

APPEAL NO. 090662
FILED JUNE 22, 2009

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 April 2, 2009. The issues before the hearing officer were:

- (1) Has the appellant (claimant) reached maximum medical improvement (MMI), and if so, on what date?
- (2) What is the claimant's impairment rating (IR)?

The hearing officer determined that: (1) the claimant reached MMI on the statutory date of April 17, 2003; and (2) the claimant's IR is 11%. The claimant appealed the hearing officer's MMI and IR determinations. On appeal, the claimant asserts that the date of statutory MMI is April 22, 2003, and attached to his appeal a chart listing 104 weeks beginning April 25, 2001, and ending April 22, 2003. The respondent (carrier) responded, urging affirmance. In addition, the carrier asks that we not consider evidence attached to the claimant's appeal which was not admitted at the hearing.

DECISION

Reversed and remanded.

The parties stipulated that the claimant sustained a compensable injury on _____. The claimant testified that he sustained an injury to his left shoulder and neck on _____. In evidence is a letter from the carrier's adjuster that states that the carrier has accepted that the compensable injury extends to the neck and back. The Texas Department of Insurance, Division of Workers' Compensation (Division) appointed (Dr. D) as the designated doctor to opine whether the claimant reached MMI and assign an IR.

MMI AND IR

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. See Appeals Panel Decision (APD) 040313-s, decided April 5, 2004.

In the instant case, the designated doctor, Dr. D, initially examined the claimant on February 20, 2008, and certified that the claimant reached MMI statutorily on April 22, 2003, with an 11% IR. Dr. D assessed an 11% IR for the left upper extremity (UE) based on loss of range of motion and sensory and motor deficits. Dr. D did not consider the claimant's cervical spine or lumbar spine injuries when he assessed an IR. We note that Dr. D's narrative report dated February 20, 2008, states that the claimant reached MMI statutorily on April 29, 2003, rather than April 22, 2003, as stated in the Report of Medical Evaluation (DWC-69). In a letter of clarification dated March 25, 2008, the Division informed Dr. D that the claimant's compensable injury included the "[b]ack and neck" and requested that the claimant's entire compensable injury be rated. We note that Dr. D's initial certification that the claimant reached MMI on April 22, 2003, with an 11% IR, cannot be adopted because it does not rate the entire compensable injury. See APD 080380, decided May 8, 2008.

In a response dated April 3, 2008, Dr. D stated that he wanted to re-examine the claimant to assess an IR based on the entire compensable injury. Dr. D subsequently re-examined the claimant on April 9, 2008, and certified that the claimant reached MMI statutorily on April 29, 2003, with a 30% IR for the left UE, cervical spine, and lumbar spine injuries. The 30% IR was based on a 8% whole person impairment for the left UE; 15% whole person impairment for the cervical spine (Diagnosis-Related Estimate (DRE) Cervicothoracic Category III: Radiculopathy); and 10% whole person impairment for the lumbar spine (DRE Lumbosacral Category III: Radiculopathy) 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).

Subsequently, the required medical examination doctor, (Dr. T), examined the claimant on July 10, 2008, and certified that the claimant reached MMI statutorily on April 17, 2003, with an 11% IR for the left UE, cervical spine, and lumbar spine injuries. In a narrative report dated July 10, 2008, Dr. T noted that there was no objective evidence of cervical or lumbar radiculopathy. Dr. T assessed an 11% IR based on 11% impairment for the left UE, 0% impairment for the cervical spine, and 0% impairment for the lumbar spine.

The hearing officer, in the Background Information of the decision states that the preponderance of the evidence does not support Dr. D's assignment of a 30% IR, because there is a lack of medical evidence showing permanent radiculopathy in either the claimant's upper or lower extremities. Additionally, the hearing officer comments that: "[s]ince there are only two [IRs] and the rating from [Dr. D] cannot be supported, it is determined [the claimant's IR] is 11% as certified by [Dr. T]. Since the MMI date has to coincide with the [IR], the MMI date is April 17, 2003." The hearing officer did not adopt the certification of MMI/IR from Dr. D. The hearing officer found that Dr. D's, the

designated doctor, certification that the claimant reached MMI on April 29, 2003, with a 30% IR, was not supported by a preponderance of the evidence.

The hearing officer determined that the claimant reached MMI on the statutory date of April 17, 2003, with an 11% IR, based on Dr. T's certification of MMI/IR. However, the evidence does not support the hearing officer's decision that the claimant reached MMI statutorily on April 17, 2003, with an 11% IR.

