

APPEAL NO. 071329  
FILED SEPTEMBER 6, 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 June 7, 2007. The issues were:

1. Has the respondent (claimant) reached maximum medical improvement (MMI)?
2. What is the claimant's impairment rating (IR)?
3. Did the claimant have disability from August 5, 2005, through the present resulting from the compensable injury of \_\_\_\_\_?
4. Did the employer make a bona fide offer of employment (BFOE) to the claimant entitling the appellant (carrier) to adjust the post injury weekly earnings, and if so, for what period?
5. Does the compensable injury of \_\_\_\_\_, extend to include rotator cuff tear of the left shoulder, left shoulder impingement, internal derangement of the left shoulder, acromioclavicular (AC) joint arthritis of the left shoulder, 2-3 millimeter (mm) disc bulges/protrusions from C3-C4 to C5-C6, mild neural foraminal narrowing at C4-C5, C5-C6 and C6-C7, and cervical radiculopathy?
6. Has the carrier waived the right to contest compensability of the AC joint arthritis of the left shoulder by not timely contesting that aspect of the injury in accordance with TEX. LABOR CODE ANN. Section 409.021 and Section 409.022?

With regard to those issues the hearing officer determined that: (1) the claimant reached MMI on January 13, 2006, as certified by the designated doctor, Dr. S; (2) the claimant's IR is 21% as certified by Dr. S; (3) the claimant had disability from August 6, 2005, "continuing through the date of this hearing, and at no other times;" (4) the employer did not make a BFOE to the claimant; (5) the compensable injury of \_\_\_\_\_, extends to include the left shoulder impingement, 2-3 mm disc bulges/protrusions from C3-4 to C5-6, mild neural foraminal narrowing at C4-5, C5-6 and C6-7, and cervical radiculopathy; (6) the compensable injury of \_\_\_\_\_, does not extend to or include rotator cuff tear of the left shoulder, internal derangement of the left shoulder or AC joint arthritis of the left shoulder; and (7) the carrier has waived the right to contest compensability of AC joint arthritis of the left shoulder by not timely contesting that aspect of the injury in accordance with Section 409.021. The hearing

officer's determination of the January 13, 2006, MMI date has not been appealed and has become final pursuant to Section 410.169.

The carrier appeals all the determinations on the other disputed issues asserting that the claimant's IR should be 7% as assessed by Dr. S in a subsequent report; the claimant did not have disability after August 6, 2005; the hearing officer incorrectly decided the extent of injury on those conditions found in favor of the claimant; and the hearing officer erred in deciding the carrier waiver issue. The claimant responds, urging affirmance.

## DECISION

Affirmed in part, and reversed and rendered in part.

The parties stipulated that the claimant sustained a compensable injury on \_\_\_\_\_, and that Dr. S is the properly appointed designated doctor. The claimant testified that he is a material handler and on \_\_\_\_\_, he injured his left shoulder and neck.

### **BFOE, DISABILITY, AND CARRIER WAIVER**

The hearing officer's determinations that the employer did not make a BFOE to the claimant; that the claimant had disability from August 6, 2005, to the date of the CCH; and that the carrier has waived the right to contest compensability of AC joint arthritis of the left shoulder by not timely contesting that aspect of the injury in accordance with Section 409.021, are supported by sufficient evidence and are affirmed.

### **EXTENT OF INJURY**

The hearing officer's determination that the compensable injury of \_\_\_\_\_, does extend to include left shoulder impingement, 2-3 mm disc bulges/protrusion from C3-4 to C5-6, mild neural foraminal narrowing at C4-5, C5-6 and C6-7, and cervical radiculopathy is supported by the evidence and is affirmed.

However, we have affirmed the hearing officer's determination that the carrier has waived the right to contest compensability of the AC joint arthritis of the left shoulder, therefore the AC joint arthritis of the left shoulder has become compensable by operation of law. We reverse so much of the hearing officer's determination on the extent-of-injury issue that determines the compensable injury does not extend to AC joint arthritis of the left shoulder and render a new decision that the compensable injury does extend to AC joint arthritis of the left shoulder by operation of carrier waiver.

## THE IR

Section 408.125(c) provides that the report of the designated doctor shall have presumptive weight, and the Texas Department of Insurance, Division of Workers' Compensation (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. 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). See Appeals Panel Decision (APD) 040313-s, decided April 5, 2004.

Dr. S, the designated doctor, in a Report of Medical Evaluation (DWC-69) and narrative, both dated January 13, 2006, certified MMI on that date (the unappealed MMI date) and assessed a 21% 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). That IR is based on Diagnosis-Related Estimates (DRE) Cervicothoracic Category III: Radiculopathy for 15% whole person impairment and a 7% whole person impairment for the left shoulder injury for a combined IR of 21%.<sup>1</sup> The carrier appeals that portion of the IR that assigns 15% impairment for cervical radiculopathy. We have affirmed the hearing officer's determination that the claimant's compensable injury extends to cervical radiculopathy, however, the carrier contends that the claimant does not have significant signs of radiculopathy so as to be ratable under the AMA Guides. In APD 030091-s, decided March 5, 2003, the Appeals Panel stated that the AMA Guides indicate that to find radiculopathy, 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 with the unaffected side, measured at the same distance above or below the elbow, and that the AMA Guides state that such findings of neurologic impairment may then be verified by electrodiagnostic studies. See Chapter 3, page 104, AMA Guides, DRE Cervicothoracic Category III. Dr. S's report, based on the claimant's condition as of the unappealed date of MMI, although stating an EMG shows evidence consistent with cervical radiculopathy, does not document loss of relevant reflexes or atrophy in accordance with the AMA Guides. Dr. S's 21% IR cannot be adopted because the medical records do not show atrophy or loss of relevant reflexes and Dr. S does not point to significant signs of radiculopathy as described in the AMA Guides. See APD 051456, decided August 16, 2005. Thus, the claimant's cervical radiculopathy has not been shown to be ratable under the criteria of the AMA Guides.

