

APPEAL NO. 111563
FILED DECEMBER 29, 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 was held on August 29, 2011. The hearing officer resolved the disputed issues by deciding that: (1) the compensable injury of (date of injury), extends to a partial thickness distal supraspinatus tendon tear in the right shoulder; (2) the respondent (claimant) reached maximum medical improvement (MMI) on January 18, 2011; and (3) the claimant's impairment rating (IR) is 8%. The appellant (carrier) appeals the hearing officer's determinations on extent of injury, MMI, and IR. The carrier also contended in a Motion to Correct Clerical Error, filed simultaneously with its appeal, that although the carrier was appealing the hearing officer's IR determination, the hearing officer's decision and order should be amended to correct the clerical error of 8% IR. The carrier stated that the 8% was based on the Report of Medical Evaluation (DWC-69) by the designated doctor, (Dr. S), which reflected 6% IR and not 8% IR. Because it was not apparent on its face that there was a clerical error, the motion was denied. The appeal file does not contain a response to the carrier's Motion to Correct Clerical Error or to its appeal.

DECISION

Affirmed in part and reversed and rendered in part.

The parties stipulated that on (date of injury), the claimant sustained a compensable injury, and that the compensable injury includes a left arm contusion, abrasion and strain, and a right shoulder sprain. It was undisputed that the claimant underwent a right shoulder MRI on September 13, 2010, and the findings revealed a partial thickness distal supraspinatus tendon tear in the right shoulder. The evidence reflects that the claimant has not had right shoulder surgery.

There are several certifications of MMI/IR in evidence from various doctors: (1) (Dr. B), the claimant's treating doctor; (2) (Dr. C), the first designated doctor to address MMI/IR; (3) Dr. S, the second designated doctor who was appointed to address MMI/IR and extent of injury; (4) (Dr. R), a referral doctor acting in place of the treating doctor; and (5) (Dr. O), a post-designated doctor required medical examination (RME) doctor. The medical records in evidence reflect that the complaints concerning the left upper extremity (UE) resolved but the claimant continued to have complaints and symptoms concerning the right UE. The hearing officer found that "[t]he preponderance of the other medical evidence is not contrary to the [d]esignated [d]octor's opinions on MMI, impairment, and extent." The hearing officer adopted Dr. S's certification of MMI on

January 18, 2011, with 8% IR; however, as previously noted, the DWC-69 in evidence indicates the claimant's IR is 6% while Dr. S's narrative report is internally inconsistent and reflects the claimant's IR is 8% and then 6%.

EXTENT OF INJURY AND MMI

The hearing officer's determination that the compensable injury of (date of injury), extends to a partial thickness distal supraspinatus tendon tear in the right shoulder is supported by the evidence and is affirmed.

The hearing officer's determination that the claimant reached MMI on January 18, 2011, is supported by the evidence and is affirmed.

IR

Section 408.125(c) provides that the report of the designated doctor shall have presumptive weight, and the Texas Department of Insurance, Division of Workers' Compensation (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 record indicates that Dr. S, the second designated doctor, examined the claimant on January 18, 2011, and after being appointed for extent of injury, re-examined the claimant on February 25, 2011. There is only one DWC-69 in evidence that reflects the examination date of January 18, 2011, but there are two narrative reports from Dr. S dated January 18, 2011, and February 25, 2011, respectively. The DWC-69 indicates that the claimant reached MMI on January 18, 2011, with a 6% IR.

In the narrative report dated January 18, 2011, Dr. S stated:

For crepitus of the right shoulder, 10% [UE] was obtained. For range of motion [(ROM)] losses of the right shoulder, 4% [UE] was obtained. The highest of these values was used as 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)] forbids concomitant use

of both crepitus and [ROM] loss. 10% [UE] converts to 8% whole person [(WP)]. In conclusion, this individual's total [WP] [IR] is therefore 6%.

