APPEAL NO. 070230
FILED MARCH 27, 2007

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 December 12, 2006. The hearing officer resolved the disputed issue by deciding that the respondent's (claimant) impairment rating (IR) is 25%. The appellant (self-insured) appealed, disputing the IR determined by the hearing officer. The claimant responded, urging affirmance.

DECISION

Reversed and rendered.

The sole issue in dispute was the claimant's IR. The parties stipulated that the claimant reached maximum medical improvement (MMI) on July 4, 2006, and that the claimant sustained a compensable injury on _____. The record reflects that the claimant had a cervical fusion of C3-4 and C4-5 on May 12, 2005. The designated doctor, Dr. B examined the claimant on November 3, 2005, and certified the claimant reached MMI on that date with a 25% IR under 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), placing the claimant in Diagnosis-Related Estimate (DRE) Cervicothoracic Category IV: Loss of Motion Segment Integrity or Multilevel Neurologic Compromise. Dr. B in response to a letter of clarification, subsequently amended the claimant's IR to 5%, stating that he reconsidered his assessment of the claimant's IR because "the Court has disallowed [Division] Advisory 2003-10, [signed July 22, 2003] regarding [a]sessment of the [IR] for [s]pinal [f]usion(s).[1]" The claimant's treating doctor based on an examination conducted July 6, 2006, certified the claimant reached MMI on that date with a 40% IR. The treating doctor assessed impairment, placing the claimant in DRE Cervicothoracic Category VI: Cauda Equina Syndrome Without Bowel or Bladder Signs stating the claimant had a diagnosis of myelopathy which was missed. However, a sole diagnosis of myelopathy does not meet the criteria identified in the AMA Guides for an IR of 40% under DRE Cervicothoracic Category VI, see page 3/103 of the AMA Guides. A request was made that the claimant be re-examined by the designated doctor. Apparently due to scheduling problems, Dr. B was not available and a second designated doctor, Dr. T was appointed. Dr. T examined the claimant on September 1, 2006, and certified the claimant reached MMI on July 4, 2006, with a 5% IR, placing the claimant in DRE Cervicothoracic Category II: Minor Impairment. Dr. T noted that the claimant showed clinical evidence of a cervicothoracic injury without the presence of radiculopathy or loss of motion segment integrity.

[1] We note that a petition for review was filed in the Texas Supreme Court in its Case #07-0089 on March 7, 2007, in Tex. Dep't. of Ins., Div. of Workers' Compensation v. Lumbermens Mut. Cas. Co., 212 S.W.3d 870, the case referenced by Dr. B. The injunction initially granted by the district court is stayed pending the outcome of the petition.

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. The hearing officer correctly applied presumptive weight to the certification of Dr. T. However, the hearing officer found that the preponderance of the evidence is contrary to Dr. T's assessment of 5% impairment. The self-insured argues in part that the hearing officer committed error because he adopted the IR certified by Dr. B on November 3, 2005, about eight months prior to the MMI date. 28 TEX. ADMIN. CODE § 130.1(c)(3) (Rule 130.1(c)(3)) provides that 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. As previously stated, MMI was not a disputed issue. The parties stipulated that the claimant reached MMI on July 4, 2006. The 25% rating assessed by Dr. B and adopted by the hearing officer was based on a MMI date of November 3, 2005.

The hearing officer noted that the treating doctor explained in his letter of January 25, 2006, why a 5% IR is inappropriate in this case. The treating doctor acknowledged in his January 25, 2006, letter that the claimant did not have radiculopathy but did have clear signs of myelopathy. The treating doctor additionally noted in his letter that if the range of motion (ROM) model had been used as a differentiator the 25% IR is more accurate because the assessment of impairment using the ROM model resulted in a 23% IR. However, in making this argument, the treating doctor uses the measurements obtained by Dr. B in his examination of November 3, 2005, which was approximately eight months prior to the date of the claimant's MMI. Therefore, this argument is not persuasive in determining the correct IR of the claimant eight months later.

We hold that the hearing officer erred in determining that the claimant's IR is 25% because that assessment of impairment was based on a certification of MMI which was approximately eight months prior to the claimant's MMI date. Dr. T's assessment of the claimant's IR was entitled to presumptive weight and was not overcome by a preponderance of the other medical evidence. We reverse the hearing officer's determination that the IR is 25% and render a new decision that the claimant's IR is 5% as certified by the second designated doctor, Dr. T.

The true corporate name of the insurance carrier is **STATE OFFICE OF RISK MANAGEMENT (a self-insured governmental entity)** and the name and address of its registered agent for service of process is

For service in person the address is:

JONATHAN BOW, EXECUTIVE DIRECTOR
STATE OFFICE OF RISK MANAGEMENT
300 W. 15TH STREET
WILLIAM P. CLEMENTS, JR. STATE OFFICE BUILDING, 6TH FLOOR
AUSTIN, TEXAS 78701.

For service by mail the address is:

JONATHAN BOW, EXECUTIVE DIRECTOR
STATE OFFICE OF RISK MANAGEMENT
P.O. BOX 13777
AUSTIN, TEXAS 78711-3777.

_____
Margaret L. Turner
Appeals Judge

CONCUR:

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Cynthia A. Brown
Appeals Judge

_____
Thomas A. Knapp
Appeals Judge