APPEAL NO. 111384
FILED NOVEMBER 23, 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 August 24, 2011. The hearing officer resolved the disputed issues by deciding that the respondent (claimant) reached maximum medical improvement (MMI) on September 16, 2009, with 64% impairment rating (IR) as certified by (Dr. Z), the designated doctor appointed by the Texas Department of Insurance, Division of Workers' Compensation (Division) to address MMI and IR. The appellant (carrier) appeals the hearing officer's MMI and IR determinations, contending that the hearing officer should have adopted the rating of (Dr. T), a post-designated doctor required medical examination (RME) doctor. The appeal file does not contain a response from the claimant.

DECISION

Affirmed in part and reversed and remanded in part.

The parties stipulated that the claimant sustained a compensable injury on (date of injury). It is undisputed that the claimant was injured due to an exposure to pesticides at work. There are two certifications of MMI/IR in evidence. The designated doctor examined the claimant on September 16, 2009, and certified that the claimant reached MMI on that date with 64% IR. In a letter dated January 15, 2010, the designated doctor responded to a letter of clarification and maintained his IR of 64%, explaining why he placed the claimant in a specific class under skin disorders. The RME doctor examined the claimant on September 14, 2010, and certified that the claimant reached MMI on September 16, 2009, with 50% IR. Both of the certifying doctors rated an impairment under skin disorders (placing the claimant in a different class) but differed in their rating for the bilateral upper extremities (UE) impairment.

The hearing officer's determination that the claimant reached MMI on September 16, 2009 (as certified by the designated doctor and the RME doctor) is supported by sufficient evidence and is affirmed.

The carrier contends in its appeal that the hearing officer's determination that the claimant's IR is 64% is "contrary to the great weight and preponderance of the evidence such that the determination is manifestly unjust or it is adverse to established law and must be reversed." The carrier argued at the CCH and on appeal that Dr. Z assigned an IR based on diagnosed conditions of "Scleroderma, Raynaud's (sic) phenomenon (bilaterally), and Carpal Tunnel Syndrome related to scleroderma" and because the

claimant does not have "Raynaud's (sic) phenomenon" and Dr. Z provided an IR that included an impairment for "Raynaud's (sic) phenomenon," Dr. Z's certification is invalid as a matter of law. The carrier further argued that Dr. Z refused to change his assigned IR even though he acknowledged his error in including that diagnosed condition in his evaluation. The carrier contends that the hearing officer erred in adopting a certification of MMI and IR that provided additional impairment for a non-existent or non-compensable condition.

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%] [IRs]; 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. *See* Appeals Panel Decision (APD) 110219, decided April 26, 2011.

The hearing officer found that "[t]he certification of MMI and 64% [IR] assigned by [Dr. Z] is not contrary to the preponderance of the evidence." The hearing officer further

found that "[t]he [IR] evaluation of [Dr. Z] was performed in accordance with the [AMA Guides]." We disagree.

The record indicates that the designated doctor's assigned 64% IR was based on combining 55% whole person (WP) impairment for skin disorders (placing the claimant in Class 4 under Table 2, page 13/280 in the AMA Guides) with 10% WP impairment for the left UE resulting in 60% WP impairment. Dr. Z then combined the 60% WP impairment with 11% WP impairment for the right UE resulting in 55% IR.

Section 3.1o entitled *Summary of Steps for Evaluating Impairments of the UE*, page 3/66 of the AMA Guides, provides for the calculation of the impairment for the UE. In his assessment, because this case does not involve amputation, Dr. Z's first step would be to "[d]etermine and record *sensory* impairments for each digit (thumb, p. 24; fingers, p. 30)." Using the UE Impairment Evaluation Record-Part 1 (Hand) worksheet, Dr. Z assigns sensory loss for the thumb, index finger, middle finger, ring finger and little finger separately for the right and then the left hand. However, Dr. Z's narrative report, dated September 16, 2009, and attached to his Report of Medical Evaluation (DWC-69), is not in accordance with Rule 130.1(c)(3)(A-D) because it fails to explain how Dr. Z calculated a sensory loss for the thumb and fingers of each hand.

