APPEAL NO. 110219
FILED APRIL 26, 2011

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 7, 2011.

The hearing officer resolved the sole issue before him by determining that the appellant's (claimant) impairment rating (IR) is 11% as assigned by the designated doctor, (Dr. J).

The claimant appealed the hearing officer's IR determination, arguing that Dr. J did not properly calculate his IR. The appeal file does not contain a response from the respondent (carrier) to the claimant's appeal.

DECISION

Reversed and remanded.

The claimant testified that he worked as a truck driver and injured his neck and right shoulder/arm on _____, while unloading propane tanks at work. The parties stipulated that the claimant sustained a compensable injury on _____. The parties further stipulated that Dr. J was appointed by the Texas Department of Insurance, Division of Workers' Compensation (Division) to serve as the designated doctor to determine the claimant's date of maximum medical improvement (MMI) and IR and that the claimant reached MMI on February 21, 2010.

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 in pertinent part that the assignment of an IR shall be based on the injured worker's condition as of the MMI date considering the medical record and the certifying examination and the doctor assigning the IR shall:

(A) identify objective clinical or laboratory findings of permanent impairment for the current compensable injury;

(B) document specific laboratory or clinical findings of an impairment;

(C) analyze specific clinical and laboratory findings of an impairment;

(D) compare the results of the analysis with the impairment criteria and provide the following:

(i) A description and explanation of specific clinical findings related to each impairment, including [0%] [IR]; and

(ii) A description of how the findings relate to and compare with the criteria described in the applicable chapter of 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 doctor's inability to obtain required measurements must be explained.

Dr. J, the designated doctor appointed to determine MMI and IR, examined the claimant on July 8, 2010. In a report, dated that same date, Dr. J diagnosed the claimant with a cervical sprain and a right shoulder sprain/strain. Dr. J certified that the claimant reached statutory MMI on February 21, 2010, and assigned an 11% IR as a result of the compensable injury based on the AMA Guides.

Dr. J attached his worksheets to his Report of Medical Evaluation (DWC-69) and narrative report. The worksheets in evidence reflect that Dr. J's range of motion (ROM) measurements for the right upper extremity (UE) resulted in a 32% UE impairment. However, Dr. J in his narrative report dated July 8, 2010, indicated that, in his opinion, the "[ROMs] per se overstate [the] degree of [the claimant's] impairment." We have long recognized that a doctor can invalidate ROM based upon observation. Appeals Panel Decision (APD) 090539, decided June 1, 2009; APD 011235, decided July 17, 2001. However, Dr. J did not assign a 0% after invalidating his UE ROM measurements. Rather, Dr. J arbitrarily assigned 10% UE impairment for loss of motion for the right shoulder without an explanation of how he applied the rating criteria in the AMA Guides after invalidating the claimant's right UE ROM testing.

The worksheets in evidence reflect that Dr. J assigned a 10% UE impairment for the surgical procedure performed on the claimant's right shoulder, which is described by Dr. J as a "right shoulder rotator cuff repair, right shoulder arthroscopic debridement and acromioplasty." Dr. J does not provide an explanation in his worksheets or narrative report as to what clinical condition of the claimant is being rated under which table or figure in the AMA Guides as required under Rule 130.1(c)(3).

Dr. J then combined 10% UE impairment (right UE ROM) with 10% UE impairment (right shoulder surgery) under the Combined Values Chart, page 322, which results in a 19% UE impairment, which converts to an 11% whole person (WP) IR, using Table 3, page 3/20.

The worksheets in evidence reflect that Dr. J also placed the claimant in Diagnosis-Related Estimates (DRE) Cervicothoracic Category I: Complaints or Symptoms (DRE I) and assigned a 0% WP IR for the neck injury. Dr. J's worksheets and narrative report dated July 8, 2010, reflect findings of nonuniform loss of cervical ROM as well as findings of muscle guarding. We note that in evidence is a report dated September 20, 2010, from (Dr. P) who stated that he disagreed with Dr. J placing the claimant in DRE I because the medical records including those of Dr. J, the designated doctor's examination, reflected findings of muscle guarding, documented neurologic impairments, findings of absent reflexes, and diagnostic testing positive for cervical radiculopathy, which would place the claimant either in DRE Cervicothoracic Category II: Minor Impairment or in DRE Cervicothoracic Category III: Radiculopathy. The 0% WP IR assigned by Dr. J for the claimant's cervical injury is contrary to the rating criteria of the AMA Guides (*see* Table 71 DRE Impairment Category Differentiators, page 3/109).

The worksheets in evidence reflect that Dr. J then combined 11% WP IR for the right shoulder injury with 0% WP IR for the neck injury, which resulted in 11% WP IR for the claimant's compensable injury. The hearing officer found that the preponderance of the medical evidence was not contrary to the designated doctor's IR and adopted Dr. J's 11% WP IR.

In reviewing a "great weight" challenge, we must examine the entire record to determine if: (1) there is only "slight" evidence to support the finding; (2) the finding is so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust; or (3) the great weight and preponderance of the evidence supports its nonexistence. *See* Cain v. Bain, 709 S.W.2d 175 (Tex. 1986).

