APPEAL NO. 080706
FILED JULY 11, 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 April 16, 2008. The hearing officer resolved the disputed issues by deciding that the respondent (claimant) reached maximum medical improvement (MMI) on November 4, 2005, with a 26% impairment rating (IR). The appellant (carrier) appealed, disputing both the determinations of MMI and IR. The claimant responded, urging affirmance.

DECISION

Reversed and rendered.

The parties stipulated that the claimant sustained a compensable injury on _____. It is undisputed that the compensable injury includes an injury to the claimant's right shoulder. A prior CCH decision determined that the compensable injury extends to and includes an injury to the cervical spine. That decision was appealed, however, the decision of the hearing officer became final. The evidence reflects that the claimant underwent a right rotator cuff repair arthroscopically on September 12, 2005. The first designated doctor, Dr. J, examined the claimant on November 4, 2005, and certified on a Report of Medical Evaluation (DWC-69) that the claimant reached MMI on that date with a 26% 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). Dr. J assessed 15% whole person impairment for the cervical spine, placing the claimant in Cervicothoracic Diagnosis-Related Estimate (DRE) Category III: Radiculopathy, and 13% whole person impairment for the right upper extremity based on range of motion (ROM) measurements of the right shoulder.

Although Dr. J certified on the DWC-69 that the claimant reached MMI on the date of the examination, November 4, 2005, in her narrative report, Dr. J stated that in her opinion, the claimant will reach MMI after completion of another six weeks of physical therapy beyond what she has already done. Dr. J also noted in her narrative that the claimant demonstrated decreased effort during ROM measurements of the right upper extremity and also noted that the claimant offered decreased effort secondary to pain/symptom magnification. Dr. J noted that the deep tendon reflexes of the upper extremities were normal, and there is no indication in her narrative report that she took measurements regarding atrophy of the upper extremities. A letter of clarification dated March 1, 2006, was sent to Dr. J from the Texas Department of Insurance, Division of Workers' Compensation (Division) which noted Dr. J's report stated the claimant had submaximal effort during the ROM testing for the right upper extremity and asked for alternative ratings because, at that time, the extent of injury regarding the cervical spine was still in dispute. Dr. J responded to the letter of clarification on March 8, 2006, asking to re-examine the claimant. An appointment was scheduled, but the claimant did

not attend the scheduled examination. On May 30, 2006, another letter of clarification was sent to Dr. J, noting the claimant's failure to attend the scheduled appointment and the carrier's request for an assessment of 0% for the right upper extremity because the veracity of the claimant's right upper extremity ROM tests are in doubt. Another letter of clarification was sent to Dr. J dated January 17, 2008, which stated the carrier has requested that Dr. J reconsider assessing 0% impairment due to the claimant's failure to attend the appointment and Dr. J's notation that the right upper extremity impairment was based on the claimant's symptom magnification during the ROM testing. No responses from Dr. J to the May 30, 2006, and the January 17, 2008, letters of clarification are in evidence.

After the administrative determination that the cervical spine was part of the claimant's compensable injury, there was a request for a designated doctor to re-evaluate the claimant. Dr. S was appointed as the designated doctor for this purpose. The parties represented at the CCH their belief that Dr. S was appointed because Dr. J was no longer on the designated doctor list. Dr. S examined the claimant on July 2, 2007, and certified the claimant reached MMI statutorily on January 19, 2007, with a 0% IR. Dr. S assigned 0% impairment for the cervical spine under Cervicothoracic Category DRE I and 0% impairment for the right shoulder. Dr. S noted that upon review of the medical records and his physical examination, the claimant had complaints and symptoms in the cervicothoracic spine, with no significant clinical findings on examination. Dr. S noted that the claimant had two separate EMGs which were reported as somewhat abnormal, but neither of which appeared to support a definitive diagnosis of radiculopathy. Dr. S noted that due to guarding and significant voluntary restriction, the ROM deficits of the right shoulder were not found to be valid for the purposes of calculating a permanent IR. Further, Dr. S noted that based on his neuromuscular examination, the claimant showed no objective sensory deficit and no objective motor deficit of the cervical spine or upper extremities.

The hearing officer found that the preponderance of the evidence is not contrary to Dr. J's assigned IR of 26% and MMI date of November 4, 2005, and that the preponderance of the evidence is contrary to Dr. S' assigned IR of 0% and MMI date of January 19, 2007. The hearing officer concluded that the claimant reached MMI on November 4, 2005, with a 26% IR.

Section 408.1225(c) provides that the report of the designated doctor has presumptive weight, and the 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. Dr. J certified on her DWC-69 that the claimant reached MMI on November 4, 2005, however, in her narrative report, she clearly states that she does not believe the claimant will reach MMI until the claimant has another six weeks (from the date of the examination of November 4, 2005) of physical therapy. We hold that the great weight and preponderance of the evidence is contrary to the hearing officer's determination that the claimant reached MMI on November 4, 2005. The preponderance of the medical evidence is contrary to Dr. J's certification of a November 4, 2005, date of MMI. We reverse the hearing

officer's determination that the claimant reached MMI on November 4, 2005, and render a new decision that the claimant reached MMI on January 19, 2007, as certified by Dr. S.

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. A new decision has been rendered that the claimant's MMI date is January 19, 2007. Dr. J rated the claimant's condition as of November 4, 2005. Therefore, Dr. J's assessment of IR cannot be adopted because it was not based on the MMI date, January 19, 2007.

Further, the hearing officer noted in his discussion that the 0% impairment assessed by Dr. S did not "comport with Dr. [J's] finding that evidence of radiculopathy was present or the two positive EMG/NCV evaluations." We note that in assessing a 15% IR for cervical radiculopathy under Cervicothoracic Category DRE III, Dr. J failed to identify and document significant signs of cervical radiculopathy such as spine-injury-related loss of relevant arm reflexes or unilateral atrophy of 2 cm or more above or below the elbow. *See* Appeals Panel Decision 072220-s, decided February 5, 2008. Dr. S acknowledged the EMGs but opined that neither of the EMGs appeared to support a definitive diagnosis of radiculopathy. Additionally, Dr. S noted that his physical examination of the claimant revealed no significant clinical findings of the claimant's cervical spine. Dr. S explained that the measurement details for the ROM of the claimant's right upper extremity were not consistent with the pathology noted on physical examination, review of the medical history, or diagnostic testing and that there were no significant clinical findings of the claimant's cervical spine. We hold that the great weight and preponderance of the evidence is contrary to the hearing officer's determination that the claimant's IR is 26%. The preponderance of the medical evidence is contrary to Dr. J's assignment of a 26% IR. The 0% impairment assessed by Dr. S was in accordance with the AMA Guides. Accordingly, we reverse the hearing officer's determination that the claimant's IR is 26% and render a new decision that the claimant's IR is 0% as assessed by the designated doctor, Dr. S.

We reverse the hearing officer's determination that the claimant reached MMI on November 4, 2005, and render a new decision that the claimant reached MMI on January 19, 2007, as certified by the designated doctor, Dr. S. We reverse the hearing officer's determination that the claimant's IR is 26% and render a new decision that the claimant's IR is 0% as assessed by the designated doctor, Dr. S.

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:

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Cynthia A. Brown
Appeals Judge

_____
Veronica L. Ruberto
Appeals Judge