APPEAL NO. 120304
FILED APRIL 20, 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 25, 2012, in [City], Texas, with [hearing officer] presiding as hearing officer. The hearing officer resolved the disputed issues by deciding that the appellant (claimant) reached maximum medical improvement (MMI) on August 1, 2011, with 6% impairment rating (IR) as certified by the treating doctor, [Dr. M]. The claimant appealed, disputing the hearing officer's MMI and IR determination, contending that the parties agreed at the CCH that the date of MMI was August 5, 2011, and that the hearing officer erred in not adopting the certification of MMI and IR of the designated doctor, [Dr. M-D]. The respondent (self-insured) responded, urging affirmance.

DECISION

Reversed and remanded in part and reversed and rendered in part.

The parties stipulated that the claimant sustained a compensable injury on [date of injury], and that Dr. M-D was appointed by the Texas Department of Insurance, Division of Workers' Compensation (Division) as designated doctor to determine MMI and IR. In his Background Information section of his decision, the hearing officer stated that the claimant injured her neck and right shoulder when a projection screen fell on her while working as a school custodian on [date of injury]. The evidence reflects that the claimant underwent three right shoulder surgeries (including a distal clavicle resection) on April 15, 2010, September 30, 2010, and March 11, 2011, performed by Dr. M. Both the treating doctor, Dr. M, and the designated doctor, Dr. M-D, certified that the claimant reached MMI on August 5, 2011. Dr. M assigned 6% IR (rating only the right shoulder) and Dr. M-D assigned 16% IR (rating the cervical spine, the right elbow, and the right shoulder).

MMI

Section 408.1225(c) provides that the report of the designated doctor has presumptive weight, and the Division shall base its determination of whether the employee has reached MMI on the report of the designated doctor unless the preponderance of the other medical evidence is to the contrary.

Dr. M, the claimant's treating doctor examined the claimant on August 1, 2011, and certified that the claimant reached MMI on that date with 6% IR. The designated doctor, Dr. M-D, examined the claimant on August 5, 2011, and certified that the claimant reached MMI on that date with 16% IR. However, in a letter dated August 23,

2011, Dr. M stated that he had reviewed Dr. M-D's report of August 5, 2011, and stated that "[t]he difference in dates is too small to argue so I would accept the date given by Dr. [M-D]. . . ." Dr. M submitted an amended Report of Medical Evaluation (DWC-69) which certified that the claimant reached clinical MMI on August 5, 2011, with 6% IR.

At the CCH, the claimant and the self-insured contended that the claimant's MMI date was August 5, 2011, as certified by the designated doctor and the treating doctor.

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 treating doctor amended his date of MMI to that certified by the designated doctor, therefore the opinions of each of the certifying doctors was that the claimant reached MMI on August 5, 2011. Therefore, that portion of the hearing officer's finding that the certification of MMI by Dr. M-D, the designated doctor, is contrary to the preponderance of the evidence is so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust.

We reverse the hearing officer's determination that the claimant reached MMI on August 1, 2011, and render a new decision that the claimant reached MMI on August 5, 2011.

IR

As previously discussed, Dr. M-D examined the claimant on August 5, 2011, and certified that the claimant reached MMI on that date with 16% 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. M-D assigned 0% for the cervical spine, placing the claimant in Diagnosis-Related Estimate Cervicothoracic Category I: Complaints or Symptoms. Further, Dr. M-D assigned 3% impairment for range of motion (ROM) deficits of the right elbow (Figures 32 and 35, on pages 3/40 and 3/41, respectively) combined with 25% impairment for the right shoulder (Figures 38, 41, and 44, on pages 3/43, 3/44, and 3/45, respectively) which resulted in 27% upper extremity (UE) impairment. 27% UE impairment was converted to 16% whole person IR (Table 3, on page 3/20).

The self-insured contended at the CCH that the certifying doctor must measure and document passive ROM under the AMA Guides rating criteria or his report is

invalid. This argument is contrary to the provisions of the AMA Guides. On page 3/15, the AMA Guides provide:

> In evaluation of restriction of motion of the hand and [UE], the full range possible of *active* motion should be carried out by the subject and measured by the examiner. Several repetitions may be performed to obtain reliable results. The examiner may check the range of *passive* motion by applying moderate pressure to the joint. However, in the [AMA Guides], the range of *active* motion takes precedence. [Emphasis in original.]

Dr. M-D measured the active ROM of the involved UE as provided by the AMA Guides.

However, although Dr. M-D noted in his narrative report the claimant's right shoulder surgeries, the designated doctor did not assign a rating under Table 27, page 3/61 for arthroplasty, distal clavicle (isolated) or provide an explanation for failure to rate the surgical procedure. It was undisputed from the medical records of the treating doctor and surgeon, Dr. M, that the claimant underwent a distal clavicle resection.

