APPEAL NO. 120628
FILED JUNE 7, 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 February 9, 2012, and concluded on February 27, 2012, in [City], Texas, with [hearing officer] presiding as hearing officer. The hearing officer resolved the disputed issues by deciding that: (1) the compensable injury of [date of injury], extends to complex regional pain syndrome (CRPS) of the right upper extremity (UE) and bilateral hand contusions; (2) the respondent (claimant) reached maximum medical improvement (MMI) on May 8, 2011; (3) the claimant's impairment rating (IR) is 13%; (4) the claimant had disability beginning May 3, 2009, and continuing through May 26, 2010 (the claimed period of disability); and (5) the employer did not tender a bona fide offer of employment (BFOE) to the claimant. The appellant (carrier) appeals the hearing officer's determinations on extent of injury, MMI, IR, disability, and BFOE. The claimant responded; however, the response was untimely and was not considered.

DECISION

Affirmed in part and reversed and remanded in part.

The parties stipulated that: (1) on [date of injury], the claimant sustained a compensable injury to at least bilateral wrist bruises, bilateral shoulder sprain/strains, mild MCL sprain to left knee, right shoulder rotator cuff tear, and bilateral knee pain; (2) the claimant has been diagnosed with the medical conditions at issue before this hearing; (3) the claimant stopped working for the employer on [date of injury], and has not returned to work for the employer since that date; (4) the designated doctor, [Dr. W] was appointed by the Texas Department of Insurance, Division of Workers' Compensation (Division) to determine MMI and IR; (5) Dr. W determined that the claimant reached MMI on January 28, 2011, with 1% IR; (6) the designated doctor, [Dr. S] was appointed by the Division to determine extent of injury; (7) Dr. S determined that the claimant's compensable injury included a right shoulder rotator cuff tear and bilateral knee pain; (8) the claimant was returned to work by [Dr. ST] on May 4, 2009, with lifting restrictions of no more than 20 pounds for four hours per day; (9) an offer of employment was delivered to the claimant on May 7, 2009; (10) the claimant received this offer of employment but did not return to work; (11) the claimant's treating doctor, [Dr. M] determined that the claimant reached statutory MMI on May 8, 2011, with 13% IR; and (12) the date of statutory MMI is May 8, 2011.

The claimant testified that she worked as a direct care professional in an adult behavioral ward and was attacked by two patients while at work. The evidence reflects that the claimant underwent a right shoulder rotator cuff repair on May 10, 2010. The

evidence also reflects that the claimant was still receiving treatment from Dr. M for her right shoulder injury on May 8, 2011.

There are two certifications of MMI and IR in evidence to be considered.[1] The hearing officer found that the designated doctor's (Dr. W) certification of MMI and IR was not supported by a preponderance of the evidence. The hearing officer further found that Dr. M's, the treating doctor, certification of MMI and IR was made 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. The hearing officer then adopted Dr. M's certification of MMI and IR.

EXTENT OF INJURY, DISABILITY, BFOE, AND MMI

The hearing officer's determination that the compensable injury extends to CRPS of the right UE and bilateral hand contusions is supported by sufficient evidence and is affirmed.

The hearing officer's determination that the claimant had disability beginning on May 3, 2009, and continuing through May 26, 2010, is supported by sufficient evidence and is affirmed.

The hearing officer's determination that the employer did not tender a BFOE to the claimant is supported by sufficient evidence and is affirmed.

The hearing officer's determination that the claimant reached MMI on May 8, 2011, is supported by sufficient evidence and is affirmed.

IR

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

[1] Prior to the examinations by Dr. W and Dr. M, there was the initial designated doctor, [Dr. I] appointed by the Division to determine MMI and IR, who examined the claimant on November 10, 2009, and certified that the claimant was not yet at MMI because she had not yet received the appropriate treatment for her right shoulder. This was followed by a March 18, 2010, examination by Dr. S, the next designated doctor for the purposes of MMI and IR, who also certified that the claimant was not at MMI because she had not yet had right shoulder surgery. As previously noted, the right shoulder rotator cuff tear repair was performed on May 10, 2010.