Because Dr. J did not properly rate the UE impairment for the claimant's right shoulder injury or the impairment for the cervical injury using the rating criteria of the AMA Guides, we hold that the hearing officer erred in finding that the preponderance of the medical evidence was not contrary to the designated doctor's IR. Accordingly, we reverse the hearing officer's determination that the claimant's IR is 11% as being so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust.

There are two other certifications of MMI/IR in evidence. There is an earlier DWC-69 and narrative report from Dr. J, dated January 7, 2010. Dr. J had previously examined the claimant on January 7, 2010, in order to determine MMI/IR and certified that the claimant reached MMI on January 7, 2010, with a 5% IR. As discussed above, the parties stipulated at the CCH that the claimant reached MMI on February 21, 2010, therefore, the 5% IR cannot be adopted.

There is the certification of MMI/IR from (Dr. V) in evidence. Dr. V, a referral doctor, examined the claimant on June 3, 2010, to determine MMI/IR. Dr. V certified that the claimant reached MMI on February 21, 2010, the stipulated date of MMI, and assigned 15% IR, using the AMA Guides. However, Dr. V's narrative report, dated June

3, 2010, in evidence, reflects that the exhibit is missing pages. In the Background Information section of the decision, the hearing officer found that "[t]he [c]laimant's work status and extent of injury could not be ascertained as the narrative report from [Dr. V] was incomplete." Dr. V's narrative report in evidence includes cervical ROM measurements but no right shoulder ROM measurements and no worksheets are attached to his report. Therefore, Dr. V's narrative report, dated June 3, 2010, does not reflect if the 15% IR assigned by Dr. V is based on the ROM Model or the Injury Model for either the cervical and/or for the right shoulder. Dr. V's narrative report does not identify objective clinical or laboratory findings of permanent impairment for the entire compensable injury nor document specific laboratory or clinical findings of the 15% impairment that Dr. V assigned for the claimant's compensable injury as required by Rule 130.1(c)(3). Accordingly, Dr. V's assigned IR of 15% cannot be adopted.

Because we have reversed the hearing officer's decision that the claimant's IR is 11% and because there is no other assigned IR with the stipulated MMI date of February 21, 2010, that can be adopted, we remand the case to the hearing officer for further consideration and development of the evidence consistent with this opinion. Section 410.203(b)(2).

REMAND INSTRUCTIONS

Dr. J is the designated doctor. On remand the hearing officer is to determine whether Dr. J is still qualified and available to be the designated doctor, and if so, request that Dr. J rate the entire compensable injury in accordance with the AMA Guides based on the claimant's condition as of the stipulated February 21, 2010, MMI date, considering the medical record, the certifying examination and the rating criteria in the AMA Guides. In determining impairments due to abnormal motions of the shoulder joint, Dr. J should determine the impairments of the UE that are contributed by abnormal shoulder motions (flexion and extension, abduction and adduction, internal and external rotation), using the methods described in Section 3.1j of the AMA Guides, page 3/45. If Dr. J invalidates the claimant's ROM measurements for the right UE, he should assign a 0%. Dr. J should also identify what clinical condition of the claimant is being rated to account for the 10% UE impairment assigned in relation to the surgery undergone and the rating criteria (identifying the table and/or figure in the AMA Guides as well as his methodology). If Dr. J is determining impairment of the UE after arthroplasty in Section 3.1m of the AMA Guides, and using Table 27, page 3/61, Dr. J should document the level of resection arthroplasty and the percent impairment of UE. In placing the claimant in a DRE cervicothoracic category, Dr. J shall identify; document; and analyze objective clinical or laboratory findings of permanent impairment. The doctor shall compare the results of the analysis with the impairment criteria of the DRE cervicothoracic category and provide a description and explanation of how specific clinical findings related to the criteria as described in the DRE cervicothoracic category in which the doctor is placing the claimant.

The hearing officer is to provide the designated doctor's report to the parties, allow the parties an opportunity to respond and to present further evidence, and then determine the claimant's IR consistent with this opinion.

If Dr. J is no longer qualified or available or refuses to rate the entire accepted injury in accordance with AMA Guides criteria, then another designated doctor is to be appointed pursuant to Rule 127.5 to determine the claimant's IR. If a new designated doctor is appointed he or she is to be advised that the date of MMI is February 21, 2010, and that the doctor is to rate the entire compensable injury according to the AMA Guides. The parties are to be advised of the designated doctor's appointment and to be allowed to comment and present evidence regarding the designated doctor's report.

SUMMARY

We reverse the hearing officer's determination that the claimant's IR is 11% and we remand the case to the hearing officer for action consistent with this opinion.

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 **LIBERTY INSURANCE CORPORATION** and the name and address of its registered agent for service of process is

CORPORATION SERVICE COMPANY
211 EAST 7TH STREET, SUITE 620
AUSTIN, TEXAS 78701.

_____
Cynthia A. Brown
Appeals Judge

CONCUR:

_____
Thomas A. Knapp
Appeals Judge

_____
Margaret L. Turner
Appeals Judge