In Appeals Panel Decision (APD) 091820, decided January 13, 2010, the Appeals Panel reversed the hearing officer's IR determination because the certifying doctor assigned the IR for a shoulder injury solely based on decreased ROM. Although in that case, the certifying doctor's narrative report noted the claimant underwent arthroscopy, open distal clavicle excision and open acromioplasty for the involved shoulder, the doctor failed to rate the surgery under Table 27 or to provide an explanation for the failure to rate the surgical procedure.

Under the facts of this case, Dr. M-D failed to rate the claimant's surgical procedure under Table 27, basing his impairment for the right shoulder solely on abnormal ROM. Therefore, that portion of the hearing officer's finding of fact that the IR by Dr. M-D is contrary to the preponderance of the evidence is supported by sufficient evidence.

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.

Dr. M examined the claimant on August 1, 2011, and certified that the claimant reached MMI on that date (later amending the MMI date to August 5, 2011), with 6% IR.

In his narrative report dated August 1, 2011, Dr. M noted the mechanism of injury, a projector screen hit the claimant in the head and right shoulder, diagnosed a right supraspinatus (muscle) (tendon) sprain and strain, but also documented a physical examination that included the cervical spine and the right shoulder. Under the axial skeleton section of his report, Dr. M stated ". . . C-Spine Musculature - tenderness/guarding in right 'SCM' and trapezius." Dr. M failed to assign an impairment for a cervical spine injury which could have included 0% impairment. *See* 28 TEX. ADMIN. CODE § 130.1(c)(3) (Rule 130.1(c)(3)). Dr. M attempted to measure the ROM for the right shoulder but invalidated any deficits in ROM. Dr. M commented in his narrative report:

> [The claimant's] demonstrated motion is non-physiological. I'm sure she has some restriction of motion but she resists even attempts at passive ROM. I'm forced under these circumstances to disregard her loss of motion in rating her condition. She did have a distal clavicle resection which was an intergal (*sic*) part of her surgical treatment for her compensable injury. This is equal to a 10% [UE] impairment based on Table 27 [page 3/61 of the AMA Guides]. This equals . . . 6% whole person impairment based on Table 3. . . . The total impairment is 6% whole person.

Whenever the issue is an IR, by necessity, the extent of the injury is subsumed in that issue. Although there was no extent-of-injury issue before him, the hearing officer commented, in the Background Information section of his decision, that the claimant had a neck and right shoulder injury. The self-insured and the claimant both contended in their opening statements that the claimant had injured her neck and right shoulder. Because Dr. M failed to rate the entire compensable injury which included a cervical injury, the hearing officer's finding that the impairment evaluation of Dr. M was carried out in accordance with the AMA Guides and that the assigned IR of Dr. M is supported by a preponderance of the evidence is so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust.

We reverse the hearing officer's determination that the claimant's IR is 6%. Because there are no other IR evaluations that can be adopted, we remand the IR issue to the hearing officer for further action consistent with this decision.

REMAND INSTRUCTIONS

Dr. M-D is the designated doctor in this case. On remand, the hearing officer is to determine whether Dr. M-D is still qualified and available to be the designated doctor. If Dr. M-D is no longer qualified or available to serve as the designated doctor, then another designated doctor is to be appointed pursuant to Rule 127.5(c) to determine the

IR for the compensable injury. We note that there was no extent-of-injury issue before the hearing officer, but that the hearing officer commented that the claimant injured her neck and right shoulder. The designated doctor in this case rated the cervical spine and right shoulder but also rated the right elbow. The hearing officer is to determine whether the compensable injury of [date of injury], extends to the right elbow. The hearing officer is to add the issue of whether the compensable injury of [date of injury], extends to a right elbow injury and to make a finding of fact, conclusion of law and determination on that issue. The parties are to be allowed an opportunity to present evidence on that extent-of-injury issue.

The hearing officer is to advise the designated doctor that the claimant reached MMI on August 5, 2011. The hearing officer is to advise the designated doctor which body parts and/or conditions are included in the compensable injury of [date of injury], and which body parts and/or conditions are in dispute. The hearing officer is then to request the designated doctor to provide multiple certifications of MMI and IR that take into account the various body parts and/or conditions that are in dispute.

The parties are to be provided with the hearing officer's letter to the designated doctor and the designated doctor's response. The parties are to be allowed an opportunity to respond. The hearing officer is to determine the IR issue consistent with this decision.

SUMMARY

We reverse the hearing officer's determination that the claimant reached MMI on August 1, 2011, and render a new decision that the claimant reached MMI on August 5, 2011.

We reverse the hearing officer's determination that the claimant's IR is 6% and remand the IR issue to the hearing officer for further action consistent with this decision.

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 **(a self-insured governmental entity)** and the name and address of its registered agent for service of process is

[SUPERINTENDENT]
[ADDRESS]
[CITY], TEXAS [ZIP CODE].

Cynthia A. Brown
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Margaret L. Turner
Appeals Judge