APPEAL NO. 090539
FILED JUNE 1, 2009

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 March 3, 2009. The hearing officer resolved the disputed issues by deciding that the date of maximum medical improvement (MMI) is February 24, 2008, and that the respondent's (claimant) impairment rating (IR) is 45%. The appellant (carrier) appealed the hearing officer's determinations of MMI and IR. The carrier additionally appealed an evidentiary ruling made by the hearing officer. The claimant responded, urging affirmance.

DECISION

Reversed and rendered.

EVIDENTIARY OBJECTION

We first address the carrier's evidentiary objection. The carrier contends in its appeal that the hearing officer erred when he admitted the Report of Medical Evaluation (DWC-69) and narrative report of (Dr. G) dated September 12, 2008, into evidence because it was not timely exchanged. Conflicting representations were made regarding whether or not the documents had been timely exchanged. To obtain reversal of a decision based upon error in the admission or exclusion of evidence, it must be shown that the evidentiary ruling was in fact error, and that the error was reasonably calculated to cause, and probably did cause the rendition of an improper decision. Appeals Panel Decision (APD) 91003, decided August 14, 1991. We conclude that the carrier has not shown that the hearing officer abused his discretion in determining that the evidence should be admitted because it was timely exchanged nor has the carrier shown that the error, if any, amounted to reversible error. *See* 28 TEX. ADMIN. CODE § 142.13(c) (Rule 142.13(c)).

FACTUAL SUMMARY

The parties stipulated that on _____, the claimant sustained a compensable injury and that (Dr. S) is the designated doctor on the issues of MMI and IR. It was undisputed that the claimant sustained work-related injuries to his neck and right upper extremity (UE).

Dr. S, the designated doctor, examined the claimant on June 8, 2006, January 16, 2007, June 4, 2007, and November 19, 2007, and opined that the claimant was not at MMI respectively.

(Dr. O), a carrier-selected required medical examination doctor, examined the claimant on May 8, 2007, and opined that the claimant reached clinical MMI on May 8,

2007, with a 5% 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). The 5% IR is based on 5% impairment for the right UE and 0% impairment for Diagnosis-Related Estimate (DRE) Cervicothoracic Category I: Complaints or Symptoms. In Dr. O's narrative report dated May 8, 2007, he noted that the claimant shows "no objective sensory deficit and no objective motor deficit of the cervical spine or [UE]."

Dr. G, a referral doctor acting in place of the treating doctor and who subsequently became the claimant's treating doctor, examined the claimant on March 12, 2008, and opined that the claimant reached statutory MMI on March 12, 2008, with a 35% IR using the AMA Guides. Dr. G assigned a 25% impairment based on DRE Cervicothoracic Category IV: Loss of Motion Segment Integrity or Multilevel Neurologic Compromise, 13% impairment for the right UE, and 0% impairment for the peripheral nerve system.

Dr. S, the designated doctor, re-examined the claimant on June 6, 2008, and opined that the claimant reached statutory MMI on March 2, 2008, with a 5% IR, using the AMA Guides. Dr. S assigned a 5% IR based on 5% impairment for DRE Cervicothoracic Category II: Minor Impairment and 0% impairment for the right UE. Dr. S noted in his narrative report dated June 6, 2008, that he invalidated the right shoulder range of motion (ROM) measurements due to the claimant's submaximal efforts. On his neuromuscular examination, Dr. S found that the claimant showed no objective sensory deficit and no objective motor deficit of the cervical spine or the right UE.

Subsequent to his initial examination on March 12, 2008, Dr. G, the treating doctor, referred the claimant for cervical flexion and extension x-rays which were performed on July 24, 2008. Dr. G re-examined the claimant on September 12, 2008, and opined that the claimant reached statutory MMI on February 24, 2008, with a 45% IR, using the AMA Guides. The 45% IR is based on a 25% impairment for DRE Cervicothoracic Category IV: Loss of Motion Segment Integrity or Multilevel Neurologic Compromise and 26% impairment for the right UE, rating abnormal ROM in the right shoulder in addition to the peripheral nerve system.

MMI

The hearing officer determined that the claimant's MMI date was February 24, 2008, as certified by the treating doctor, Dr. G. As previously noted, Dr. G initially certified that the claimant reached statutory MMI on March 12, 2008, and subsequently changed the date of MMI certified because he believed the statutory MMI date was February 24, 2008. Dr. G noted in his narrative report of September 12, 2008, that he believes that the claimant should be in a chronic pain management program and that daily sessions with a counselor would be of benefit. Dr. G indicated that he believed that further material recovery could be reasonably anticipated.