In a subsequent DWC-69 and narrative both dated June 21, 2006, Dr. S states that the claimant is not at MMI. In response to a letter of clarification, Dr. S, in a third

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<sup>1</sup> See Combined Value Chart, page 322 of the AMA Guides.

DWC-69 and narrative dated May 17, 2007, based on his June 21, 2006, reexamination writes:

It is my opinion [the claimant] was [at] MMI on 1/13/2006 inasmuch as he was undergoing no treatment, no surgery was planned, nor did the patient at that time indicate that he wanted any surgery. I rescinded it later because he had changed his mind; however, since this has not occurred, then I feel that he was MMI 1/13/2006 and I would therefore stand by the fact that I felt he was at MMI on 1/13/2006. The second question is considering the certification of MMI as of 1/13/2006, the patient had a 21% IR and the request is to do the same IR minus cervical radiculopathy. The patient was given a 12% upper extremity impairment based on a range of motion [ROM] measurements of his shoulder and that consists of a 7% whole person impairment based on his shoulder and if one gives this patient's impairment rating based just on his shoulder, then his impairment rating would be 7% WPIR [whole person impairment rating].

The May 17, 2007, DWC-69 certifies the January 13, 2006, date of MMI and assesses a 7% IR. The 7% IR is only for the claimant's left shoulder injury. This 7% IR cannot be adopted because the entire compensable injury was not rated. While the claimant does not have ratable cervical radiculopathy, based on our affirmation of other cervical injuries, the claimant clearly has a cervical injury that must be rated. The doctor evaluating permanent impairment must consider the entire compensable injury. APD 043168, decided January 20, 2005. The doctor assigning the IR shall provide a description and explanation of specific clinical findings related to each impairment, including 0% ratings. Rule 130.1(c)(3)(D)(i). Dr. S rates the left shoulder injury, but fails to rate the cervical injury other than withdrawing the 15% impairment for DRE Cervicothoracic Category III.

In evidence is a DWC-69 and narrative both dated August 9, 2006, from Dr. H the carrier's required medical examination doctor, who examined the claimant on August 9, 2006. Dr. H certifies MMI on January 13, 2006 (the unappealed date of MMI) and assess a 12% IR. The 12% IR includes a 7% whole person impairment for loss of ROM of the left shoulder (as also assessed by Dr. S). Dr. H notes no objective signs of radiculopathy and assess a 5% impairment under DRE Cervicothoracic Category II: Minor Impairment, which is combined with the 7% whole person impairment of the left shoulder to arrive at the 12% IR.<sup>2</sup> Thus, Dr. H assigned impairment for both the cervical injury and the left shoulder injury based on the MMI date of January 13, 2006, and this rating can be adopted.

We do not address the 7% whole person IR for the left shoulder injury as assigned by both Dr. S and Dr. H because neither party contends that the 7% IR for the left shoulder is not in accordance with the AMA Guides or that some other impairment percentage should be assigned for the left shoulder injury.

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<sup>2</sup> See Combined Value Chart, page 322 of the AMA Guides.

We reverse the hearing officer's determination that the claimant's IR is 21% as certified by Dr. S as being contrary to the preponderance of the medical evidence and the AMA Guides, and we render a decision that the claimant's IR is 12% as certified by Dr. H.

### **SUMMARY**

We affirm the hearing officer's decision that there was no BFOE; that the claimant had disability from August 6, 2005, to the date of the CCH; that the carrier waived the right to contest compensability of AC joint arthritis of the left shoulder; and that the compensable injury of \_\_\_\_\_, extends to include left shoulder impingement, 2-3 mm disc bulges/protrusions from C3-4 to C5-6, mild neural foraminal narrowing at C4-5, C5-6 and C6-7, and cervical radiculopathy. We reverse the hearing officer's determination that the compensable injury does not extend to include the AC joint arthritis and render a new decision that the claimant's compensable injury does extend to and include AC joint arthritis of the left shoulder by virtue of carrier waiver. We also reverse the hearing officer's determination that the claimant's IR is 21% as assigned by Dr. S and we render a decision that the claimant's IR is 12% as assigned by Dr. H.

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

**CORPORATION SERVICE COMPANY  
701 BRAZOS, SUITE 750, COMMODORE 1  
AUSTIN, TEXAS 78701.**

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Thomas A. Knapp  
Appeals Judge

CONCUR:

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Margaret L. Turner  
Appeals Judge

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Veronica L. Ruberto  
Appeals Judge