APPEAL NO. 211980
FILED JANUARY 21, 2022

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 November 2, 2021, with the record closing on November 8, 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 appellant (claimant) reached maximum medical improvement (MMI) on February 15, 2021; and (2) the claimant's impairment rating (IR) is 3%.

The claimant appealed, disputing the ALJ's determinations of MMI and IR. The respondent (carrier) responded, urging affirmance of the disputed MMI and IR determinations.

DECISION

Reversed and remanded.

The parties stipulated, in part, that on (date of injury), the claimant sustained a compensable injury at least in the form of a left shoulder rotator cuff tear and a left shoulder strain. The claimant testified that he was injured when he slipped and fell after disconnecting hoses.

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 reached MMI on February 15, 2021, with a 3% IR as certified by the Division-appointed designated doctor, (Dr. H). Dr. H examined the claimant on February 19, 2021, and initially certified that the claimant reached MMI on January 8, 2021, with a 6% 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). In his narrative report, Dr. H noted that the claimant had received all the physical therapy recommended for a massive rupture of the rotator cuff and did not anticipate that additional treatment and/or therapy would result in lasting further tissue recovery.

On September 15, 2021, the benefit review officer sent a letter of clarification (LOC) to Dr. H and noted that it was unclear if Dr. H had the claimant's physical therapy notes for review and attached physical therapy notes through February 15, 2021. Dr. H responded to the LOC on September 17, 2021. Dr. H in an amended report certified that the claimant reached MMI on February 15, 2021, with a 3% IR. Dr. H noted that he changed his opinion of the claimant's MMI date after taking into consideration the additional physical therapy notes which he was provided. Dr. H stated that he was provided with additional physical therapy notes through February 15, 2021, which showed the claimant had continued improvement in the range of motion (ROM) of his left shoulder. Dr. H then used the ROM measurements of the claimant's left shoulder taken on February 15, 2021, to assess impairment of 3%.

In evidence is a letter from the law firm representing the claimant dated September 10, 2021, requesting that a LOC be sent to Dr. H because the claimant did not complete physical therapy until April 5, 2021, and stated that physical therapy notes from one physical therapy provider for the dates of service of April 27, 2020, through May 6, 2020, and from a second physical therapy provider for the dates of service of September 3, 2020, through April 5, 2021, were attached.

Rules 130.1(b)(4)(A) and 130.1(c)(3) specifically require that the certifying doctor, including the designated doctor, review the medical records before certifying an MMI date and assigning an IR. In Appeals Panel Decision (APD) 062068, decided December 4, 2006, the Appeals Panel held that the 1989 Act and the Division rules require that the designated doctor conduct an examination of the claimant and review the claimant's medical records. *See also* APD 130187, decided March 18, 2013, in which the designated doctor did not have the post-operative physical therapy medical records prior to making his first MMI/IR certification; therefore, his certification of MMI and IR could not be adopted. Rule 127.10(a)(1) provides, in part, that the treating doctor and insurance carrier shall provide to the designated doctor copies of all the injured employee's medical records in their possession relating to the medical condition

to be evaluated by the designated doctor. The evidence established that Dr. H did not have all of the claimant's medical records for his examination before making a determination on MMI and IR, the issues he was appointed to determine. *See* APD 132258, decided November 20, 2013, and APD 182362, decided December 27, 2018.

Dr. H revised his opinion of the claimant's MMI date after receiving additional physical therapy records which showed the claimant had improved ROM but Dr. H specifically stated that he only received physical therapy notes through February 15, 2021. However, in evidence are additional physical therapy notes through April 5, 2021. There is a physical therapy note in evidence dated April 5, 2021, that states the claimant had been discharged from care by his surgeon and noted the claimant had reached his maximum potential for physical therapy. Dr. H did not have the claimant's physical therapy records after February 15, 2021. Accordingly, we reverse the ALJ's determinations that the claimant reached MMI on February 15, 2021, and the claimant's IR is 3%.

The only other certification of MMI/IR in evidence is from (Dr. A), a referral doctor acting in place of the treating doctor. Dr. A examined the claimant on August 23, 2021, and certified that the claimant reached MMI on April 16, 2021, with a 10% IR. In her discussion of the evidence, the ALJ was persuaded that Dr. A did not rate the entire compensable injury. Dr. A only notes the diagnosis of strain of muscle and tendon of the rotator cuff of the left shoulder, and it is unclear from his report that Dr. A considered the entire compensable injury. Consequently, the certification of MMI/IR from Dr. A cannot be adopted.

Because there is not a certification of MMI/IR that can be adopted we remand the issues of MMI/IR to the ALJ for further action consistent with this decision.

SUMMARY

We reverse the ALJ's determination that the claimant reached MMI on February 15, 2021, and we remand the MMI issue to the ALJ for further action consistent with this decision.

We reverse the ALJ's determination that the claimant's IR is 3%, and remand the IR issue to the ALJ for further action consistent with this decision.

REMAND INSTRUCTIONS

Dr. H is the designated doctor in this case. On remand the ALJ is to determine whether Dr. H is still qualified and available to be the designated doctor. If Dr. H 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 date of MMI and IR for the (date of injury), compensable injury. On remand, the ALJ is to ensure that the required medical records are sent to the designated doctor pursuant to Rule 127.10, including the claimant's physical therapy notes through April 5, 2021.

The parties are to be provided with the designated doctor's new MMI/IR certification and are to be allowed an opportunity to respond. The ALJ is then to make a determination of 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 **ACE AMERICAN INSURANCE COMPANY** and the name and address of its registered agent for service of process is

CT CORPORATION SYSTEM
1999 BRYAN STREET, SUITE 900
DALLAS, TEXAS 75201-3136.

Margaret L. Turner
Appeals Judge

CONCUR:

Cristina Beceiro
Appeals Judge

Carisa Space-Beam
Appeals Judge