

APPEAL NO. 091820
FILED JANUARY 13, 2010

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 November 4, 2009. The hearing officer resolved the disputed issues by determining that the appellant (claimant) reached maximum medical improvement (MMI) on January 6, 2009, with a 4% impairment rating (IR). The claimant appealed the hearing officer's determinations on MMI and IR. The respondent (carrier) responded, urging affirmance.

DECISION

Reversed and rendered.

The parties stipulated that the claimant sustained a compensable injury on _____, and that the Texas Department of Insurance, Division of Workers' Compensation (Division) appointed (Dr. P) to opine whether the claimant reached MMI and assign an IR. The claimant had surgery on his left shoulder on February 22, 2008.

MMI/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.

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 designated doctor, Dr. P, examined the claimant on January 6, 2009, and certified that the claimant reached MMI on January 6, 2009, with a 4% IR. (Dr. V), the claimant's surgeon and treating doctor, in a narrative report dated December 30, 2008, stated that on February 22, 2008, the claimant had surgery to repair a rotator cuff tear and that he performed arthroscopic procedures that included shoulder arthroscopy, an open distal clavicle excision, and open acromioplasty. Dr. V additionally noted in that report that post-operatively the claimant had rehabilitation and significant improvement in his shoulder function although his shoulder function was still not normal. The claimant testified that the surgery improved his shoulder condition but after that he has

felt no improvement. The claimant testified at the CCH that his shoulder seems like it is the same as it was about a year ago.

The designated doctor, Dr. P, examined the claimant on January 6, 2009, and assigned a 4% IR based only on the claimant's decreased range of motion (ROM) for the left shoulder, 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). Although Dr. P noted the claimant's surgical procedure under the treatment history, Dr. P failed to rate the surgical procedure. Upon his review of the letter of clarification from the Division dated April 16, 2009, additional medical records, and Dr. V's dispute of his assigned MMI/IR, Dr. P did not make any revision to the claimant's assigned IR or provide an explanation of his failure to provide an impairment for arthroplasty, distal clavicle (isolated) under Table 27, page 3/61 of the AMA Guides.

With regard to an upper extremity impairment, the AMA Guides on page 3/62 provide that "[i]n the presence of decreased motion, motion impairments are derived separately (Sections 3.1f through 3.1j) and *combined* with arthroplasty impairments using the Combined Values Chart (p. 322)." See Appeals Panel Decision 071283-s decided September 13, 2007.

In his examination, Dr. P documented the presence of decreased motion for the left shoulder; however, he failed to combine ROM impairment with arthroplasty impairment under Table 27 as provided by the AMA Guides, thereby not rating the entire compensable injury. Accordingly, we reverse the hearing officer's determination that the claimant's MMI is January 6, 2009, and that the claimant's IR is 4%.

OTHER CERTIFICATION OF MMI/IR

Given that we have reversed the hearing officer's MMI and IR determinations, we consider the only other certification of MMI/IR in evidence from Dr. V, the claimant's surgeon. Dr. V certified that the claimant reached MMI on December 30, 2008, with a 10% IR based on a 7% upper extremity impairment for the upper extremity due to ROM combined with a 10% upper extremity impairment for a distal clavicle excision per Table 27, resulting in a 16% impairment for the upper extremity. This is then converted per Table 3, page 3/20 of the AMA Guides, resulting in a 10% whole person IR. Dr. V's certification of MMI/IR is in accordance with the AMA Guides. Accordingly, we render a new decision that the claimant reached MMI on December 30, 2008, with a 10% IR as certified by Dr. V, the treating surgeon.

SUMMARY

We reverse the hearing officer's decision that the claimant reached MMI on January 6, 2009, and we render a new decision that the claimant reached MMI on December 30, 2008.

We reverse the hearing officer's decision that the claimant's IR is 4% and we render a new decision that the claimant's IR is 10%.

The true corporate name of the insurance carrier is **SENTRY INSURANCE, A MUTUAL COMPANY** and the name and address of its registered agent for service of process is

**CT CORPORATION
350 NORTH ST. PAUL STREET
DALLAS, TEXAS 75201.**

Margaret L. Turner
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Veronica L. Ruberto
Appeals Judge