APPEAL NO. 061939
FILED DECEMBER 1, 2006

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 August 17, 2006. The hearing officer resolved the disputed issue by deciding that the respondent (claimant) reached maximum medical improvement (MMI) on December 29, 2005, with a 15% impairment rating (IR). The appellant (carrier) appealed, arguing that as a matter of law the hearing officer erred in her determinations of MMI and IR. The appeal file does not contain a response from the claimant.

DECISION

Reversed and rendered.

The parties stipulated that the claimant sustained a compensable head and cervical injury while in the course and scope of her employment on _____. At issue was the date of the claimant's MMI and her IR. Two certifications of MMI and IR were in evidence. The designated doctor examined the claimant on September 16, 2005, and certified the claimant reached MMI on that date with a 5% IR, placing the claimant in Cervicothoracic Diagnosis-Related Estimate (DRE) Category II, 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 designated doctor noted that the claimant showed clinical signs of a cervical spine injury without the presence of radiculopathy or loss of motion segment integrity. He noted in his review of records that the claimant underwent an EMG on December 16, 2004, that was consistent with a cervical radiculopathy affecting the C6 and C7 nerve root. However, when noting the details of his physical examination, the designated doctor reported that the deep tendon reflexes of the upper extremities are equal and that there is no atrophy noted, no motor deficits, and no true sensory deficit.

Dr. P, acting in place of the treating doctor, examined the claimant on December 29, 2005, certifying the claimant reached MMI on that date with a 15% IR, placing the claimant in Cervicothoracic DRE Category III, using the AMA Guides. In worksheets attached to the certification, Dr. P noted that "evidence of radiculopathy is present (positive EMG findings)." The narrative from Dr. P does not document loss of reflexes or atrophy.

The carrier challenges the MMI date certified by Dr. P, arguing that there is no medical evidence to support that the claimant's condition changed at all between September 16, 2005, and December 29, 2005. The carrier contends that the evidence supports the MMI date given by the designated doctor. 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. We hold that the hearing officer's determination that the preponderance of the medical evidence is contrary to the designated doctor's report on the issue of MMI is not supported by the medical evidence. The designated doctor noted in his narrative report that cervical spinal surgery had been recommended, but the claimant chose not to proceed with surgical intervention, and that she had one year of conservative physical therapy. The record reflects that the claimant has not had surgery as of the date of MMI. The hearing officer noted that the claimant underwent additional treatment after the date the designated doctor placed the claimant at MMI. In his response dated December 12, 2005, to a letter of clarification, the designated doctor pointed out that no further treatment was planned that would significantly alter the claimant's physical condition. There is no medical evidence that further material recovery of the claimant was reasonably anticipated, since she opted not to have surgery, after the date the designated doctor placed the claimant at MMI. The designated doctor's report of September 16, 2005, certifying MMI on that date is entitled to presumptive weight, is supported by the evidence and is not contrary to the preponderance of the other medical evidence.

The carrier challenges the 15% impairment for the Cervicothoracic DRE III assessed by Dr. P asserting that there are no significant sign of radiculopathy as required for that rating by the AMA Guides. There is a medical record in evidence dated December 7, 2004, which notes that the claimant's biceps and triceps reflexes are 2+ and symmetrical and that her brachioradialis reflex is slightly diminished on the left when compared to the right. In response to a letter of clarification, the designated doctor noted that though there was a history of radiculopathy, the IR assessed must be based on a permanent condition and that at the time he determined the claimant to have reached MMI, there was no evidence of muscle atrophy in the upper extremities and that deep tendon reflexes were present and equal bilaterally.

The hearing officer in her discussion of the evidence stated that the treating doctor noted on January 13, 2006, that the claimant had significant signs of radiculopathy and discussed loss of relevant reflexes and unilateral atrophy. However, the treating doctor's discussion of loss of relevant reflexes and unilateral atrophy in his correspondence dated January 13, 2006, was simply a recitation of the language in the AMA Guides, which set forth the criteria for rating radiculopathy. The treating doctor did not document in such correspondence, or in any other of his records, any loss of relevant reflexes or atrophy of the claimant. He did note that the claimant had a positive EMG and continued to suffer from radicular pain. A positive EMG is not enough to rate radiculopathy under the AMA Guides. Appeals Panel Decision (APD) 050729-s, decided May 23, 2005, APD 051456, decided August 16, 2005, and APD 051824, decided September 19, 2005, all reference APD 030091-s, decided March 5, 2003, which held that to find radiculopathy the doctors must look to see if there is a loss of relevant reflexes or unilateral atrophy with greater than a two centimeter decrease in circumference compared to the unaffected side, measured at the same distance above

or below the elbow. Such findings of neurologic impairment may then be verified by diagnostic studies.

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 § 130.6(i) (Rule 130.6(i)) provides that the designated doctor's response to a Division request for clarification is considered to have presumptive weight as it is part of the doctor's opinion. We hold that the hearing officer's determination that the preponderance of the medical evidence establishes that the claimant has permanent impairment relative to her cervical spine radiculopathy condition as a result of her _____, injury is not supported by the medical evidence. Dr. P's assessment of a 15% IR based on Cervicothoracic DRE Category III: Radiculopathy does not comply with the requirements set forth in the AMA Guides for rating radiculopathy. However, the designated doctor's report of September 16, 2005, assessing a 5% IR based on Cervicothoracic DRE Category II: Minor Impairment is entitled to presumptive weight and is supported by the evidence and is not contrary to the preponderance of the other medical evidence.

The hearing officer's finding that "the preponderance of the medical evidence is contrary to [the designated doctor's] report on the issue of MMI and, therefore, [the designated doctor's] assigned MMI date does not have presumptive weight and is not adopted" is reversed. The hearing officer's finding that "the preponderance of the medical evidence is contrary to [the designated doctor's] report on the issue of IR and, therefore, [the designated doctor's] report does not have presumptive weight and is not adopted on the issue of IR" is reversed. The hearing officer's finding that "the preponderance of the medical evidence rebuts [the designated doctor's] opinion on MMI and establishes that December 29, 2005, is the earliest date after which further material recovery from or lasting improvement to the claimant's injury can no longer reasonably be anticipated, based on reasonable medical probability" is reversed.

We reverse the hearing officer's determination that the claimant reached MMI on December 29, 2005, with a 15% IR per Dr. P's report and render a new determination that the claimant reached MMI on September 16, 2005, with a 5% IR per the designated doctor's report.

The true corporate name of the insurance carrier is **AMERICAN CASUALTY COMPANY OF READING, PENNSYLVANIA** and the name and address of its registered agent for service of process is

**CT CORPORATION SYSTEM**
**350 NORTH ST. PAUL STREET**
**DALLAS, TEXAS 75201**.

_____
Margaret L. Turner
Appeals Judge

CONCUR:

_____
Thomas A. Knapp
Appeals Judge

_____
Veronica L. Ruberto
Appeals Judge