APPEAL NO. 110414
FILED MAY 18, 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 28, 2011. The hearing officer resolved the disputed issues by deciding that the respondent's (claimant) impairment rating (IR) is 15% and the Texas Department of Insurance, Division of Workers' Compensation (Division) should not contact the designated doctor, (Dr. S), to resolve the IR issue regarding the designated doctor's report, dated July 28, 2010, pursuant to 28 TEX. ADMIN. CODE § 126.7(u) (Rule 126.7(u)).[1] The appellant (carrier) appealed, disputing the hearing officer's IR determination. The claimant responded, urging affirmance. The hearing officer's decision that the Division should not contact the designated doctor, Dr. S, to resolve the IR issue regarding his report dated July 28, 2010, pursuant to Rule 126.7(u) was not appealed and has become final pursuant to Section 410.169.

DECISION

Reversed and rendered.

The parties stipulated that the claimant sustained a compensable injury on _____, and reached maximum medical improvement (MMI) on August 20, 2009. Dr. S was appointed by the Division for the purpose of assessing an IR for the compensable injury. Dr. S initially examined the claimant on August 20, 2009, and certified that the claimant reached MMI on August 20, 2009, with a 10% 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. S placed the claimant in Diagnosis-Related Estimate (DRE) Lumbosacral Category III: Radiculopathy.

Dr. S examined the claimant a second time on February 24, 2010, and gave an opinion in a report dated February 24, 2010, regarding the extent of the claimant's compensable injury. In evidence was a Benefit Dispute Agreement (DWC-24) dated July 10, 2009, which stated the parties agree that the compensable injury of _____, extends to the disc protrusion at L1-2, disc protrusion at L2-3, and disc protrusion at T11-12.

A letter of clarification was sent to Dr. S on June 28, 2010, noting the August 20, 2009, certification failed to include a rating for the disc protrusion at T11-12 and asked Dr. S to consider this condition in reconsidering the claimant's IR. Dr. S re-examined the claimant on July 28, 2010, and certified that the claimant reached MMI on August 20, 2009, with a 15% IR. Dr. S placed the claimant in DRE Thoracolumbar Cagetory III: Radiculopathy for 15%. Dr. S stated that "[w]ith the advent of inclusion of the thoracic region, it is medically probable that [the claimant's] impairment evaluation should

[1] We note that this provision is now found in Rule 127.20 of the new designated doctor rules.

include the thoracolumbar region. Normally, this would make no difference; however, in this specific case, there is a different impairment for use of the different DRE classification." The hearing officer specifically found that the preponderance of the evidence is not contrary to the designated doctor's determination that the claimant's IR is best described by DRE Thoracolumbar Category III: Radiculopathy of the AMA Guides.

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. The AMA Guides provide on page 3/95 that it is difficult to separate the cervical, thoracic, lumbar, and sacral spine regions functionally because the signs related to the different regions commonly overlap. Additionally, the AMA Guides provide on page 3/95 that for purposes of "this book" the cervical region may be considered to represent the cervicothoracic region, the thoracic region to represent the thoracolumbar region, and the lumbar region to represent the lumbosacral region.

In evidence is correspondence from a peer review doctor dated August 25, 2010. The peer reviewer stated that the claimant does not have a thoracic level radiculopathy, noting the designated doctor did not even document a specific spasm, guarding, or dysmetria relegated to the thoracic area so no permanent impairment rating should be assigned for the thoracic area of the claimant's spine.

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).

The carrier argued at both the CCH and on appeal that the designated doctor failed to rate the entire compensable injury. We agree. The DWC-24 in evidence reflects the parties' agreement that the claimant's compensable injury extended to both the thoracic and lumbar levels of the claimant's spine. The designated doctor, however, only gave the claimant an IR for the thoracic area of the claimant's spine as described in the AMA Guides. The designated doctor did not assign a specific impairment for the claimant's lumbar spine as described in the AMA Guides. Accordingly, we reverse the hearing officer's determination that the claimant's IR is 15%.

The initial IR certified by the designated doctor cannot be adopted because as previously noted it only assessed impairment for the claimant's lumbar spine injury and not his thoracic spine injury.

There is only one other certification of impairment in evidence with the stipulated date of MMI, August 20, 2009. The certification is from a carrier required medical evaluation doctor, (Dr. F). Dr. F examined the claimant on November 15, 2010. Dr. F certified that the claimant reached MMI on August 20, 2009, the same date stipulated by the parties, and assessed the claimant's IR to be 10%, using the AMA Guides. Dr. F noted the claimant's muscle atrophy in the lower extremity was 2.5 centimeters smaller than the same area on the right lower extremity, the claimant had a hypoactive knee jerk and the EMG showed evidence of radiculopathy. Dr. F placed the claimant in DRE Lumbosacral Category III: Radiculopathy 10% and DRE Thoracolumbar I: Complaints of Symptoms 0%. Dr. F noted the claimant had a single level degenerative change with no clear-cut objective clinical findings in the thoracic spine. For reasons discussed above, we reverse the hearing officer's determination that the claimant's IR is 15% and render a new decision that the claimant's IR is 10%.

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

RON O. WRIGHT, PRESIDENT
6210 EAST HIGHWAY 290
AUSTIN, TEXAS 78723.

_____
Margaret L. Turner
Appeals Judge

CONCUR:

_____
Cynthia A. Brown
Appeals Judge

_____
Carisa Space-Beam
Appeals Judge