APPEAL NO. 132926
FILED FEBRUARY 13, 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 (CCH) was held on July 23, 2013,[1] and concluded on November 5, 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 bilateral shoulder impingement; (2) the appellant (claimant) had disability beginning on June 18, 2011, and continuing through the date of the CCH; (3) the claimant reached maximum medical improvement (MMI) on October 16, 2012; and (4) the claimant's impairment rating (IR) is 6%. The claimant appealed all of the hearing officer's determinations. The claimant alleges that at the beginning of the July 23, 2013, CCH, the parties stipulated that bilateral shoulder rotator cuff tears were accepted by the carrier, and that the hearing officer erred in not giving effect to that stipulation on the record in the November 5, 2013, CCH. The claimant also argues that the hearing officer erred in adopting the report of [Dr. B], the second designated doctor appointed by the Texas Department of Insurance, Division of Workers' Compensation (Division) to determine extent of injury, MMI, and IR. The respondent (carrier) responded, urging affirmance of the hearing officer's determinations. The carrier did not respond to the claimant's allegation that the parties stipulated at the July 23, 2013, CCH that the carrier had accepted bilateral shoulder rotator cuff tears.

DECISION

Affirmed in part, reformed in part, and reversed and remanded in part.

STIPULATIONS

Section 410.166 and 28 TEX. ADMIN. CODE § 147.4(c) (Rule 147.4(c)) provide, in part, that an oral stipulation or agreement of the parties that is preserved in the record is final and binding on the date made.

At the July 23, 2013, CCH, the claimant requested a stipulation that the carrier has accepted bilateral shoulder rotator cuff tears. When questioned by the hearing officer, the carrier agreed that it would stipulate to what was reported on the Benefit Review Conference (BRC) Report. The BRC report in evidence states that the "[c]arrier has accepted bilateral shoulder rotator cuff tears. . . ." A review of the record shows that the parties did in fact stipulate at the July 23, 2013, CCH that the carrier has accepted bilateral shoulder rotator cuff tears. Although the carrier stated at the

[1] We note that the hearing officer's decision does not list the July 23, 2013, CCH date.

November 5, 2013, CCH that it would not stipulate that it has accepted bilateral shoulder rotator cuff tears, the carrier had already so stipulated at the July 23, 2013, CCH. Therefore, per the parties' stipulation, we reform the hearing officer's Finding of Fact No. 1. to add the following:

I. The carrier has accepted bilateral shoulder rotator cuff tears.

DISABILITY AND EXTENT OF INJURY

The hearing officer's determinations that the claimant had disability beginning on June 18, 2011, and continuing through the date of the CCH, and that the compensable injury of [date of injury], does not extend to bilateral shoulder impingement are supported by sufficient evidence and are 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. 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 reached MMI on October 16, 2012, with a 6% IR per the last certification of Dr. B, the second designated doctor appointed by the Division.

Dr. B initially examined the claimant on June 12, 2012, and certified in a Report of Medical Evaluation (DWC-69) of that same date, that the claimant had not reached MMI but was expected to do so on September 1, 2012. In an attached narrative report, Dr. B noted that the claimant had not received treatment for his left shoulder, and therefore, was not at MMI.

Dr. B next examined the claimant on October 16, 2012, and certified in a DWC-69 of that same date, that the claimant reached MMI on October 16, 2012, with a 0% IR. In an attached narrative report Dr. B noted diagnoses of "[r]epair of rotator cuff on both sides; right shoulder on March 12, 2012, and do not have operative report for left shoulder," and "[b]ilateral ruptures of rotator cuff." Dr. B invalidated range of motion (ROM) measurements of the claimant's bilateral shoulders and assessed 0% IR for the claimant's right and left shoulders.

Dr. B last examined the claimant on August 22, 2013, in response to a letter of clarification (LOC) sent by the hearing officer. We note that the hearing officer's LOC is not in evidence. On that date Dr. B certified that the claimant reached MMI on October 16, 2012, with a 6% IR. In an attached narrative report, Dr. B noted diagnoses of atrophied rotator cuff, right side, and post-operative repair rotator cuff, right and left shoulder. Regarding MMI, Dr. B opined that "[the] [claimant] reached [MMI] as of October 16, 2012. There is no new information for me to change the [MMI] date."

