

APPEAL NO. 070769
FILED JUNE 12, 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 (CCH) was held on August 1, 2006, in (City 1), Texas with (hearing officer) presiding as hearing officer. In Appeals Panel Decision (APD) 061775, decided October 4, 2006, we remanded the case to the hearing officer to reconstruct the record. A CCH on remand was held on March 23, 2007, (City 1), Texas. The hearing officer resolved the disputed issues after the CCH on remand by deciding that the respondent (claimant) reached maximum medical improvement (MMI) on February 17, 2003, with a 20% impairment rating (IR) as certified by Dr. W, the Texas Department of Insurance, Division of Workers' Compensation (Division)-selected designated doctor.

The appellant (carrier) appealed the hearing officer's MMI and IR determinations, arguing that the designated doctor, Dr. W, improperly considered the claimant's post-MMI surgery and applied the Division's Advisory 2003-10, signed July 22, 2003, and Advisory 2003-10B, signed February 24, 2004, (advisories) in determining MMI and IR. The carrier requests that the Appeals Panel adopt Dr. W's prior certification that the claimant reached MMI on October 21, 2002, with a 12% IR. The claimant responded, urging affirmance of the hearing officer's determinations.

DECISION

Reversed and rendered.

FACTUAL SUMMARY

The parties stipulated that on _____, the claimant sustained a compensable injury. The claimant testified that he sustained injuries to his neck, right shoulder, and back. The claimant testified that he underwent five surgeries due to his compensable injury: right shoulder surgery in February 2002; spinal surgery in March 2004; spinal surgery in February 2006; cervical surgery in April 2006; and right shoulder surgery in October 2006. Other evidence reflects that the claimant had additional spinal surgery on July 29, 2004.

On October 21, 2002, Dr. W examined the claimant and certified on that same date that the claimant reached MMI on "01/01/1900" with a 17% IR. We note that Dr. W's narrative report dated October 28, 2002, does not list a date of MMI, however, other reports in evidence reference Dr. W's report of October 28, 2002, and list the MMI date as October 21, 2002. Dr. W assigned a 2% IR for the right shoulder, 5% IR for Diagnosis-Related Estimate (DRE) Cervicothoracic Category II: Minor Impairment for the cervical spine, and 10% IR for DRE Lumbosacral Category III: Radiculopathy for the lumbar spine 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). Dr. W notes in his

report that for the lumbar spinal region there is “documented evidence of radiculopathy on EMG/NCV study.”

In response to a letter of clarification dated January 21, 2003, Dr. W amended his report to reflect a 5% IR, rather than a 10% IR, for the lumbar spine, for a total whole person impairment of 12%. Dr. W assigned a 2% IR for the right shoulder, 5% IR for DRE Cervicothoracic Category II: Minor Impairment for the cervical spine, and 5% IR for DRE Lumbosacral Category II: Minor Impairment for the lumbar spine. Dr. W indicated in his report that the claimant had no significant signs of lumbosacral radiculopathy as required by the AMA Guides by stating that “[r]eading the DRE category III over again, it does indeed state that the EMG study should only be used to confirm a radiculopathy determined by examination results.”

In another response to a letter of clarification dated June 16, 2003, Dr. W states that “[a]fter reviewing the additional medical material received, which was sent out for additional clarification to a radiologist, it would be my recommendation that a re-examination be performed.” On September 3, 2003, Dr. W re-examined the claimant and certified on that same date that the claimant reached MMI on “10/21/2002” with a 12% IR. Dr. W’s narrative report dated September 9, 2003, notes that the claimant has reached MMI based on his examination of the claimant’s right shoulder, cervical spine, and lumbar spine. Dr. W’s narrative report shows that he assigned a 2% IR for the right shoulder, 5% IR for DRE Cervicothoracic Category II: Minor Impairment for the cervical spine, and 5% IR for DRE Lumbosacral Category II: Minor Impairment for the lumbar spine. Dr. W noted in his September 9, 2003, report that he re-examined the claimant and that “nothing has changed significantly in the interim, then my opinion of October 28, 2002 regarding [MMI] and the [IR] still stands.”

