

APPEAL NO. 080006
FILED MARCH 3, 2008

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 November 19, 2007. The hearing officer determined that the compensable injury of _____, extends to include tendinopathy of the infraspinatus, tendinopathy of the interarticular biceps, small-to-moderate amount of fluid in the subacromial-subdeltoid bursa finding suspicious for bursitis, small inferior labral tear and myofascial pain syndrome and that the respondent's (claimant) impairment rating (IR) is 3%.

The appellant (carrier) appealed, contending that the range of motion (ROM) studies supporting the 3% IR in the designated doctor's amended report was done long after the stipulated maximum medical improvement (MMI) date and that the claimant's IR should be 2% as assessed by the designated doctor shortly after the stipulated MMI date. The carrier also appeals the extent-of-injury determination, contending it is not supported by medical evidence. The claimant responds, urging affirmance of the extent-of-injury determination and of the 3% IR or adoption of the referral doctor's 7% IR.

DECISION

Affirmed in part and reversed and rendered in part.

EXTENT OF INJURY

The hearing officer's determination that the compensable injury of _____, extends to include tendinopathy of the infraspinatus, tendinopathy of the interarticular biceps, small-to-moderate amount of fluid in the subacromial-subdeltoid bursa finding suspicious for bursitis, small inferior labral tear, and myofascial pain syndrome is supported by sufficient evidence and is affirmed.

IR

The claimant testified that he injured his right shoulder and right arm pulling a pallet jack on _____. The parties stipulated that the claimant sustained a compensable injury on _____, that the date of MMI is March 13, 2006, and that Dr. G was appointed as the designated doctor.

The claimant was treated conservatively and eventually was referred to Dr. M. In a report dated January 9, 2006, Dr. M writes that the claimant has had a very severe injury of two tendons and that he "had an eccentric contraction which tends to be worse than by straight pull." In a Report of Medical Evaluation (DWC-69) and narrative, both dated March 13, 2006, Dr. M noted that he was selected by the treating doctor to act in place of the treating doctor to evaluate MMI and IR and certified the claimant at clinical

MMI on that date (the stipulated MMI date) with a 7% IR based on decreased right shoulder ROM 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). Dr. C in a record review dated March 28, 2006, questioned Dr. M's IR because the degrees of flexion and abduction recorded by Dr. M varied from other documented ROM measurements taken in January 2006.

Dr. G, the designated doctor, examined the claimant on May 2, 2006, certified an "assigned" clinical MMI date of March 13, 2006, and assessed a 2% IR using ROM measurements. The difference between Dr. M's IR and Dr. G's IR was the difference in the ROM measurements. Dr. M, in a letter dated June 9, 2006, disagreed with Dr. G stating that Dr. G "found virtually full [ROM]."

Dr. G was sent a letter of clarification (LOC) dated May 17, 2007, asking, among other things, about his ROM measurements. Dr. G replied by letter dated June 2, 2007, listing the various records he had reviewed and stating "it becomes apparent that the [claimant's] injury had not stabilized, and indeed may have worsened since the initial evaluation of 5-02-06. The [IR] assigned on 5-02-06 was based on the actual findings at that time." Dr. G added that the claimant "will require re-examination to determine the extent of current impairment." In a DWC-69 dated July 27, 2007, and a narrative report Dr. G indicated that he had examined the claimant on July 24, 2007, certified an "assigned" clinical MMI date of March 13, 2006, and assessed a 3% IR based on loss of ROM. A medical record review by Dr. C dated August 8, 2007, notes among other matters, that the "change in the [IR] is simply due to a change in the ROM. It is quite probable that if the individual was evaluated again, his [IR] may go back down to 2%, as a slight variation in ROM is not unexpected." Dr. G in a letter dated August 22, 2007, responding to a LOC which included Dr. C's comments, stated:

[The claimant] was evaluated by me on 7-24-07; the [IR] submitted was based on [ROM] only. I found no other positive physical findings including no atrophy, tendonitis, crepitation or other disorders. The ROM was checked twice for validity and an [IR] of 3% was assigned. The ROM was found to be slightly diminished over the previous evaluation. The IW gave a good effort and ROM validated. I see no reason to change the [IR]. The MMI date of 3-13-06 was assigned by the [Texas Department of Insurance, Division of Workers' Compensation (Division)] and printed on the 69. This date was not assigned by me.

The hearing officer found that Dr. G, the designated doctor, found the claimant to be at MMI on March 13, 2006, with a 3% IR and that Dr. G's assigned IR is supported by a preponderance of the evidence. The hearing officer concluded that the claimant's IR is 3%. 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 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 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 the IR "must be based on the injured employee's condition as of the date of MMI." Appeals Panel Decision 040313-s, decided April 5, 2004.

In this case, the carrier contends that the designated doctor remeasured the ROM only because he thought that perhaps the claimant's ROM had deteriorated since his original exam and wanted to assess the "current" ROM 16 months after the MMI date. The carrier also states that Dr. M gave the original March 13, 2006, MMI date and that because "it was only off the statutory date of MMI by a few days . . . the parties stipulated to the date." Dr. G, particularly in his second report, makes clear that the MMI date was assigned to him (and printed on the DWC-69) and that his measurements were based on the dates of his examinations (May 2, 2006 and July 24, 2007) rather than on the stipulated date of MMI, March 13, 2006.

As previously noted, Rule 130.1(c)(3) provides that the assignment of an IR for the compensable injury "shall be based" on the claimant's condition as of the MMI date. Dr. G makes it abundantly clear that he was assigning the IR as of the date of his examinations. In fact Dr. G, in his June 2, 2007, response, states that the IR assigned on May 2, 2006, "was based on the actual findings at that time" rather than as of the stipulated March 13, 2006, MMI date. The fact that the designated doctor examined the claimant after the MMI date in assigning an IR is not a basis in itself for not adopting an IR assigned by the designated doctor. However, in this case the IRs assigned by the designated doctor cannot be adopted because there is no indication in the designated doctor's reports that he was attempting to assign an IR based on the claimant's condition as of the MMI date. Consequently, neither of Dr. G's IRs can be adopted because they clearly were based on the claimant's condition as of the date of the examination rather than on the stipulated MMI date. The only other IR in evidence that can be adopted is Dr. M's report, assigning a 7% IR on the stipulated date of MMI.

Accordingly, we reverse the hearing officer's determination that the claimant's IR is 3% and render a new decision that the claimant's IR is 7% as assessed by Dr. M on the stipulated date of MMI.

SUMMARY

We affirm the hearing officer's determination on the issue of the extent of the compensable injury. We reverse the hearing officer's determination that the claimant's IR is 3% and we render a new decision that the claimant's IR is 7% as assigned by Dr. M on the stipulated date of MMI.

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

**CORPORATION SERVICE COMPANY
701 BRAZOS STREET, SUITE 1050
DALLAS, TEXAS 78701.**

Thomas A. Knapp
Appeals Judge

CONCUR:

Veronica L. Ruberto
Appeals Judge

Margaret L. Turner
Appeals Judge