Dr. B assessed 10% impairment for a distal clavicle resection of the right shoulder under Table 27, page 61 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), which converts to 6% whole person impairment. Although Dr. B noted ROM deficits in the claimant's left shoulder, Dr. B assessed 0% impairment for the left shoulder because:

> 1) At initial MRI of July 6, 2011, report says torn rotator cuff and atrophy of muscles of rotator cuff. Atrophy only means that the rupture has occurred before [date of injury], and due to lack of activities supraspinatus and infraspinatus muscles had atrophied. 2) [The claimant] had repair of rotator cuff on right shoulder on March 12, 2012, and soon after on the left side. Normally, when muscles of rotator cuff are atrophied repair is very rarely successful. 3) [The claimant] had repair of rotator cuff in the past in 1998. It seems this problem is going on from that time. 4) [Dr. M] looks like he is recommending shoulder arthroplasty. It is for chronic condition – not for the injury of [date of injury].

Dr. B further stated that the claimant "did not tear his rotator cuff muscles on the [date of injury], injury. Therefore, his compensable injury is sprain of both shoulders."

In evidence is an operative report dated March 2, 2012, which reflects that the claimant underwent an arthroscopic resection of anterior superior labral tear and resection of distal clavicle and revision of rotator cuff tear of the right shoulder. The operative report reflects a pre-operative diagnosis of recurrent rotator cuff tear of the

right shoulder. The claimant testified that he also underwent a rotator cuff repair on his left shoulder on August 29, 2012. Although an operative report of that date is not in evidence, there is a note from [Dr. L] dated September 10, 2012, noting that the claimant underwent a left rotator cuff repair on August 29, 2012.

In both his October 16, 2012, and August 22, 2013, narrative reports, Dr. B stated that there was no operative report for review regarding a left shoulder surgery. Dr. B's October 16, 2012, date of MMI is based on the claimant being three months post-operative for a left shoulder surgery; however, Dr. B did not have the left shoulder surgery operative report.

Section 408.0041(c) provides in pertinent part that the treating doctor and the insurance carrier are both responsible for sending to the designated doctor all of the injured employee's medical records relating to the issue to be evaluated by the designated doctor that are in their possession.

The evidence established that Dr. B did not have all of the claimant's medical records for his examination before making a determination on MMI and IR, the issues Dr. B was appointed to determine. *See* Appeals Panel Decision (APD) 132258, decided November 20, 2013.

Additionally, as discussed above, the parties have stipulated that the carrier has accepted bilateral shoulder rotator cuff tears. Dr. B assessed 6% whole person impairment for a distal clavicle resection of the claimant's right shoulder, which the claimant underwent to repair a right rotator cuff repair. Dr. B assessed 0% impairment for the claimant's left shoulder because he believed the ROM deficits were due to a pre-existing rotator cuff tear. However, Dr. B made clear in his August 22, 2013, narrative report that he did not believe the claimant sustained bilateral shoulder rotator cuff tears in the compensable injury. Dr. B did not consider and rate the entire compensable injury. *See* APD 110463, decided June 13, 2011, and APD 101567, decided December 20, 2010. Because Dr. B did not have all of the claimant's medical records prior to his examination and because Dr. B did not consider and rate the entire compensable injury, we reverse the hearing officer's determination that the claimant reached MMI on October 16, 2012, with a 6% IR.

There are numerous other MMI/IR certifications in evidence. The first is Dr. B's October 16, 2012, MMI/IR certification. In an attached narrative report Dr. B noted diagnoses of "[r]epair of rotator cuff on both sides; right shoulder on March 12, 2012, and do not have operative report for left shoulder," and "[b]ilateral ruptures of rotator cuff." Regarding MMI Dr. B opined that: "[t]he [claimant] reached [MMI] as of October 16, 2012. The [claimant] is more than three months post-operative left shoulder surgery, according to the [claimant]. There is no operative report in the chart for

review." Dr. B invalidated ROM measurements of the claimant's bilateral shoulders and assessed 0% whole person impairment for the claimant's compensable injury. Dr. B's October 16, 2012, date of MMI is based on the claimant being three months post-operative for a left shoulder surgery; however, Dr. B did not have the left shoulder surgery operative report. APD 132258, *supra*. Additionally, Dr. B's 0% IR did not include a rating for the claimant's right distal clavicle resection, a surgery the claimant underwent for the compensable injury. APD 110463, *supra*, and APD 101567, *supra*. For these reasons, Dr. B's October 16, 2012, MMI/IR certification cannot be adopted.