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;
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> (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 AMA Guides. The doctor's inability to obtain required measurements must be explained.

The evidence reflects that Dr. W examined the claimant on January 28, 2011, and certified that the claimant reached statutory MMI on that date with 1% IR. Subsequent to the CCH, Dr. W was sent a letter of clarification informing her of the correct date of statutory MMI and the hearing officer requested an amended Report of Medical Evaluation (DWC-69) or re-examination of the claimant. Dr. W responded by submitting an amended DWC-69 placing the claimant at clinical MMI on January 28, 2011, with 1% IR.

Because we have affirmed the hearing officer's determination that the claimant reached MMI on May 8, 2011, Dr. W's 1% IR cannot be adopted. Dr. W's assigned 1% IR was not based on the claimant's condition as of May 8, 2011, the affirmed MMI date, considering the medical record and the certifying examination. Further, Dr. W's assigned 1% IR is based on abnormal range of motion (ROM) measurements of the

right shoulder.[2] Dr. W in providing an IR failed to rate the entire compensable injury in regards to CRPS of the right UE (as administratively determined), the left shoulder, bilateral knees, wrists, and hands (as stipulated by the parties), even if the impairment assigned was 0%.

The evidence reflects that Dr. M examined the claimant on October 5, 2011, and certified that the claimant reached statutory MMI on May 2, 2011, with 13% IR. Subsequent to the CCH and the parties' stipulation on the statutory MMI date, Dr. M submitted an amended DWC-69 certifying that the claimant reached statutory MMI on May 8, 2011, with 13% IR. In his narrative report dated October 5, 2011, Dr. M rated abnormal ROM for the right hand, right wrist, and right shoulder in addition to radial digit sensory loss for the ring and little finger of the right hand. Dr. M assigned 20% right UE impairment which he converted to 12% whole person (WP) impairment. Dr. M stated in his narrative report that he combined the 12% WP right UE impairment with a 1% WP impairment for the left knee which resulted in 13% WP IR for the compensable injury. This is the IR that the hearing officer adopted.

The method to rate CRPS (also known as reflex sympathetic dystrophy (RSD)) is found under section "Causalgia and [RSD]," page 3/56 of the AMA Guides. *See* Appeals Panel Decision (APD) 052243-s, decided November 29, 2005.

The AMA Guides provide in pertinent part:

1. Rate the [UE] impairment due to loss of motion of each joint involved (Sections 3.1f through 3.1j).

2. Rate the sensory deficit or pain impairment according to instructions in this section and Table 11a ([page 3/48]).

3. Rate the motor deficit impairment of the injured peripheral nerve, if it applies (Table 12a [page 3/49]).

4. The appropriate impairment percents for loss of motion, pain or sensory deficits, and motor deficits if present are *combined* using the Combined Values Chart ([page] 322) to determine the [UE] impairment. Major causalgia may result in a complete loss of function and an impairment of the extremity as great as 100%.

[2] We note that the hearing officer erroneously states in the Background Information section of his decision that Dr. W's 1% IR is based on measurements for the right knee, but that is not the case as set out in the measurements provided by Dr. W in her January 28, 2011, narrative report. We also note that the hearing officer failed to state in his decision that [Dr. SR] testified for the carrier.

Dr. M did not attempt to rate the claimant's right UE CRPS in the manner outlined in the AMA Guides. Dr. M rated abnormal ROM for each joint he determined to be involved but did not explain or produce a worksheet describing and analyzing his rating of 10% impairment for radial sensory loss of the right ring finger or his rating of 10% impairment for radial sensory loss of the right little finger. Dr. M failed to describe and analyze any rating for motor deficit impairment of any injured peripheral nerve, if it applied.

There are additional problems with Dr. M's IR. In rating abnormal ROM for the right wrist, Dr. M measured 25° for ulnar deviation. Dr. M failed to round to the nearest 10° in using Figure 29, as provided by the AMA Guides on pages 3/37 and 3/38. *See* APD 022504-s, decided November 12, 2002. Further, Dr. M measured 30° for right shoulder adduction and assigned 0% impairment; however, Figure 41, page 3/44, provides that 30° adduction results in 1% impairment.

