APPEAL NO. 211713
FILED DECEMBER 14, 2021

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 September 22, 2021, in (city), Texas, with (administrative law judge) presiding as the administrative law judge (ALJ). The ALJ 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) cannot yet be assigned. The appellant (self-insured) appealed the ALJ's determinations. The claimant responded, urging affirmance of the ALJ's determinations.

DECISION

Reversed and remanded.

The parties stipulated, in part, that the claimant sustained a compensable injury on (date of injury), in the form of a sprain of the left hand and wrist, full thickness tear of triangular fibrocartilage complex of the left wrist, strain of the left foot, and strain of the left thigh. The claimant was injured on (date of injury), when he fell to the ground while restraining a resident attempting to flee the employer's facility.

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 Texas Department of Insurance, Division of Workers' Compensation (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, in part, 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 ALJ determined that the claimant had not reached MMI and therefore an IR cannot yet be assigned based upon the certification from (Dr. B), a doctor referred by the treating doctor to act in his place. Dr. B examined the claimant on May 6, 2021, and opined the claimant had not reached MMI because an MRI of the claimant's left wrist should be taken to assess the pathology of the pain and determine if surgery is an option. Dr. B further opined that if there was no indication for surgical intervention, he recommended the claimant undergo work conditioning for 10-20 visits to improve the claimant's range of motion, strength, and function.

The self-insured contends that the evidence shows the claimant has reached statutory MMI, and therefore a determination that the claimant has not reached MMI is legally incorrect. Section 401.011(30)(B) defines statutory MMI as "the expiration of 104 weeks from the date on which income benefits begin to accrue." Section 408.082(b) provides that:

> If the disability continues for longer than one week, weekly income benefits begin to accrue on the eighth day after the date of the injury. If the disability does not begin at once after the injury occurs or within eight days of the occurrence but does result subsequently, weekly income benefits accrue on the eighth day after the date on which the disability began.

The parties did not stipulate to or discuss the date of statutory MMI, and there was no finding of a date of statutory MMI by the ALJ. However, in evidence is the Employer's First Report of Injury or Illness (DWC-1) dated June 17, 2019, reflecting the date of injury as (date of injury), and the date the claimant began losing time from work as May 25, 2019. Additionally, the claimant indicated in his testimony that he believed he began losing time from work on (date of injury), and that he was not able to earn his preinjury wage. Based on the evidence in this case, it appears the date of statutory MMI may have passed; however, we do not have sufficient evidence of that date. The Appeals Panel has previously 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* Appeals Panel Decision (APD) 131554, decided September 3, 2013, and APD 172017, decided October 3, 2017; *see also* APD 200978, decided August 25, 2020. Accordingly, we reverse the ALJ's determinations that the claimant has not reached MMI, and, because the claimant has not reached MMI, an IR cannot yet be assigned.

There is one other certification in evidence, which is from (Dr. S), the designated doctor. Dr. S examined the claimant on November 19, 2020, and certified the claimant reached MMI on July 23, 2020, with a two percent IR, using 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). The ALJ found Dr. S's certification to be contrary to the preponderance of the evidence. The ALJ's finding is supported by sufficient evidence. Accordingly, we remand the issues of MMI and IR to the ALJ for further action consistent with this decision.

REMAND INSTRUCTIONS

Dr. S is the designated doctor in this case. The ALJ is to determine whether Dr. S is still qualified and available to serve as designated doctor. If Dr. S is no longer qualified or available, then another designated doctor is to be appointed.

The ALJ is to take a stipulation from the parties regarding the date of statutory MMI. If the parties are unable to stipulate to the date of statutory MMI, the ALJ is to make a determination of the date of statutory MMI in order to inform the designated doctor of the date of statutory MMI.

The ALJ is to advise the designated doctor of the date of statutory MMI and request that the designated doctor give an opinion on the claimant's date of MMI and rate the entire compensable injury, which includes a sprain of the left hand and wrist, full thickness tear of triangular fibrocartilage complex of the left wrist, strain of the left foot, and strain of the left thigh, in accordance with the AMA Guides considering the medical record and the certifying examination. The date of MMI cannot be after the date of statutory MMI.

The parties are to be provided with the designated doctor's new certification and allowed an opportunity to respond. The ALJ 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 ALJ, 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)** and the name and address of its registered agent for service of process is

NAME
ADDRESS
CITY, TEXAS ZIP CODE.

Carisa Space-Beam
Appeals Judge

CONCUR:

Cristina Beceiro
Appeals Judge

Margaret L. Turner
Appeals Judge