It is not clear from the record when the claimant's exact date of disability began. *See* Rule 124.7(b). However, the compensable injury date is _____, and the claimant's accrual date for income benefits could not have been earlier than March 5, 2006. Given the earliest possible accrual date, the date of statutory MMI for the claimant could not be earlier than March 2, 2008, which is the expiration of 104 weeks from the earliest date on which income benefits could have begun to accrue. *See* APD 070930, decided July 11, 2007. In evidence is correspondence from the Texas Department of Insurance, Division of Workers' Compensation (Division) to Dr. S dated October 23, 2008, which states that "the correct statutory date of MMI is March 2, 2008."

Section 401.011(30)(A) defines MMI as "the earliest date after which, based on reasonable medical probability, further material recovery from or lasting improvement to an injury can no longer reasonably be anticipated." 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.

The hearing officer clearly excluded the date of MMI certified by Dr. O of March 8, 2007, in which Dr. O opined that the claimant reached MMI clinically. The hearing officer was persuaded that the claimant reached MMI statutorily as certified by Dr. G. Therefore, it is not necessary to remand the case to the hearing officer to consider Dr. O's certification of MMI. Both Dr. G and the designated doctor certified that the claimant reached MMI statutorily rather than clinically. However, as we previously mentioned the February 24, 2008, date of statutory MMI certified by Dr. G is not the correct statutory date of MMI. Correspondence from the Division in evidence states that the correct statutory date of MMI is March 2, 2008. The hearing officer's determination that the MMI date is February 24, 2008, is so against the great weight and preponderance as to be clearly wrong and manifestly unjust. The preponderance of the other medical evidence is not contrary to the designated doctor's certification of MMI. Accordingly, we reverse the hearing officer's determination that the claimant reached MMI on February 24, 2008, and we render a new decision that the claimant reached MMI on March 2, 2008, as certified by the designated doctor, Dr. S.

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. 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 MMI date." *See* APD 040313-s, decided April 5, 2004.

The hearing officer determined that the claimant's IR is 45% as assigned by Dr. G. Dr. G's assessment of impairment is based on an MMI date of February 24, 2008. *See* Rule 130.1(c)(3). In that we have rendered a new decision that the claimant's MMI date is March 2, 2008, as certified by the designated doctor, the hearing officer's determination that the claimant's IR is 45% is so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust. Accordingly, we reverse the hearing officer's determination that the claimant's IR is 45%.

Review of the record shows that there is only one certification of MMI/IR with a date of MMI of March 2, 2008, which can be adopted. Dr. S, the designated doctor, certified that the claimant reached MMI on March 2, 2008, with a 5% IR. Dr. S noted in his narrative report dated June 6, 2008, that he invalidated the right shoulder ROM measurements. We have long recognized that a doctor can invalidate ROM based upon observation. *See* APD 011235, decided July 17, 2001. The 5% IR is based on a 5% impairment for DRE Cervicothoracic Category II: Minor Impairment and a 0% impairment for the right UE. Dr. S noted in his narrative report dated June 6, 2008, that there was clinical evidence of muscle spasm but no ratable radiculopathy or loss of motion segment integrity and that the claimant showed no objective sensory deficit and no objective motor deficit of the cervical spine or right UE. On September 12, 2008, Dr. S responded to a letter of clarification and indicated his disagreement with Dr. G's assignment of a 35% IR. Dr. S opined that the cervical injury's rating based on DRE Cervicothoracic Category II: Minor Impairment was correct because the claimant had evidence of muscle spasm, only 1 cm of atrophy in his right UE and no loss of a major reflex. Additionally, Dr. S explained that he had invalidated the ROM deficits for the right shoulder because of the claimant's positive Waddell signs and extreme self-limitation. The preponderance of the other medical evidence is not contrary to the designated doctor's certification of IR. Given that we have reversed the hearing officer's decision that the claimant's IR is 45%, we render a new decision that the claimant's IR is 5% as certified by the designated doctor, Dr. S.

SUMMARY

We reverse the hearing officer's decision that the claimant reached MMI on February 24, 2008, and we render a new decision that the claimant reached MMI on March 2, 2008, as certified by the designated doctor, Dr. S.

We reverse the hearing officer's decision that the claimant's IR is 45% and we render a new decision that the claimant's IR is 5% as certified by the designated doctor, Dr. S.

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

LEO F. MALO
12222 MERIT DRIVE, SUITE 700
DALLAS, TEXAS 75251.

_____
Cynthia A. Brown
Appeals Judge

CONCUR:

_____
Veronica L. Ruberto
Appeals Judge

_____
Margaret L. Turner
Appeals Judge