

APPEAL NO. 080071
FILED MARCH 20, 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 (CCH) was held on December 19, 2007. With regard to the disputed issues the hearing officer determined that: (1) the appellant (claimant) reached maximum medical improvement (MMI) on January 30, 2007; (2) the claimant's impairment rating (IR) is 12%; and (3) the claimant had disability beginning May 4, 2005, and continuing through the date of the CCH, but because the claimant reached MMI on January 30, 2007, he is not entitled to temporary income benefits (TIBs) after that date.

The claimant appealed, contending that he did not reach MMI until May 1, 2007, with a 16% IR as assessed by (Dr. R), a doctor selected by the treating doctor acting in place of the treating doctor. The claimant also appeals the disability determination urging that he had "disability" (was entitled to TIBs) until the May 1, 2007, MMI date certified by Dr. R. The respondent (carrier) responds, urging affirmance.

DECISION

Affirmed in part and reversed and remanded in part.

The parties stipulated that the claimant sustained a compensable injury on _____; that (Dr. MD) was the designated doctor; and that Dr. MD certified that the claimant reached MMI on January 30, 2007, with an IR of 12%. The evidence established that the claimant was a laborer and sustained injuries to his right shoulder, right hand and neck on _____. Medical records show the claimant had right middle finger surgery on May 12, 2005.

MMI

The hearing officer's determination that the claimant reached MMI on January 30, 2007, is supported by sufficient evidence and is affirmed.

DISABILITY

The hearing officer's determination that the claimant had disability from May 4, 2005, through the date of the CCH is in the claimant's favor. The claimant's appeal of the disability issue concerns the MMI date. The hearing officer correctly determined that the claimant is not entitled to TIBs after he reached MMI on January 30, 2007, although he had disability after that date. Sections 408.101(a) and 408.102(a).

IR

The claimant had right middle finger surgery on May 12, 2005, performed by (Dr. I). In a Report of Medical Evaluation (DWC-69) and narrative both dated August 25, 2005, Dr. I certified the claimant at clinical MMI that date with a 7% IR. The 7% IR was based only on loss of range of motion (ROM) of the right middle finger.

Dr. MD, the designated doctor, examined the claimant on January 30, 2007, and in a DWC-69 and narrative of that date certified the claimant reached clinical MMI on January 30, 2007, with a 12% IR. Dr. MD notes that on October 19, 2006, the claimant "underwent arthroscopic rotator cuff repair right shoulder, repair of superior glenoid labrum tear, [and] acromioplasty with soft tissue graft." Dr. MD noted that the claimant had complaints of pain in the right shoulder, right hand and right side of his back. Dr. MD diagnosed status post extensor tendon repair right middle finger distal interphalangeal (DIP) joint, status post rotator cuff repair of the right shoulder and cervical strain.

Dr. MD performed ROM testing and stated "[t]he middle finger [ROM] values are considered invalid; however, the overall impairment calculated with these values is only 1% over [Dr. I's] evaluation on August 25, 2005, and will be used."¹ Using his own measurements, Dr. MD calculated the ROM in the joints of the right middle finger to obtain a finger impairment, which was converted to a hand impairment, which in turn was converted to a 14% upper extremity (UE) impairment. Similarly, Dr. MD found the right shoulder ROM to be invalid and commented that there "are no post operative [ROM] measurements documented in the notes provided." Dr. MD stated with regard to the right shoulder ROM that "there was evidence of self-limiting behavior and lack of full effort provided on examination today; therefore, [ROM] obtained today cannot be used to evaluate his impairment." Dr. MD stated "[t]he [ROM] provided by [Dr. B] on July 31, 2006, resulted in a 7% [UE] impairment." Apparently, Dr. B had done ROM testing on July 31, 2006, which was prior to the claimant's right shoulder surgery in October 2006, and Dr. MD had that report. Dr. MD combined the 14% UE impairment for the right finger he calculated using his own ROM measurements with the 7% UE impairment for the shoulder calculated by Dr. B to arrive at a 20% UE impairment, which was converted to a 12% whole person IR using Table 3 on page 20 of 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).

The claimant was subsequently examined by Dr. R, a doctor selected by the treating doctor acting in place of the treating doctor, on August 17, 2007. Dr. R certified the claimant reached "statutory" MMI on May 1, 2007, with a 16% IR.

Dr. R's report was sent to Dr. MD, the designated doctor, in a letter of clarification dated August 24, 2007, and Dr. MD was asked if any revision in his report was needed.

¹The right middle finger ROM measurements Dr. MD, the designated doctor, used to calculate the finger impairment are not the finger ROM measurements found in Dr. I's report.

Dr. MD replied by letter dated August 30, 2007, that he had reviewed the report and saw no reason to change his MMI date or 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.

The Appeals Panel has previously recognized that a designated doctor can rely on tests, examinations and reports done by others, provided the IR ultimately assigned is a result of the designated doctor's independent judgment. Appeals Panel Decision (APD) 002764, decided January 16, 2001; APD 001703, decided September 6, 2000. However, 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. See APD 040313-s, decided April 5, 2004. In this case, Dr. MD in assigning an IR as of the January 30, 2007, MMI date, relied on the shoulder ROM measurements performed by another doctor on July 31, 2006, prior to extensive right shoulder surgery in October 2006. While Dr. MD can rely on the tests and measurements of others, in this case Dr. MD's 12% IR cannot be adopted because it was based in part on ROM measurements of the right shoulder performed prior to the October 19, 2006, right shoulder surgery, which would probably not reflect the claimant's condition on the January 30, 2007, MMI date. We reverse the hearing officer's determination that the claimant's IR is 12%.

Dr. I's 7% IR cannot be adopted because it was based on the claimant's condition as of the August 25, 2005, MMI date Dr. I certified, and not on the claimant's condition on the MMI date of January 30, 2007. Dr. R's 16% IR cannot be adopted because it was based on the claimant's condition as of May 1, 2007, the MMI date certified by Dr. R, and not his condition on the MMI date of January 30, 2007. See Rule 130.1(c)(3).

We reverse the hearing officer's determination that the claimant's IR is 12%. We remand the IR issue to the hearing officer for further proceedings consistent with this decision. The claimant should be re-examined by the designated doctor, if he is still qualified and available, or by a second designated doctor if necessary, for an assignment of an IR for the compensable injury based on the claimant's condition as of the January 30, 2007, MMI date, considering the medical records and certifying examination.

SUMMARY

We affirm the hearing officer's determination that the claimant reached MMI on January 30, 2007, and that he is not entitled to TIBs after that date. We reverse the

hearing officer's determination that the claimant's IR is 12% and remand the IR issue to the hearing officer for further consideration and development of the evidence consistent with the decision.

Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Division, pursuant to Section 410.202 which was amended June 17, 2001, to exclude Saturdays and Sundays and holidays listed in Section 662.003 of the Texas Government Code in the computation of the 15-day appeal and response periods. See APD 060721, decided June 12, 2006.

The true corporate name of the insurance carrier is **BITUMINOUS CASUALTY CORPORATION** and the name and address of its registered agent for service of process is

**GLENN CAMERON
222 WEST LAS COLINAS BLVD, SUITE 1720
IRVING, TEXAS 75016.**

Thomas A. Knapp
Appeals Judge

CONCUR:

Veronica L. Ruberto
Appeals Judge

Margaret L. Turner
Appeals Judge