In his subsequent narrative report dated February 25, 2011, Dr. S discusses his opinion that the MRI findings of September 13, 2010, should be included in the extent of injury. He does not amend his opinion on MMI or IR, only stating, "[t]he right shoulder impairment established [by myself] is 6%, as well as [Dr. B] of 5%, represents an individual with more than a shoulder strain."

In reviewing Dr. S's assigned 6% IR based on crepitus, we note that the AMA Guides, page 3/58, Section 3.1m, entitled "Impairment Due to Other Disorders of the [UE]" discusses bone and joint disorders, which would include joint crepitation. The AMA Guides provide:

Derangements not previously described can contribute to impairments of the . . . [UE], and, if present, these should be considered in the final impairment determination. They include bone and joint disorders The impairments are evaluated separately; appropriate impairment percents from Tables 19 through 30 are multiplied by percents from Table 18 (at right) representing the impaired parts

It is emphasized that impairments from the disorders considered in this section are usually estimated by using other criteria. The criteria described in this section should be used only when the other criteria have not adequately encompassed the extent of the impairments.

Table 18 (at right) shows impairment percents for loss of function of the digits, hand, wrist, elbow, and shoulder due to the conditions described in this section and relates the percents to larger units and the [WP]

Bone and Joint Deformities

Joint Crepitation with Motion

Joint crepitation with motion may reflect synovitis or cartilage degeneration. The impairment percent according to Table 19 (p. 59) is multiplied by the relative value of the joint (Table 18, at right).

Under Table 19, entitled "Impairment from Joint Crepitation" for the mild crepitation the percentage joint impairment is 10% UE. However, Dr. S did not provide a worksheet or explanation in his narrative reports for the calculation of joint crepitation with motion using Tables 18 and 19 (multiplying the 10% UE by a value found in Table 18) and then converting that UE impairment to WP IR under

Table 3. Although Dr. S provided a worksheet for assigning impairment based on ROM deficits for the right shoulder, he did not assign a WP IR based on the claimant's ROM measurements, choosing to rate the claimant's compensable injury under Section 3.1m of the AMA Guides for joint crepitation with motion. Because Dr. S did not follow the criteria provided in the AMA Guides for rating joint crepitation with motion, nor provide the documentation as required in Rule 130.1(c)(3), Dr. S's IR cannot be adopted, whether the IR is 6% or 8%.

There is only one other certification of MMI/IR in evidence with the certified MMI date of January 18, 2011, which we have previously affirmed. Dr. O, the post-designated doctor RME doctor examined the claimant on July 12, 2011, and certified that the claimant reached clinical MMI on January 18, 2011, with a 4% IR based on ROM deficits of the right shoulder. During his examination, Dr. O did not find that the claimant had crepitation of the right shoulder and measured flexion at 130° and extension at 50° (under Figure 38 results in UE impairment of 3% and 0%, respectively); abduction at 120° and adduction at 50° (under Figure 41 results in UE impairment of 3% and 0%, respectively); and internal and external rotation both 80° (under Figure 44 results in UE impairment of 0% for each). Adding 3% + 0% + 3% + 0% + 0% + 0% results in 6% UE impairment. Under Table 3, 6% UE impairment converts to 4% WP IR, which is the IR assigned by Dr. O for the compensable injury, which included the affirmed extent-of-injury condition. Therefore, this IR can be adopted.

We reverse the hearing officer's determination that the claimant's IR is 8% and we render a new decision that the claimant's IR is 4%.

SUMMARY

We affirm the hearing officer's determination that the compensable injury of (date of injury), extends to a partial thickness distal supraspinatus tendon tear in the right shoulder.

We affirm the hearing officer's determination that the claimant reached MMI on January 18, 2011.

We reverse the hearing officer's determination that the claimant's IR is 8% and render a new decision that the claimant's IR is 4%.

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

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Cynthia A. Brown
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Margaret L. Turner
Appeals Judge