

APPEAL NO. 120232
FILED APRIL 23, 2012

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 January 11, 2012, in [City], Texas, with [hearing officer] presiding as hearing officer. The hearing officer resolved the disputed issues by deciding that the date of maximum medical improvement (MMI) is June 11, 2010, and that the respondent's (claimant) impairment rating (IR) is 25%. The appellant (carrier) appeals the hearing officer's determination of the claimant's IR. The appeal file does not contain a response from the claimant. The hearing officer's determination that the MMI date is June 11, 2010, was not appealed and has become final pursuant to Section 410.169. We note that at the CCH the parties stipulated that the claimant reached MMI on June 11, 2010.

DECISION

Reversed and rendered.

The parties stipulated that the claimant sustained a compensable injury on [date of injury]; [Dr. F] was the designated doctor appointed on the issues of MMI and IR; and the carrier accepted a right arm/elbow laceration, acute radiculopathy of the bilateral lower extremities, aggravation of previously existing lumbar disc bulges, and aggravation of pre-existing lumbar spondylolisthesis as part of the compensable injury. The record reflects that the claimant had a lumbar fusion prior to the date of injury at issue. The claimant testified that she was walking down a ramp and fell on [date of injury], injuring her back. Medical records from the claimant's treating doctor, [Dr. Fr], reflect that the claimant had surgery on May 5, 2009, which included a posterior column osteotomy at L3-4 and laminectomy with fusion and instrumentation at L2 through the sacrum. The hearing officer found that "[t]he [IR] evaluation of [Dr. F] was performed in accordance with 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)], and is supported by a preponderance of the evidence."

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 the designated doctor, Dr. F, examined the claimant on August 14, 2010, and certified that the claimant reached MMI on June 11, 2010, with a 25% IR, using the AMA Guides. Dr. F noted that the claimant's deep tendon reflexes are zero at the knees and ankles. Dr. F assigned a 25% IR placing in the claimant in Diagnosis-Related Estimates (DRE) Lumbosacral Category V: Radiculopathy and Loss of Motion Segment Integrity.

DRE Lumbosacral Category V provides that the patient meets the criteria of DRE Lumbosacral Category III and DRE Lumbosacral Category IV, that is, both radiculopathy and loss of motion segment integrity are present (Table 71, differentiators 2, 3, 4, and 5, page 109). The AMA Guides, Table 71 on page 3/109 for Loss of Motion Segment Integrity requires "[f]lexion and extension comparison roentgenograms show significant injury-related anterior-to-posterior translation of two adjacent vertebral bodies of 5 mm or more in the lumbar . . . or the roentgenograms show 15° more angular motion in the sagittal plane of L5 and S1 than at L4 and L5, or 11° more angular motion in the sagittal plane of a motion segment above L5 than in the adjacent motion segment." The AMA Guides on page 3/99 note the importance of careful and accurate roentgenographic studies cannot be overemphasized.

The narrative attached to the designated doctor's certification does not give the flexion and extension comparison the AMA Guides require for an assignment of loss of motion segment integrity and does not explain why the claimant meets the criteria for DRE Lumbosacral Category V: Radiculopathy and Loss of Motion Segment Integrity. See Appeals Panel Decision 111364, decided November 18, 2011.

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's determination that the IR of Dr. F was performed in accordance with the AMA Guides is so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust. The certification of IR assessed by Dr. F cannot be adopted because it is not in accordance with the AMA Guides.

Two other certifications were in evidence. The claimant's treating doctor, Dr. Fr, examined the claimant on June 11, 2010, and certified the claimant reached MMI on

that date with a 25% IR, using the AMA Guides, and placing the claimant in DRE Lumbosacral Category V: Radiculopathy and Loss of Motion Segment Integrity. The claimant's treating doctor noted that the claimant had good results from her surgical procedure but then stated that the claimant had a grade 2 spondylolisthesis at L3-4 and has a questionable nonunion at L2-3. Dr. Fr noted the claimant had diminished reflexes bilaterally. Dr. Fr noted the claimant had a "multi-level surgical procedure performed as well with profound loss of motion and loss of motion segments due to surgical arthrodesis/fusion." Dr. Fr does not document that flexion/extension x-rays were taken or document any measurement of anterior-to-posterior translation of two adjacent vertebral bodies or angular motion and does not explain why the claimant meets the criteria for DRE Lumbosacral Category V: Radiculopathy and Loss of Motion Segment Integrity. The certification of IR assessed by Dr. Fr cannot be adopted because it is not in accordance with the AMA Guides. We note that neither Dr. F nor Dr. Fr documented structural inclusions as defined in DRE Lumbosacral Category IV: Loss of Motion Segment Integrity which would provide for placement in DRE Lumbosacral Category V: Radiculopathy and Loss of Motion Segment Integrity.

One other certification is in evidence. [Dr. O], a carrier-selected post-designated doctor required medical examination doctor, examined the claimant on September 20, 2011, and certified that the claimant reached MMI on June 11, 2010, with a 10% IR, using the AMA Guides, placing the claimant in DRE Lumbosacral Category III: Radiculopathy. In evidence is a Radiology Imaging Report dated October 20, 2011, which notes that AP, lateral and collateral views of the lumbar spine were obtained and inadvertently, flexion/extension views were not obtained. The radiology report notes the claimant was contacted but stated she was not able to return for additional imaging. Dr. O noted the claimant had absent reflexes. Dr. O stated that the claimant had surgery and fusion and there was no evidence of loss of motion segment integrity. He stated the only thing that would change his opinion regarding DRE Lumbosacral Category III: Radiculopathy rating would be flexion and extension films that would qualify for abnormal angulation and translation. He noted that the lumbar spine did not appear to be unstable at the time of his examination.

All of the doctors who examined the claimant noted that she had diminished reflexes and all three doctors with certifications of MMI/IR in evidence agreed that she had ratable radiculopathy. Even though both the treating doctor, Dr. Fr, and the designated doctor, Dr. F, placed the claimant in DRE Lumbosacral Category V: Radiculopathy and Loss of Motion Segment Integrity, neither doctor documented the amount, if any, of significant injury-related anterior-to-posterior translation or angular motion as required by the AMA Guides. There was no evidence that flexion/extension x-rays were performed. The evidence reflects that the only IR evaluation performed in accordance with the AMA Guides with the stipulated date of MMI that can be adopted is

the IR evaluation of Dr. O. Accordingly, we reverse the hearing officer's decision that the claimant's IR is 25% and render a new decision that the claimant's IR is 10% as certified by Dr. O.

The true corporate name of the insurance carrier is **AMERICAN ZURICH INSURANCE COMPANY** 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 78701-3218.**

Margaret L. Turner
Appeals Judge

CONCUR:

Cynthia A. Brown
Appeals Judge

Thomas A. Knapp
Appeals Judge