According to Section 3.1f Thumb (pages 3/24-25) and Section 3.1g Fingers (pages 3/30-31), their Subsections on S*ensory Loss of Thumb* and *Sensory Loss of Fingers* provide for a calculation either under "Transverse Sensory Loss (both digital nerves involved)" or "Longitudinal Sensory Loss (one digital nerve involved). Under each, the certifying doctor, after determining whether one or two digital nerves are involved, must use a two-point discrimination test to calculate if an impairment exists. A two-point discrimination of 6 millimeters (mm) or less is considered to be normal and is not an impairment. In his narrative report dated September 16, 2009, under the neurologic examination, Dr. Z reports only that there was a two-point discrimination of the digits of both hands greater than 5 mm. As such, Dr. Z fails to document if this is a normal or abnormal finding. Furthermore, in his narrative report and attached worksheets regarding the claimant's digits for each hand, Dr. Z does not identify whether one or two digital nerves are involved for any digit and does not provide a specific two-point discrimination measurement that can be used to determine if any impairment exists for any digit. To calculate the claimant's UE impairment, there must be a calculation of impairment for the digits/hand according to the AMA Guides. Without which, there is no calculation of the claimant's WP IR for his compensable injury, based on an IR for his digits/hand/wrist/skin disorder.

Therefore, the preponderance of the other medical evidence contradicts the IR contained in the report of the designated doctor chosen by the Division and Dr. Z's IR cannot be adopted.

There is only one other certification of MMI/IR in evidence which is from Dr. T, the RME doctor. Dr. T assessed 50% IR for the claimant's compensable injury based on an IR for his digits/hand/wrist/skin disorder. Dr. T's narrative report dated September 14, 2010, attached to his DWC-69, includes in part the UE Impairment Record-Part 2 (Wrist, elbow, shoulder) worksheet for the claimant's right and left wrists. According to his worksheet, for the claimant's left wrist, Dr. T measured 15° for radial deviation and 25° for ulnar deviation. Using Figure 29, page 3/38, Dr. T assigned 1% impairment for radial deviation and 1% impairment for ulnar deviation, which he added together to equal 2%. This 2% impairment was added to 7% impairment for flexion/extension, which results in a 9% regional impairment for the claimant's left wrist.

On page 3/37 of the AMA Guides the directions for rating radial and ulnar deviation measurements must be rounded to the nearest 10°. However, Figure 29 on page 3/38, which is used to rate impairment based upon these measurements, uses increments of 5°. This conflict is resolved by looking to the general directions of interpolating, measuring, and rounding off which are found on page 2/9 of the AMA Guides and which provide as follows in relevant part:

> In general, an impairment value that falls between those appearing in a table or figure of the *Guides* may be adjusted or interpolated to be proportional to the interval of the table or figure involved, unless the book gives other directions.

Here, the AMA Guides do give other directions than applying the values given in Figure 29 on page 3/38. Those directions provide that the measurements be rounded to the nearest 10°. Using the language cited above from page 2/9 of the AMA Guides, these directions control over Figure 29 and should have been applied in calculating the claimant's IR. *See* APD 022504-s, decided November 12, 2002. Because Dr. T, the RME doctor, did not properly apply the AMA Guides in assessing the claimant's IR, his assigned IR cannot be adopted.

Because we have reversed the hearing officer's decision that the claimant's IR is 64% and because there is no other assigned IR with the affirmed MMI date of September 16, 2009, 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. Z is the designated doctor. On remand the hearing officer is to determine whether Dr. Z is still qualified and available to be the designated doctor, and if so, request that Dr. Z rate the entire compensable injury in accordance with the AMA Guides based on the claimant's condition as of the administratively determined September 16, 2009, MMI date, considering the medical record, the certifying examination and the rating criteria in the AMA Guides.

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. Z 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 September 16, 2009, and that the doctor is to rate the entire compensable injury according to the AMA Guides as of the date of MMI. Rule 130.1(c)(3). 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 64% 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 **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.

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Cynthia A. Brown
Appeals Judge

CONCUR:

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Thomas A. Knapp
Appeals Judge

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Margaret L. Turner
Appeals Judge