APPEAL NO. 121157
FILED AUGUST 9, 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 March 20, 2012, with the record closing on May 10, 2012, in [City], Texas, with [hearing officer] presiding as hearing officer. With regard to the two disputed issues before her, the hearing officer determined that: (1) the compensable injury of [date of injury], extends to L5-S1 radiculopathy but does not extend to spondylosis or degenerative disc disease; and (2) the respondent's (claimant) impairment rating (IR) is 13%.

The appellant (self-insured) appealed, contending that the IR adopted by the hearing officer was an erroneous application 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) and that the IR should be 5% as assessed by the designated doctor appointed to give an opinion on maximum medical improvement (MMI) and IR. The self-insured also appealed the hearing officer's determination that the compensable injury of [date of injury], includes L5-S1 radiculopathy. The claimant responded, urging affirmance.

The hearing officer's determination that the compensable injury of [date of injury], does not extend to spondylosis or degenerative disc disease has not been appealed and therefore has become final in accordance with Section 410.169.

DECISION

Affirmed in part and reversed and rendered in part.

The parties stipulated that: (1) the claimant sustained a compensable injury on [date of injury]; (2) Dr. [Dr. JT] was appointed by the Texas Department of Insurance, Division of Workers' Compensation (Division) as the first designated doctor to determine MMI and IR; (3) Dr. JT certified that the claimant reached MMI on December 15, 2008, with a 5% IR but rescinded this certification; (4) [Dr. ET] was the second designated doctor to determine MMI and IR; (5) Dr. ET certified that the claimant reached MMI on December 29, 2009, with a 5% IR; (6) [Dr. C] was the third designated doctor and was appointed to determine the extent of the compensable injury; (7) [Dr. B] as the treating surgeon certified that the claimant reached MMI on December 29, 2009, with a 13% IR; and (8) the claimant reached MMI on December 29, 2009.

Although not listed among the stipulations in the hearing officer's decision, the parties stipulated that the self-insured has accepted herniated discs at L4-5 and L5-S1 and L4-5 radiculopathy as part of the compensable injury.

The claimant testified that he was a master plumber, that he had sustained a prior low back injury in 2005, had undergone several surgeries and had returned to work when he was involved in a work-related motor vehicle accident which reinjured his low back. The self-insured stipulated that it accepted certain herniated discs and L4-5 radiculopathy as the compensable injury. At issue is radiculopathy at L5-S1 and the IR. It is undisputed that the claimant had a dorsal column spine stimulator implanted and underwent additional spinal surgery to repair the spine stimulator in 2009 and that the date of statutory MMI had been extended to December 29, 2009, the stipulated MMI date.

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 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.

Dr. C, the designated doctor on the extent of injury, in a report dated September 27, 2011, found absent reflexes in the ankles and knees bilaterally, diagnosed "failed back surgery with continued radiculopathy" and opined that the "radiculopathy at L4-L5 and the L4-L5 herniated disc and L5-S1 herniated disc are a direct result of the injury." After the CCH, the hearing officer kept the record open, sent additional records and a letter of clarification to Dr. C. Dr. C responded by an addendum dated April 13, 2012, stating: "In my opinion, the radiculopathy at L5-S1 was caused by the injury based on radiculopathy shown by the MRI, the location of the clinical symptoms and signs, and the failure of the various methods of treatments." Dr. B, the treating doctor, in a report dated November 1, 2011, agreed with Dr. C's assessment provided that the disc herniations and radiculopathy are the conditions that required treatment not the underlying degeneration.

Dr. B, the treating surgeon, examined the claimant on January 14, 2011, and certified that the stipulated statutory MMI date of December 29, 2009, with a 13% IR. Dr. B found loss of left patellar and Achilles reflexes. Dr. B based his 13% IR on 10% impairment for Diagnosis-Related Estimate (DRE) Lumbosacral Category III:

Radiculopathy and assessed an additional 3% impairment for the implanted dorsal column stimulator to arrive at the 13% IR. Dr. B explained:

> The patient also has an implanted dorsal column stimulator. The placement of the dorsal column stimulator is an impairment that would not otherwise be covered by the patient's radicular pain complaints. Since this does not represent the natural condition for his body, this would be an additional impairment. Page 9 of the 4th Edition AMA Guides allows for additional impairment due to treatment. As a result, I am assessing an additional 3% to account for the implanted dorsal column stimulator the patient has in his thoracic spine, which is in addition to the impairment to his lumbar spine.