Dr. M provided no worksheets for UE impairment evaluation of the left shoulder. As previously noted, the parties stipulated that the compensable injury extended to bilateral shoulder sprain/strains. In his October 5, 2011, narrative report, Dr. M notes his measurements of the left shoulder ROM. Dr. M measured left shoulder flexion at 150°, which according to Figure 38, page 3/43, results in 2% impairment. Dr. M measured left shoulder extension at 40°, which according to Figure 38, results in 1% impairment. Dr. M's measurement of 30° adduction under Figure 41, page 3/44, results in 1% impairment and his measurement of 150° abduction, Figure 41, results in 1% impairment. Dr. M's measurement of 80° internal rotation and 90° external rotation, Figure 44, page 3/45, results in 0% impairment. Adding left shoulder percentages of 2 + 1 + 1 + 1 + 0 + 0 results in 5% left shoulder UE impairment; however, Dr. M failed to assign any impairment using the measurements obtained in his certifying exam for the left shoulder thereby not rating the entire compensable injury.

Additionally, Figure 23, page 3/34, entitled "Finger Impairments Due to Abnormal Motion at the [Metacarpophalangeal (MP)] Joint" provides different impairments due to loss of extension for a measurement of 10° and for a measurement of +10°. In his worksheets, Dr. M lists a measurement of 10° for the MP of the middle finger for which he assigns 3% impairment. However, Figure 23 gives a 7% impairment for a measurement of 10° in contrast to the measurement of +10° which results in 3% impairment.

Therefore, for each of the reasons noted above, the hearing officer erred in determining that the claimant's IR is 13% as assigned by Dr. M, who did not rate the entire compensable injury in accordance with the AMA Guides.

There is no other IR in evidence that can be adopted. We reverse the hearing officer's determination that the claimant's IR is 13% as determined by Dr. M and remand the issue of IR to the hearing officer for further action consistent with this decision.

SUMMARY

We affirm the hearing officer's determination that the compensable injury of [date of injury], extends to CRPS of the right UE and bilateral hand contusions.

We affirm the hearing officer's determination that the claimant had disability beginning on May 3, 2009, and continuing through May 26, 2010.

We affirm the hearing officer's determination that the employer did not tender a BFOE to the claimant.

We affirm the hearing officer's determination that the claimant reached MMI on May 8, 2011.

We reverse the hearing officer's determination that the claimant's IR is 13% as determined by Dr. M and remand the issue of IR to the hearing officer for further action consistent with this decision.

REMAND INSTRUCTIONS

Dr. W is the designated doctor in this case. On remand, the hearing officer is to determine whether Dr. W is still qualified and available to be the designated doctor. If Dr. W is no longer qualified or available to serve as the designated doctor, then another designated doctor is to be appointed to determine MMI and IR for the compensable injury of [date of injury].

The hearing officer is to advise the parties to send the claimant's complete medical records to the designated doctor for review.

The hearing officer is to advise the designated doctor that the compensable injury of [date of injury], as administratively determined or stipulated to by the parties, extends to: (1) bilateral wrist bruises; (2) bilateral shoulder sprain/strains; (3) mild MCL sprain to the left knee; (4) right shoulder rotator cuff tear; (5) bilateral knee pain; (6) CRPS of the right UE; and (7) bilateral hand contusions. The hearing officer is to request that the designated doctor render an opinion on the IR for the compensable injury of [date of injury], in accordance with the AMA Guides based on the claimant's condition as of the May 8, 2011, MMI date and in accordance with Rule 130.1(c)(3).

The hearing officer is to provide the letter being sent to the designated doctor and the designated doctor's response to the parties and allow the parties to respond and introduce additional evidence in response to the designated doctor's certified IR evaluation. The hearing officer is then to make a determination on IR supported by the evidence.

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 **ZURICH AMERICAN 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.

Cynthia A. Brown
Appeals Judge

CONCUR:

Carisa Space-Beam
Appeals Judge

Margaret L. Turner
Appeals Judge