APPEAL NO. 072011
FILED DECEMBER 18, 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 October 2, 2007. The hearing officer resolved the sole disputed issue by deciding that the respondent's (claimant) impairment rating (IR) is 34% as assessed by the claimant's treating doctor, Dr. D. The appellant (self-insured) appeals the hearing officer's determination and the claimant responds, urging affirmance.

DECISION

Reversed and rendered.

The parties stipulated that the claimant sustained a compensable injury on _____; that the claimant reached maximum medical improvement (MMI) on July 10, 2006; and that Dr. B was appointed as designated doctor. The evidence established that the claimant injured her right shoulder and right knee in a slip and fall accident in the course and scope of her employment.

The hearing officer found that the 34% IR assessed by Dr. D was made in accordance with 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) and is supported by a preponderance of the evidence. However, Dr. D's Report of Medical Evaluation (DWC-69) in evidence certifies that the claimant reached clinical MMI on July 17, 2006. In Appeals Panel Decision (APD) 040514, decided April 28, 2004, the hearing officer adopted the IR assigned by the treating doctor that was based on an MMI date different from the stipulated date of MMI. In that case, the Appeals Panel reversed the hearing officer's IR determination because the treating doctor's certification of IR was not based upon the claimant's condition on the stipulated date of MMI, therefore the certification could not be adopted. In the instant case, the hearing officer determined that the claimant's IR is 34% as assigned by Dr. D based on an MMI date of July 17, 2006. As previously mentioned, the parties stipulated that the date of MMI was July 10, 2006. Because Dr. D assigned an IR that was not based upon the claimant's condition on the stipulated date of MMI, July 10, 2006, the 34% IR assigned by Dr. D cannot be adopted. Accordingly, we reverse the hearing officer's determination that the claimant's IR is 34%.

The report of the designated doctor is in evidence. Dr. B examined the claimant on September 25, 2006, and certified the claimant reached statutory MMI on July 3, 2006, with a 7% IR, using the AMA Guides. Dr. B noted that range of motion (ROM) of the right shoulder and right knee was performed by a certified technician, but that due to guarding and significant voluntary restriction the ROM deficits were not found to be valid, and the measurements were not consistent with the physical examination. Dr. B

assessed a 10% upper extremity impairment for the right shoulder based on Table 27 for a distal clavicle resection arthroplasty and a 2% lower extremity impairment based on Table 64 for a partial lateral meniscectomy. The lower extremity and upper extremity impairments were then converted into whole person impairments and combined for a total whole person IR of 7%.

In a letter of clarification dated January 24, 2007, the Texas Department of Insurance, Division of Workers' Compensation (Division) notified Dr. B that the claimant was disputing his MMI and IR certification, and submitted information from Dr. D for Dr. B to review. Dr. B responded on February 22, 2007, requesting that the claimant return to his office to retest the ROM of her right shoulder. On February 13, 2007, the claimant's right shoulder and right knee were retested, and upon reviewing the ROM measurements Dr. B again found that the claimant's ROM deficits were invalid.

The Division sent a second letter of clarification to Dr. B dated May 23, 2007, notifying him that the date of statutory MMI is July 10, 2006, and that he failed to attach the ROM measurements he relied on taken in February of 2007. A letter from Dr. D was also attached for Dr. B to review. Dr. B responded, attaching the requested ROM measurements and acknowledged that he reviewed the letter from Dr. D but stood by his previous assessment of 7% IR. Dr. B submitted an amended DWC-69, certifying the date of MMI as July 10, 2006, and assigning a 7% IR.

With regard to upper extremity impairment, the AMA Guides at page 3/62 provide that "in the presence of decreased motion, motion impairments are derived separately (Sections 3.1f through 3.1j) and combined with arthroplasty impairments using the Combined Values Chart." *See* APD 071283-s decided September 13, 2007. With respect to the lower extremities, the AMA Guides provide at page 3/84 that some impairment estimates are assigned more appropriately on the basis of a diagnosis than on the basis of findings on physical examination and that the physician, in general, should decide which estimate best describes the situation and should use only one approach for each anatomic part. The AMA Guides go on to state at page 3/84 that there may be instances in which elements from both diagnostic and examination approaches will apply to a specific situation. Dr. B did not base the IR on loss of ROM because he concluded that the ROM deficits were invalid. The hearing officer found that Dr. B's assigned IR is not supported by a preponderance of the evidence. We disagree. We have long recognized that a designated doctor can invalidate ROM based on observation. APD 970499, decided May 1, 1997, *see also* APD 041178, decided _____.

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. 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* APD 040313-s, decided April 5, 2004. As noted, Dr. D's IR cannot be adopted as it is not based on the claimant's condition as of the stipulated date of MMI. The only IR in evidence that is based on the stipulated date of MMI is the 7% IR assigned by Dr. B. Dr. B explained why the IR could not be based on ROM deficits as they were invalid and his assigned 7% IR is in accordance with the AMA Guides. Accordingly, we reverse the hearing officer's determination that the claimant's IR is 34% and render a new decision that the claimant's IR is 7% as assessed by the designated doctor.

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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Thomas A. Knapp
Appeals Judge

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Veronica L. Ruberto
Appeals Judge