The Appeals Panel has previously addressed the use of the provision for Adjustments for Effects of Treatment or Lack of Treatment on page 2/9 of the AMA Guides in Appeals Panel Decision 090692-s, decided July 14, 2009. The AMA Guides provide in part on page 2/9, as follows:

> **ADJUSTMENTS FOR EFFECTS OF TREATMENT OR LACK OF TREATMENT**
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> In certain instances, the treatment of an illness may result in apparently total remission of the patient's signs and symptoms. Examples include the treatment of hypothyroidism with levothyroxine and the treatment of type I diabetes mellitus with insulin. Yet it is debatable as to whether the patient has regained the previous status of normal good health. In these instances, the physician may choose to increase the impairment estimate by a small percentage (eg, 1% to 3%), combining that percent with any other impairment percent by means of the Combined Values Chart (p. 322).
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> In some instances, as with the recipients of transplanted organs who are treated with immunity-suppressing pharmaceuticals or persons treated with anticoagulants, the pharmaceuticals themselves may lead to impairments. In such an instance, the physician should use the appropriate parts of the *Guides* to evaluate the impairment related to the pharmaceutical. If information in the *Guides* is lacking, the physician may combine an estimated impairment percent, the magnitude of which would depend on the severity of the effect, with the primary organ system impairment, by means of the Combined Values Chart.

In summary, adjustments under Section 2.2 page 2/9 of the AMA Guides provide for additional impairment in cases where: (1) treatment of an illness results in apparent

remission of symptoms but the patient has not regained his prior good health; and (2) pharmaceuticals themselves may lead to impairment. We hold the placement of a dorsal column stimulator would not meet either of the examples in the AMA Guides. The hearing officer erred by adopting an IR that was based on a misapplication of the AMA Guides by adding an impairment for placement of the dorsal column stimulator.

Dr. ET, the designated doctor to opine on MMI and IR initially examined the claimant in August 2010.[1] Dr. ET, in his report certified that the claimant was not at MMI. In his narrative, Dr. ET had a diagnosis of "[c]ontinued mechanical low back pain with continued radiculopathy;" however, his examination found the claimant's calf diameter "equal bilaterally" and "[n]o pathological reflexes are present in either lower extremity."

Dr. ET re-examined the claimant on October 13, 2010.[2] Dr. ET stated several times in his report that there "is no discrete radiculopathy" because "deep tendon reflexes are normal and, secondly, there is no muscular weakness or atrophy in the lower extremities." Dr. ET restated that conclusion in answering a question of what the claimant's IR is. We read Dr. ET's reports, to say that while the claimant has continued radiculopathy, that radiculopathy is not ratable under the AMA Guides because of evidence of normal reflexes and lack of atrophy. Dr. ET certified the stipulated statutory MMI date of December 29, 2009, with a 5% IR based on DRE Lumbosacral Category II: Minor Impairment. The hearing officer rejected Dr. ET's rating because the hearing officer (incorrectly) stated the examination was performed 13 months after the date of MMI. Actually, it was Dr. B's examination that was performed on January 14, 2011, that was 13 months after the date of MMI, not the examination of Dr. ET.

As previously noted, 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. We hold that Dr. ET's IR is not contrary to the preponderance of the other medical evidence.

Accordingly, we affirm the hearing officer's determination that the compensable injury of [date of injury], includes L5-S1 radiculopathy as being supported by sufficient evidence. We reverse the hearing officer's determination that the claimant's IR is 13% for the reasons stated herein, and we render a new decision that the claimant's IR is 5% as assessed by designated doctor, Dr. ET.

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[1] Either on August 11, 2010, as stated in the narrative or August 18, 2010, as stated on the Report of Medical Evaluation (DWC-69).

[2] Dr. ET lists October 13, 2010, as the date of examination rather than January 14, 2011, as listed by the hearing officer in the Background Information of her decision.

The true corporate name of the insurance carrier is **(a governmental entity self-insured through T.A.S.B. Risk Management Fund)** and the name and address of its registered agent for service of process is

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

Thomas A. Knapp
Appeals Judge

CONCUR:

Cynthia A. Brown
Appeals Judge

Margaret L. Turner
Appeals Judge