APPEAL NO. 080375
FILED MAY 15, 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 February 11, 2008. The hearing officer resolved the disputed issues by deciding that: (1) the respondent (claimant) reached maximum medical improvement (MMI) on July 25, 2006; (2) the claimant's impairment rating (IR) is 10%; and (3) the claimant sustained disability from July 14, 2005, through April 26, 2007 (the disability period in dispute at the CCH). The appellant (carrier) appeals, disputing the hearing officer's determinations of MMI, IR, and disability. The appeal file does not contain a response from the claimant.

DECISION

Affirmed in part, reversed and rendered in part, and reversed and remanded in part.

The parties stipulated that the claimant sustained a compensable injury on _____; Dr. M was appointed as the designated doctor; and the date of statutory MMI is August 1, 2006. The claimant testified that she injured her low back while lifting boxes. A prior CCH held on January 16, 2007, determined that the compensable injury of _____, extends to include changes in the lumbar spine, including radiculopathy, apart from a soft tissue sprain/strain. The decision from the CCH held on January 16, 2007, was not appealed by either party. The evidence reflects that on March 15, 2007, which was after the statutory MMI date, the claimant underwent a left L5-S1 discectomy and decompression.

Dr. M initially examined the claimant on December 21, 2004, and certified that the claimant had not yet reached MMI. Dr. M re-examined the claimant on July 14, 2005, and certified that the claimant reached MMI on that date with a 5% IR under 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). The 5% IR assessed was based on Diagnosis-Related Estimate (DRE) Lumbosacral Category II: Minor Impairment. Dr. M noted in his narrative report that the claimant had a history of lumbar radiculopathy, which was supported by electrodiagnostic findings but that her patellar and Achilles reflexes were symmetrical and that she had no indication of muscular atrophy in the upper or lower legs. Dr. M examined the claimant a third time on April 26, 2007, and amended his prior certification. Dr. M certified that the claimant reached MMI on April 26, 2007, with a 10% IR, placing the claimant in DRE Lumbosacral Category III: Radiculopathy. Dr. M based his placement of the claimant in DRE Lumbosacral Category III on "electrodiagnostic evidence for, and subsequent surgery for left L5 lumbar radiculopathy." In a July 23, 2007, response to a letter of clarification, Dr. M stated he overlooked the correct statutory date of MMI of August 1, 2006, and would

amend both the narrative report and the Report of Medical Evaluation (DWC-69) to reflect the correct statutory date of MMI. Dr. M stated in his response that the MMI date was August 1, 2006. Dr. M again responded to a letter of clarification on November 6, 2007, and certified that the claimant reached MMI statutorily but incorrectly stated the statutory MMI date to be July 25, 2006. In support of placing the claimant at MMI on the statutory date, Dr. M noted that a "pre-statutory" CT myelogram described prominent left lateral L5-S1 foraminal stenosis with exiting L5 nerve root being contacted. Dr. M stated that following the claimant's surgery there was a substantial reduction in symptoms and an increase in function. Dr. M again assigned the claimant a 10% IR for lumbosacral radiculopathy.

**MMI**

Section 408.1225(c) provides that the report of the designated doctor has presumptive weight, and the Texas Department of Insurance, Division of Workers' Compensation (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. In this case the amended report of Dr. M is entitled to presumptive weight and should be adopted unless the preponderance of the medical evidence is to the contrary. The hearing officer determined that the MMI date was July 25, 2006, as certified by Dr. M in his last amended report. However, it is clear from the evidence that Dr. M intended to certify that the claimant reached MMI statutorily and was simply mistaken about the date of statutory MMI in his last response. In the response of July 23, 2007, Dr. M certified that the claimant reached statutory MMI on August 1, 2006, the date stipulated to be statutory MMI by the parties. We hold that the preponderance of the medical evidence is contrary to the hearing officer's finding that the claimant reached MMI on July 25, 2006. We reverse the hearing officer's determination that the claimant reached MMI on July 25, 2006, and render a new decision that the claimant reached MMI on August 1, 2006.

**IR**

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 the IR must be based on the injured worker's condition as of the date of MMI and shall not be based on changes in the injured employee's condition occurring after that date, such as when the injured employee's condition changes as a result of surgery that takes place after the date of MMI. 29 Tex. Reg. 2328 (2004). In response to public comment on Rule 130.1, the Division, in the preamble, noted that in the situations where the claimant reaches

MMI clinically, rather than with the expiration of 104 weeks or the extended date in the event of spinal surgery, future changes in the injured worker's condition may cause the MMI date to change and that "[i]n the event the MMI date is changed due to a post-MMI change in the injured employee's conditions, there should be a re-evaluation of the IR as of the new MMI date." 29 Tex. Reg. 2332 (2004). *See* Appeals Panel decision (APD) 072242, decided February 13, 2008.