The claimant contends that the correct date of statutory MMI is April 22, 2003. 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.

In evidence is a document entitled "[Electronic Data Interchange (EDI)] [I]nformation" which lists: (1) the claimant's name; (2) claimant's claim number; (3) date of injury of _____; and (4) date last worked on _____. In that same document, it lists two different dates that disability began, April 18, 2001 and April 24, 2001. Under the facts of this case, the claimant sustained a compensable injury on _____, and, if the eighth day of disability was April 24, 2001, then the date of statutory MMI under Section 401.011(30)(B) would be no earlier than April 22, 2003. See APD 090539, decided June 1, 2009, APD 070930, decided July 11, 2007. Given that statutory MMI could not be earlier than April 22, 2003, Dr. T's certification that the claimant reached MMI statutorily on April 17, 2003, is legally incorrect. Further, we note that Dr. T did not properly convert the UE impairment to a whole person impairment using the AMA Guides. Dr. T assessed a 12% impairment for the left UE and incorrectly converted the 12% impairment to 11% whole person impairment. However, using the AMA Guides, Table 3, page 3/20, a 12% impairment for the UE converts to 7% whole person impairment, rather than the 11% whole person impairment assessed by Dr. T.

The hearing officer's decision that the claimant reached MMI on the statutory date of April 17, 2003, with an 11% IR is legally incorrect. Accordingly, we reverse the hearing officer's decision that the claimant reached MMI on the statutory date of April 17, 2003, with an 11% IR.

OTHER CERTIFICATIONS OF MMI/IR

In the instant case, there are two other certifications of MMI/IR, both from Dr. D, the designated doctor. As previously mentioned, Dr. D initially certified that the claimant reached MMI on April 22, 2003, with an 11% IR, however, that certification of MMI/IR

cannot be adopted because he assessed an IR for the left UE only and he did not rate the entire compensable injury. See APD 080380, *supra*.

As previously mentioned, if the eighth day of disability was April 24, 2001, the date of statutory MMI under Section 401.011(30)(B) would be no earlier than April 22, 2003. The designated doctor, Dr. D, certified that the claimant reached MMI statutorily on April 29, 2003, rather than clinically. We note that the parties did not stipulate as to the date of statutory MMI and that the designated doctor has certified a date of statutory MMI which is later than April 22, 2003. However, there is conflicting evidence of when disability began. Given the conflicting dates of beginning disability, we are unable to render a decision on the disputed issues of MMI/IR given the evidence presented.

Since the hearing officer's MMI and IR determinations have been reversed and there is no other certification of MMI/IR in evidence which we can adopt, we remand the MMI and IR issues to the hearing officer.

On remand, the hearing officer should see if the parties can stipulate to the date of statutory MMI applicable to this case, or if not, take additional evidence from the parties regarding the accrual date of disability so the hearing officer can determine the correct date of statutory MMI. The designated doctor in this case is Dr. D. The hearing officer is to determine whether Dr. D is still qualified and available to be the designated doctor, and if so, request that Dr. D determine when the claimant reached MMI and assign an IR, based on the entire compensable injury, which includes the left shoulder, cervical spine and lumbar spine, in accordance with the AMA Guides. On remand, the hearing officer should advise the designated doctor of the date of statutory MMI, and specifically tell the designated doctor he is to find the MMI date (which can be no later than the statutory date), and assign an IR based on the claimant's condition as of the MMI date. The hearing officer is to provide the designated doctor's response to the parties and allow the parties an opportunity to respond and then make determinations regarding the MMI and IR. If Dr. D is no longer qualified and available to serve as the designated doctor, then another designated doctor is to be appointed pursuant to Rule 126.7(h) to determine the claimant's MMI and IR, which includes the left shoulder, cervical spine and lumbar spine.

SUMMARY

We reverse the hearing officer's decision that the claimant reached MMI on the statutory date of April 17, 2003, with an 11% IR, and we remand the MMI and IR issues to the hearing officer.

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 **EMPLOYERS MUTUAL CASUALTY COMPANY** and the name and address of its registered agent for service of process is

**EMPLOYERS MUTUAL CASUALTY COMPANY
C/O DON WEISE
2505 NORTH PLANO ROAD, SUITE 200
RICHARDSON, TEXAS 75080.**

Veronica L. Ruberto
Appeals Judge

CONCUR:

Cynthia A. Brown
Appeals Judge

Margaret L. Turner
Appeals Judge