The second MMI/IR certification is from [Dr. S], a doctor selected by the treating doctor to act in the treating doctor's place. Dr. S examined the claimant on September 19, 2013, and certified that the claimant reached MMI on August 6, 2013, with a 28% IR.

The parties did not stipulate or litigate the date of statutory MMI. The claimant sustained the compensable injury on [date of injury]. As previously discussed, the hearing officer's determination that the claimant had disability beginning on June 18, 2011, and continuing through the date of the CCH has been affirmed. The evidence established that the eighth day of disability in this case is June 25, 2011. Given that the eighth day of disability is June 25, 2011, the date of statutory MMI under Section 401.011(30)(B) is June 22, 2013. *See* APD 131978, decided October 3, 2013. Because the statutory date of MMI in the instant case is June 22, 2013, the MMI/IR certification certifying the claimant reached MMI on August 6, 2013, with a 28% IR cannot be adopted.

There are also three MMI/IR certifications certifying that the claimant has not reached MMI. The first is from [Dr. K], the first designated doctor appointed by the Division. Dr. K examined the claimant on January 21, 2012, and certified that the claimant has not reached MMI. The second is Dr. B's initial MMI/IR certification on June 12, 2012, certifying that the claimant had not reached MMI. The third is an alternate certification from [Dr. Sp], a doctor selected by the treating doctor to act in the treating doctor's place. Dr. Sp examined the claimant on March 15, 2013, and certified that the claimant has not reached MMI. The Appeals Panel has held that it is legal error to determine a claimant has not reached MMI in a decision and order dated after the date of statutory MMI. *See* APD 131554, decided September 3, 2013. Given that the statutory date of MMI in this case is June 22, 2013, the MMI/IR certifications in evidence certifying that the claimant has not reached MMI cannot be adopted.

As there is no MMI/IR certification 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 claimant had disability beginning on June 18, 2011, and continuing through the date of the CCH.

We affirm the hearing officer's determination that the compensable injury of [date of injury], does not extend to bilateral shoulder impingement.

We reform Finding of Fact No. 1.I to add that the carrier has accepted bilateral shoulder rotator cuff tears, as reflected by the parties' stipulation in the record.

We reverse the hearing officer's determinations that the claimant reached MMI on October 16, 2012, with a 6% IR, and we remand the issues of MMI and IR to the hearing officer for further action consistent with this decision.

REMAND INSTRUCTIONS

Dr. B is the designated doctor in this case. On remand, the hearing officer is to determine whether Dr. B is still qualified and available to be the designated doctor. If Dr. B is no longer qualified or available to serve as the designated doctor, then another designated doctor is to be appointed pursuant to Rule 127.5(c) to determine the claimant's MMI and IR.

The hearing officer is to advise the designated doctor that the compensable injury extends to bilateral shoulder rotator cuff tears as stipulated to by the parties. The hearing officer is also to advise the designated doctor that the compensable injury does not extend to bilateral shoulder impingement as administratively determined. The hearing officer is also to advise the designated doctor that the date of statutory MMI in this case is June 22, 2013. The hearing officer is then to request the designated doctor to give an opinion on the claimant's MMI, which cannot be after June 22, 2013, the statutory date of MMI, and rate the entire compensable injury, in accordance with the AMA Guides considering the medical record and the certifying examination.

On remand, the hearing officer should ensure that the treating doctor and the carrier shall 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, which is MMI and IR.

The parties are to be provided with the hearing officer's letter to the designated doctor and the designated doctor's response. The parties are to be allowed an opportunity to respond. The hearing officer is then to make a determination on MMI and IR that is supported by 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, PRESIDENT
6210 EAST HIGHWAY 290
AUSTIN, TEXAS 78723.

Carisa Space-Beam
Appeals Judge

CONCUR:

Cristina Beceiro
Appeals Judge

Margaret L. Turner
Appeals Judge