Dr. M noted in his November 6, 2007, response to a letter of clarification that the claimant did not exhibit unilateral atrophy or have obviously diminished reflexes but nevertheless assessed impairment under DRE Lumbosacral Category III: Radiculopathy based on a CT myelogram. As previously stated, in his narrative report dated April 26, 2007, Dr. M noted that there was no indication of muscular atrophy in the upper or lower legs. He further noted that patellar reflexes were symmetrical while the right Achilles reflex appeared mildly diminished but pointed out that the right side was not the side that was treated surgically, and was asymptomatic at the time of the examination. Dr. M went on to explain that without any muscle atrophy over this long a period of time, the likelihood of motor fiber loss related to lumbar radiculopathy associated with the compensable injury would be unlikely. According to the AMA Guides, to receive a rating for radiculopathy, the claimant must have significant signs of radiculopathy, such as loss of relevant reflex(es), or measured unilateral atrophy of 2 centimeters or more above or below the knee, compared to measurements on the contralateral side at the same location. The atrophy or loss of relevant reflex must be spine-injury-related for radiculopathy to be rated. *See* APD 072220-s, decided February 5, 2008. The findings of neurologic impairment may be verified by electrodiagnostic studies, but the AMA Guides do not state that electrodiagnostic studies, showing nerve root irritation, without loss of relevant reflexes or atrophy, constitutes undeniable evidence of radiculopathy. *See also* APD 050729-s, decided May 23, 2005; APD 051824, decided September 19, 2005; and APD 051456, decided August 16, 2005. According to the reports of Dr. M, the claimant did not have significant signs of radiculopathy required by the AMA Guides for a rating under DRE Lumbosacral Category III. Dr. M acknowledged that the claimant did not exhibit any significant signs of lumbar radiculopathy, such as loss of relevant reflexes or unilateral atrophy, on the date of the certifying examination of April 26, 2007; however, that examination occurred after the claimant had lumbar spine surgery on March 15, 2007, which was after the MMI date of August 1, 2006. There is no indication in Dr. M's reports that the claimant had significant signs of radiculopathy, such as loss of relevant reflexes or unilateral atrophy, on the date of MMI, August 1, 2006. Accordingly, we reverse the hearing officer's determination that the claimant's IR is 10%. No other certification in evidence assesses an IR for the claimant on the date of MMI of August 1, 2006. We reverse the hearing officer's determination that the claimant's IR is 10% and remand this case back to the hearing officer.

Dr. M is the current designated doctor for this case. If on remand, Dr. M is no longer qualified or is unwilling to serve as designated doctor, another designated doctor will have to be appointed. On remand the hearing officer shall: (1) inform the designated doctor that the date of MMI is August 1, 2006; (2) request that the

designated doctor assign an IR for the compensable injury according to the AMA Guides based on the claimant's condition as of the date of MMI; (3) after the designated doctor has submitted another DWC-69 and narrative report certifying MMI and IR, provide the DWC-69 and narrative report to the parties and then hold further proceedings to allow the parties to respond to the report, including the submission of additional medical evidence if necessary; and (4) make a determination of IR.

## DISABILITY

The hearing officer's decision that the claimant sustained disability from July 14, 2005, through April 26, 2007, is supported by sufficient evidence and is affirmed.

## SUMMARY

We affirm the hearing officer's determination that the claimant sustained disability from July 14, 2005, through April 26, 2007. We reverse the hearing officer's determination that the claimant reached MMI on July 25, 2006, and render a new decision that the claimant reached MMI on August 1, 2006. We reverse the hearing officer's determination that the claimant's IR is 10% and remand back to the hearing officer for actions consistent with this 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 **ACE AMERICAN INSURANCE COMPANY** and the name and address of its registered agent for service of process is

**ROBIN M. MOUNTAIN**
**6600 CAMPUS CIRCLE DRIVE EAST, SUITE 300**
**IRVING, TEXAS 75063.**

_____
Margaret L. Turner
Appeals Judge

CONCUR:

_____
Thomas A. Knapp
Appeals Judge

_____
Veronica L. Ruberto
Appeals Judge