On September 19, 2005, Dr. W examined the claimant again and certified on September 26, 2005, that the claimant reached MMI on February 17, 2003, with a 20% IR. Dr. W’s narrative report dated September 26, 2005, reflects that he assigned 0% IR for the right shoulder, 0% IR for DRE Cervicothoracic Category I: Complaints or Symptoms for the cervical spine, and 20% IR for the lumbar spine based on the advisories. Dr. W’s report indicates that the claimant had “lumbar-laminectomy and fusion with instrumentation and decompression, L4-5 and L5-S1, by [Dr. F] July 29, 2004.” Dr. W comments that the claimant “had been previously given an [IR], but that was prior to his lumbar surgery.” This IR cannot be adopted because it is based on the claimant’s surgery after MMI. See 28 TEX. ADMIN. CODE 130.1(c)(3) (Rule 130.1(c)(3)).

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. Both Sections 408.1225(c) and 408.125(c) apply to this case because the CCH was held on or after September 1, 2005.

The hearing officer determined that the claimant's IR is 20% per Dr. W's certification. 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. In APD 040313-s, decided April 5, 2004, the Appeals Panel stated that Rule 130.1(c)(3):

has been interpreted to mean that the IR shall be based on the condition as of the MMI date and is not to be based on subsequent changes, including surgery. The preamble of Rule 130.1(c)(3) clarifies that IR assessments "must be based on the injured employee's condition as of the date of MMI." 29 Tex Reg. 2337 (2004).

As previously mentioned above, the claimant underwent a lumbar-laminectomy and fusion with instrumentation and decompression at L4-5 and L5-S1 on July 29, 2004. The evidence indicates that Dr. W expressly included a rating for a surgery that occurred after the date of MMI. Accordingly, we reverse the hearing officer's determination that the claimant's IR is 20% as having been based on post-MMI surgery.

Given that this case was remanded once, the Appeals Panel may not remand again. Section 410.203(c). See also Albertson's, Inc. v. Ellis, 131 S.W.3d 245 (Tex. App.-Fort Worth 2004, pet. denied). Since the hearing officer's IR determination has been reversed and there is no other certification of MMI/IR that rates the claimant's condition at MMI on February 17, 2003, we reverse the hearing officer's MMI determination that the claimant's MMI date is February 17, 2003. We will consider other certifications of MMI/IR in evidence that may be adopted.

Review of the record shows that there are two certifications of MMI/IR in evidence from Dr. W. On October 21, 2002, Dr. W examined the claimant and determined that the claimant's IR was 17%. This IR cannot be adopted because it does not comply with the AMA Guides in rating radiculopathy. Dr. W explained in his letter of clarification dated January 21, 2003, that he agreed that a rating under DRE Lumbosacral Category III: Radiculopathy for the lumbar region was improper. On September 3, 2003, Dr. W re-examined the claimant and certified that the claimant reached MMI on October 21, 2002, with a 12% IR. Therefore, the only certification which can be adopted is the certification of September 3, 2003, certifying that the claimant reached MMI on October 21, 2002, with a 12% IR.

SUMMARY

We reverse the hearing officer's determination that the claimant reached MMI on February 17, 2003, with a 20% IR, per Dr. W's certification and render a new decision that the claimant reached MMI on October 21, 2002, with a 12% IR per Dr. W's certification.

The true corporate name of the insurance carrier **NATIONAL AMERICAN INSURANCE COMPANY** and the name and address of its registered agent for service of process is

**CT CORPORATION SYSTEM
350 NORTH ST. PAUL, SUITE 2900
DALLAS, TEXAS 75201.**

Veronica L. Ruberto
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Margaret L. Turner
Appeals Judge