

APPEAL NO. 110871
FILED AUGUST 4, 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 May 18, 2011, in [City], Texas, with [hearing officer] presiding as hearing officer.

The hearing officer resolved the sole disputed issue by determining that the appellant's (claimant) impairment rating (IR) is 13% as assigned by Dr. O, a post-designated doctor required medical examination (RME) doctor. The claimant appeals the hearing officer's IR determination, stating that there is no 13% IR assigned by Dr. O. The claimant alleges that the only assigned 13% IR is that of Dr. OC, who was previously appointed to determine maximum medical improvement (MMI)/IR and was then subsequently disqualified from being a designated doctor in this case. The claimant also contends that the hearing officer erred by not sending the current designated doctor, Dr. MK, another letter of clarification (LOC) requesting him to rate the entire compensable injury by determining what impairment should be assigned for the claimant's major depressive disorder, and by refusing to add an issue as to whether the Texas Department of Insurance, Division of Workers' Compensation (Division) abused its discretion by denying the requested LOC. The respondent (carrier) responds, urging affirmance and requesting a clerical correction of the IR from 13% to 8%, which is the IR assigned by Dr. O.

DECISION

Reversed and remanded.

PROCEDURAL MATTERS

At the CCH and in his appeal, the claimant contended that the hearing officer erred by not sending Dr. MK, the designated doctor, another LOC and by refusing to add an issue on whether the Division abused its discretion by not sending the requested LOC. The claimant contended that, because Dr. MK failed to respond to the LOC previously sent to him, the claimant was entitled to another LOC to request the designated doctor to rate the entire compensable injury.

In the Background Information section of his decision, the hearing officer stated:

Dr. [MK's] report clearly indicates that he considered [the] [c]laimant's diagnosis of depression, that he was aware of the decision in the previous proceeding which included depression as a part of the injury, and was aware of previous [IRs] assigning a depression component. Dr. [MK] did not add a rating for depression in his 20% determination. [The] [c]laimant requested a [LOC] to Dr. [MK] asking him to specifically assign a rating for depression, even if it were 0% However, a [LOC] was not written to

Dr. [MK] because his rating for the low back is problematic and cannot be adopted. Accordingly, the addition of a rating for depression would not result in a rating that could be adopted.

We note that an abuse of discretion occurs when an action is taken without reference to any guiding rules and principles. See Downer v. Aquamarine Operations, Inc., 701 S.W.2d 238 (Tex. 1985).

The hearing officer in considering the requested LOC, has taken action for the reasons stated in his decision and with reference to guiding rules and principles. Under the facts of this case, we hold that there was no abuse of discretion by the hearing officer in denying the claimant's request for a LOC or in denying the claimant's request to add an issue.

IR

The parties stipulated that the claimant sustained a compensable injury on _____, and reached MMI on June 25, 2009, the date of statutory MMI, as certified by Dr. MK and Dr. O. The parties also stipulated that Dr. MK was appointed as a designated doctor by the Division to determine MMI/IR.

The claimant testified that he was injured at work when he was involved in a motor vehicle rollover. The medical records reflect that a low back injury and fractured rib were diagnosed and treated as part of the claimant's work injury. The medical evidence reflects that the claimant had lumbar fusion surgery at L4-5 on January 29, 2009, and had a prior history of a 1989 lumbar fusion surgery at L5-S1. Further, the medical records in evidence reflect that the claimant's treating and consulting doctors assessed and treated the lumbar spine, a fractured rib, and depression in connection with the claimant's work injury. In a prior CCH held on February 10, 2010, a hearing officer determined that the compensable injury of _____, extends to major depressive disorder, and Division records reflect that the extent-of-injury decision was never appealed.

It was undisputed that Dr. OC was initially appointed by the Division to determine MMI/IR. Dr. OC referred the claimant to Dr. B to assess an impairment for the claimant's depression. However, it was undisputed that Dr. OC was subsequently disqualified to serve as the designated doctor because of a disqualifying association. We note that after Dr. OC received Dr. B's report, Dr. OC certified that the claimant reached MMI on June 25, 2009, with a 13% IR, based on 10% for Diagnosis- Related Estimates (DRE) Lumbosacral Category III: Radiculopathy and 3% for major depressive disorder, 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 Division then appointed Dr. MK as the designated doctor to determine MMI/IR. Dr. MK examined the claimant on November 16, 2010, and certified that the

claimant reached clinical MMI on November 16, 2010, with a 20% IR based on 20% for DRE IV Lumbosacral Category: Loss of Motion Segment Integrity, stating “this postoperative patient who clearly has loss of motion segment from his procedure, he also appears to have definitive radiculopathy with muscle wasting. I believe that he qualifies for category for DRE IV, which would place him at 20% whole person impairment.” In a December 20, 2010, response to a LOC, Dr. MK stated he had made a typographical error on his Report of Medical Evaluation (DWC-69) and amended the claimant’s MMI date to the date of statutory MMI, June 25, 2009, and submitted a new DWC-69.

In a LOC dated January 11, 2011, the Division informed Dr. MK that the compensable injury of _____, extends to major depressive disorder and that his prior IR did not include an assessment of that condition. Dr. MK was requested to assess an impairment or explain why there would be no impairment for major depressive disorder. The claimant was re-examined by Dr. MK on March 10, 2011. Dr. MK submitted a DWC-69 in which he certified that the claimant reached statutory MMI on June 25, 2009, with a 20% IR. In his narrative report, Dr. MK stated that the 20% IR is based on placing the claimant in DRE Lumbosacral Category IV: Loss of Motion Segment Integrity and further that “[i]t has been brought to my attention today on the [LOC] the single question asked is if I would please issue an amended DWC-69 with an MMI date on or before [June 25, 2009], at the date at which he reached MMI. In this regard, I note that his injury was [_____], and I feel that statutorily he indeed did reach statutory MMI on [June 25, 2009].”

Dr. F, a referral doctor acting in place of the treating doctor, certified that the claimant’s IR is 13%, using the AMA Guides and placing the claimant in DRE Lumbosacral Category III: Radiculopathy (documenting a loss of reflexes) for an impairment of 10%, and for an impairment of 3% for major depressive disorder.

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 hearing officer made findings of fact that Dr. O, the RME doctor, assigned an IR of 13%, and that the IR assigned by Dr. O is supported by the preponderance of the evidence. The hearing officer made a conclusion of law and decision that the claimant’s IR is 13%. However, the DWC-69 and narrative report by Dr. O in evidence reflects that Dr. O assigned 8% for the claimant’s IR, based on assigning 5% for the low back injury, placing the claimant in DRE Lumbosacral Category II: Minor Impairment, and 3% for major depressive disorder. Furthermore, Dr. O testified at the CCH as to his assigned 8% IR as well as why Dr. MK’s 20% IR was incorrect under the AMA Guides. It is unclear whether the hearing officer mistakenly identified Dr. O and intended to adopt a 13% IR as certified by Dr. F or Dr. OC (the disqualified designated doctor), or whether the hearing officer mistakenly identified the 8% IR as certified by Dr. O as 13%.

Because Dr. O did not assess an IR of 13%, the hearing officer's determination that adopted the IR assessed by Dr. O 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 13% and remand the IR issue to the hearing officer to make a determination based on the evidence in the record.

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 Appeals Panel Decision 060721, decided June 12, 2006.

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

**CINDY GHALIBAF
5221 NORTH O'CONNOR BOULEVARD, SUITE 400
IRVING, TEXAS 75039-3711.**

Cynthia A. Brown
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Margaret L. Turner
Appeals Judge