

APPEAL NO. 091375  
FILED DECEMBER 2, 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 (CCH) was held on August 17, 2009. The hearing officer resolved the disputed issues by deciding that: (1) the \_\_\_\_\_, compensable injury does not extend to cervical disc pathology with effacement of the cervical cord at C5-6 and C6-7; (2) the appellant/cross-respondent (claimant) reached maximum medical improvement (MMI) on January 12, 2009; and (3) the claimant's impairment rating (IR) is 14%.

Both parties appealed. The claimant appealed, disputing the hearing officer's extent-of-injury determination. The respondent/cross-appellant (carrier) responded, urging affirmance of the extent-of-injury determination. The carrier also cross-appealed, disputing the hearing officer's determination that the claimant's IR is 14%. The appeal file does not contain a response from the claimant to the carrier's cross-appeal. The hearing officer's determination that the claimant reached MMI on January 12, 2009, was not appealed and has become final pursuant to Section 410.169.

DECISION

Affirmed in part and reversed and remanded in part.

The parties stipulated that the claimant sustained a compensable injury on \_\_\_\_\_.<sup>1</sup> The claimant testified that she sustained an injury while lifting rotors, making deliveries in the course and scope of her employment. In evidence is a Notice of Disputed Issue(s) and Refusal to Pay Benefits (PLN-11) dated October 24, 2008, which evidences that the carrier accepted a cervical sprain/strain and right shoulder tear but disputed that the compensable injury extended to any other body part, injuries, conditions, diagnosis or symptoms.

**NEWLY DISCOVERED EVIDENCE**

The claimant attached to her appeal several documents, some of which were not offered into evidence at the CCH, including an internet article discussing the spinal cord. Documents submitted for the first time on appeal are generally not considered unless they constitute newly discovered evidence. See generally, Appeals Panel Decision (APD) 93111, decided March 29, 1993; Black v. Wills, 758 S.W.2d 809 (Tex. App.-Dallas 1988, no writ). In determining whether new evidence submitted with an appeal requires remand for further consideration, the Appeals Panel considers whether the evidence came to the knowledge of the party after the hearing, whether it is cumulative of other evidence of record, whether it was not offered at the hearing due to a lack of diligence, and whether it is so material that it would probably result in a different

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<sup>1</sup> A review of the record reflects that the stipulation that the claimant sustained a compensable injury on \_\_\_\_\_, was made but the hearing officer failed to include the stipulation in the decision and order.

decision. See APD 051405, decided August 9, 2005. Upon our review, we cannot agree that the evidence meets the requirements of newly discovered evidence and will not be considered.

## **EXTENT OF INJURY**

The hearing officer's determination that the \_\_\_\_\_, compensable injury does not extend to cervical disc pathology with effacement of the cervical cord at C5-6 and C6-7 is supported by sufficient evidence and is affirmed.

## **IR**

The hearing officer found that (Dr. P), the doctor selected to act in place of the treating doctor, certified that the claimant reached MMI on January 12, 2009, with a 14% IR. The hearing officer determined that the claimant's IR is 14% based on the certification of Dr. P. Dr. P assessed a 14% 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) based on a 10% whole person impairment for loss of range of motion for the claimant's right shoulder and on a 5% impairment for Cervicothoracic Diagnosis-Related Estimate (DRE) Category II: Minor Impairment. In her narrative report, Dr. P stated the claimant was placed in Cervicothoracic DRE Category II "due to the evidence on [the] MRI of 3 mm disc bulge pushing into the C5-6 nerve root and sensory loss noted on the examination in the C5-6 dermatome on the right upper extremity [(UE)]."

As previously noted, the hearing officer determined that the compensable injury does not extend to cervical disc pathology with effacement of the cervical cord at C5-6 and C6-7 and that determination has been affirmed. The evidence establishes that Dr. P assessed a 5% impairment for cervical spine based on the cervical disc pathology which is not part of the compensable injury. Accordingly, the hearing officer's determination that the claimant's IR is 14% is reversed.

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. 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.

The hearing officer found that (Dr. D) is the properly appointed designated doctor on the issue of the claimant's IR and that Dr. D certified the claimant reached MMI on

January 12, 2009, with an IR of 10%. Additionally, the hearing officer found that the assigned IR by Dr. D is not supported by a preponderance of the evidence. The hearing officer noted in the Background Information portion of his decision that the only certification of impairment that addressed the entire compensable injury is that from Dr. P of 14%. In the narrative report attached to his certification, Dr. D gives the following as diagnoses: rotator cuff tear with impingement syndrome status post surgical repair and distal clavicle excision with the surgical repair. Dr. D noted that the claimant had abnormal motion in her right shoulder and assessed an 8% UE impairment combined with a 10% UE impairment for distal clavicle excision under Table 27, page 3/61 of the AMA Guides. Dr. D noted that the two UE values are combined yielding a 17% UE impairment which converts to a 10% whole person impairment. Dr. D listed the claimant's cervical MRI as a diagnostic test he had reviewed but noted that the cervical spine was "[n]ot compensable per letter from the adjustor." Dr. D noted in his narrative report that the claimant did not have tenderness in her cervical spine. However, there is no indication that Dr. D considered any cervical injury in assessing impairment for the claimant's compensable injury. It is undisputed that the claimant's compensable injury included a cervical sprain/strain. We note that Dr. D's initial assessment of a 10% IR cannot be adopted because it does not rate the entire compensable injury. See APD 080380, decided May 8, 2008.

The designated doctor properly appointed on the issue of the claimant's IR in this case is Dr. D. For reasons discussed above neither the IR assessed by Dr. P nor Dr. D can be adopted. Therefore, the issue of the claimant's IR is remanded to the hearing officer. On remand, the hearing officer is to determine whether Dr. D is still qualified and available to be the designated doctor, and if so, request that Dr. D assign an IR, based on the entire compensable injury, which includes a right shoulder and a cervical injury (excluding cervical disc pathology with effacement of the cervical cord at C5-6 and C6-7) in accordance with the AMA Guides. On remand, the hearing officer should advise the designated doctor of the date of MMI (January 12, 2009) and assign an IR based on the claimant's condition as of the MMI date. The hearing officer is to provide the designated doctor's response to the parties and allow the parties an opportunity to respond and then make a determination regarding the IR. If Dr. D is no longer qualified and available to serve as the designated doctor, then another designated doctor is to be appointed pursuant to Rule 126.7(h) to determine the claimant's MMI and IR, which includes a right shoulder and cervical injury (excluding cervical disc pathology with effacement of the cervical cord at C5-6 and C6-7).

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 **CHARTER OAK FIRE INSURANCE COMPANY, A MEMBER OF THE TRAVELERS INDEMNITY COMPANY** and the name and address of its registered agent for service of process is

**CORPORATION SERVICE COMPANY  
D/B/A CSC - LAWYERS INCORPORATING SERVICE COMPANY  
701 BRAZOS STREET, SUITE 1050  
AUSTIN, TEXAS 78701.**

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Margaret L. Turner  
Appeals Judge

CONCUR:

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Thomas A. Knapp  
Appeals Judge

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Veronica L. Ruberto  
Appeals Judge