) can be assigned.

The claimant appealed the hearing officer's determination regarding extent of injury, contending that there was sufficient evidence of causation to prove the disputed condition is part of the compensable injury. The respondent/cross-appellant (self-insured) appealed the determinations that the claimant has not reached MMI and an IR cannot be assigned, contending that the determination that the claimant has not reached MMI is based on the disputed condition that the hearing officer determined was not compensable. The self-insured responded to the claimant's appeal, urging affirmance for the issue on which it prevailed. The appeal file does not contain a response from the claimant to the self-insured's appeal.

DECISION

Affirmed in part and reversed and remanded in part.

The parties stipulated that: (1) it is undisputed that on [date of injury], the claimant sustained a compensable right patella fracture, face contusion, left hand sprain, right ankle sprain, cervical sprain, lumbar strain, and depression a single episode injury; and (2) [Dr. E] is the designated doctor appointed by the Texas Department of Insurance, Division of Workers' Compensation (Division) for the issues of MMI, IR, and extent of injury. The claimant testified that she was injured when she tripped on a mat while carrying a large steel pan in the cafeteria of a high school where she worked as a kitchen worker.

EXTENT OF INJURY

The hearing officer's determination that the compensable injury of [date of injury], does not extend to cervical radiculopathy from C4 through C7 is supported by sufficient evidence and is affirmed.

MMI AND 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.

The hearing officer determined that the claimant has not reached MMI and an IR cannot be assigned per Dr. E, the designated doctor.

Dr. E first examined the claimant on January 3, 2013, and determined that the claimant had not yet reached MMI because there were remaining symptoms and objective findings and there were additional venues of treatment that were currently in process. He further opined that the compensable injury extends to a lumbar sprain/strain and depression. Dr. E subsequently re-examined the claimant on April 25, 2013, and again determined that the claimant had not reached MMI. As part of that exam, Dr. E referred the claimant to [Dr. B] for a consultation and an EMG. Dr. E discussed the results of the EMG in his narrative report, stating that the tests "demonstrate active denervation that appears fairly acutely active affecting all levels of the cervical spine from C5-T1." In explaining his determination that the claimant has not reached MMI, Dr. E stated that "it is my opinion that [the claimant] has not achieved [MMI] because there are remaining symptoms; there are objective findings present, there are additional venues of treatment needed with reference to her cervical spine. The [claimant] has been advised to have [epidural steroid injection] by [Dr. J], and the EMG performed by [Dr. B] demonstrates the presence of acute injury to the cervical spine. It is my opinion that she has reached MMI in all other areas, but not in the area of the cervical spine."

Dr. E's determination that the claimant has not reached MMI is based, in part, on the results of the EMG which diagnosed cervical radiculopathy. However, as noted above, we have affirmed the hearing officer's determination that the compensable injury of [date of injury], does not extend to this condition. Dr. E's certification considers a condition determined not to be a part of the compensable injury, and as such it cannot be adopted. *See* Appeals Panel Decision (APD) 110463, decided June 13, 2011; and APD 101567, decided December 20, 2010. Accordingly, we reverse the hearing officer's determination that the claimant has not reached MMI and an IR cannot be assigned.

There are two other certifications of MMI and IR in evidence. The first is from [Dr. W], a doctor selected by the treating doctor to act in his place. Dr. W examined the claimant on September 25, 2012, and determined that the claimant had not yet reached MMI, but she was expected to do so on December 25, 2012, because she was still being evaluated for the patellar fracture and a therapy program had been recommended. Dr. W listed the following conditions under "clinical impression": contusion of the face (resolving), right patella fracture, right ankle sprain, cervical strain (resolved), lumbar strain (resolved), left wrist strain (resolved), left thumb strain (resolved), and left hip strain (resolved). However, Dr. W failed to rate the compensable condition of a single episode of depression. Therefore, his certification cannot be adopted. *See* APD 110463, *supra*; and APD 101567, *supra.*

The second certification is from [Dr. H], a required medical examination doctor. Dr. H certified that the claimant reached MMI on January 17, 2013, with an eight percent IR. Dr. H listed as diagnoses a right patellar fracture, cervical sprain/strain, lumbar sprain/strain, and face contusion. He placed the claimant in Diagnosis-Related Estimate Cervicothoracic Category II: Minor Impairment for a five percent IR, and additionally assessed a three percent IR for the non-displaced patella fracture. Dr. H failed to rate the compensable conditions of a left hand sprain, right ankle sprain, and depression, a single episode. Accordingly, Dr. H's certification cannot be adopted. *See* APD 110463, *supra*; and APD 101567, *supra.*

Since there is no other certification of MMI and 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.

SUMMARY

We affirm the hearing officer's determination that the compensable injury of [date of injury], does not extend to cervical radiculopathy from C4 through C7.

We reverse the hearing officer's determination that the claimant has not reached MMI and an IR cannot be assigned, and remand the issues of MMI and IR to the hearing officer for further action consistent with this decision.

REMAND INSTRUCTIONS

Dr. E is the designated doctor in this case. On remand, the hearing officer is to determine whether Dr. E is still qualified and available to be the designated doctor. If Dr. E 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 advise the designated doctor that the compensable injury of [date of injury], includes a right patella fracture, face contusion, left hand sprain, right ankle sprain, cervical sprain, lumbar strain, and depression, a single episode, as stipulated by the parties. Further, the hearing officer is to advise the designated doctor that the [date of injury], compensable injury does not extend to cervical radiculopathy from C4 through C7, as administratively determined.

The hearing officer is to request the designated doctor to rate the entire compensable injury based on the claimant's condition as of the date of MMI 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) considering the medical record and the certifying examination.

The parties are to be provided with the designated doctor's new MMI and 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 **(a self-insured governmental entity through East Texas Educational Insurance Association)** and the name and address of its registered agent for service of process is

SUPERINTENDENT
[ADDRESS]
[CITY], TEXAS [ZIP CODE].

Cristina Beceiro
Appeals Judge

CONCUR:

Carisa Space-Beam
Appeals Judge

Margaret L. Turner
Appeals Judge