

APPEAL NO. 121193
FILED AUGUST 17, 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 May 4, 2012, with the record closing on May 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 July 20, 2011, with five percent impairment rating (IR) as certified by the designated doctor, [Dr. CL].

The claimant appealed the hearing officer's MMI and IR determinations, contending that Dr. CL did not consider and rate the entire compensable injury, which included the left shoulder. The claimant also contended that the interpreter at the CCH did not sufficiently interpret for him to understand the legal proceeding and its legal consequences at the CCH. The claimant argued that he requested a continuance for a new interpreter to be provided and the hearing officer erred in not granting his request. The respondent (carrier) responded, urging affirmance of the disputed determinations and contending there was no reversible error regarding the interpretation at the CCH or the failure to grant a continuance to obtain another interpreter.

DECISION

Reversed and remanded.

The parties stipulated that on [date of injury], the claimant sustained a compensable injury; the Texas Department of Insurance, Division of Workers' Compensation (Division)-appointed designated doctor for purposes of determining MMI and IR is Dr. CL; and the date of statutory MMI is June 11, 2012. The claimant testified that while at work, he was involved in a motor vehicle accident (MVA), injuring his ribs, neck, left shoulder, and thoracic spine.

28 TEX. ADMIN. CODE § 140.2(a) (Rule 140.2(a)) provides that the Division on its own motion or upon request, will provide special accommodations to an individual who intends to participate in a proceeding and who does not speak English, or who has a physical, mental, or developmental handicap.

The file indicates that the CCH was recorded on one compact disc (CD) by the hearing officer. There was also a court reporter present at the CCH. The carrier included with its response to the claimant's appeal, a written transcript of the CCH.

Following the receipt of the claimant's appeal and the carrier's response, the Division's own translator provided a translation to the Appeals Panel (which included the

statements of the court interpreter from English into Spanish and from Spanish into English and the statements of the claimant in Spanish during the CCH as recorded on the CD). The CD recording, the written transcript, and the Division's own translation were reviewed on appeal.

Although there were errors in the interpretation by the Division-appointed interpreter at the CCH, the errors were not material to the resolution of the disputed issues. Further, the claimant asked for the interpretation to be slowed down or for a continuance. The hearing officer acknowledged the claimant's request and slowed the proceedings down. Therefore, we hold there was no reversible error based on the interpretation at the CCH.

The claimant contends in his appeal that the designated doctor's (Dr. CL) certification of MMI/IR should not have been adopted by the hearing officer because: (1) there was a need for additional treatment and there was an anticipation of further material recovery; (2) the designated doctor failed to rate the entire compensable injury, which included the left shoulder; and (3) the designated doctor failed to properly evaluate the claimant and document his objective findings pursuant to Rule 130.1(c)(3) in assigning an IR.

Rule 130.1(c)(3) provides that 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; and (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 zero percent [IRs]; and (ii) [a] description of how the findings relate to and compare with the criteria described in the applicable chapter 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). The doctor's inability to obtain required measurements must be explained.

In the Background Information section of her decision, the hearing officer stated that "[t]he [c]arrier accepted injuries to the [c]laimant's cervical spine, left shoulder, ribs, and thoracic spine." In evidence is a Notice of Disputed Issue(s) and Refusal to Pay Benefits (PLN-11), which states the carrier accepts as compensable a left cervical sprain/strain, left shoulder sprain/strain, and thoracic sprain/strain but disputes a lumbar or right shoulder injury, cervical radiculopathy, the cervical MRI findings of August 17, 2010, the thoracic MRI findings of August 17, 2010, and cervical spondylosis. In evidence is a carrier-submitted Request for Designated Doctor Examination (DWC-32)

dated July 21, 2011, which states the injuries determined to be compensable or accepted are rib, left shoulder, and back.

In its response to the claimant's appeal, the carrier stated that it accepted an injury in the form of a sprain/strain to the cervical, thoracic, left shoulder and a rib. The carrier contends that: (1) Dr. CL rated the entire compensable injury, which included the left shoulder; (2) that Dr. CL correctly certified an MMI date because the claimant experienced minimal relief after his first cervical injection and the designated doctor correctly determined further material relief was not anticipated after his certified MMI date of July 20, 2011; and (3) some of the accepted conditions did not receive any rating because they had resolved before the date of MMI or no impairment was provided in the AMA Guides.

Dr. CL examined the claimant on August 15, 2011, to address MMI, IR, and the claimant's ability to return to work, as evidenced by the Commissioner Order - Approval of Request for Designated Doctor Examination (EES-14). Dr. CL certified that the claimant reached MMI on July 20, 2011, with five percent IR.

In Dr. CL's narrative report dated August 15, 2011, described the work injury as a "lateral whiplash injury to [the claimant's] neck" and a bruised left elbow due to a MVA. Dr. CL noted that the claimant had extensive physical therapy with the last visit being July 20, 2011. Accordingly, in his determination of MMI, Dr. CL certified July 20, 2011, as the date of MMI.¹

In his physical examination findings, Dr. CL states "[t]here is no atrophy of the upper extremity muscles. All muscle groups are 4/4. There is full range of motion [ROM] of his shoulders, elbow, and wrists." Dr. CL lists the diagnoses of acute neck strain with pre-existing underlying degenerative disc disease with secondary degenerative arthritis without radiculopathy or loss of motion and left elbow contusion-resolved. There is no listed diagnosis for the left shoulder, the rib(s), or the thoracic spine although the DWC-32 in evidence listed these injured body parts as compensable. Dr. CL obtained ROM measurements for the left elbow and documented the measurements in a worksheet attached to his narrative report. With the measurements he obtained and documented in his certifying exam, Dr. CL used Figure 32, page 3/40, and Figure 35, page 3/41, and assessed zero percent impairment for the left elbow under the AMA Guides. However, Dr. CL does not document any

¹ We note that Dr. CL's narrative report listed July 20, 2011, as the date of MMI but in his initial Report of Medical Evaluation (DWC-69), Dr. CL certified the date of June 20, 2011, as the date of MMI. After a letter of clarification (LOC) to Dr. CL revealed this discrepancy, Dr. CL submitted an amended DWC-69 with the certified date of MMI, July 20, 2011, which was consistent with his narrative report.

measurements or analyze any findings with regard to the claimant's left shoulder or provide a specific impairment for the claimant's left shoulder.

The five percent IR assigned by Dr. CL for the compensable injury is based on placing the claimant in Diagnosis-Related Estimate (DRE) Cervicothoracic Category II: Minor Complaint.

A LOC dated May 16, 2012, was sent by the Division to Dr. CL. Although this LOC was not admitted into evidence, Dr. CL's response to the LOC was admitted as a hearing officer's exhibit. Dr. CL states:

I have been asked to determine MMI and IR for the entire compensable injury that also includes the thoracic spine and fractured rib. When [the claimant] was seen on August 15, 2011, the thoracic and rib injuries were symptom free. Thoracic contusions and rib fractures typically take 6 to 8 weeks to heal. Upon review of the medical records and physical examination, the [claimant] did not have complaints and symptoms of thoracic injury, with no significant clinical findings on exam. Based on Table 74, DRE Category I, page 110, he is assigned a whole person impairment of [zero percent] due to this condition. Upon review of the medical records and physical examination, the [claimant] shows no diagnosis related impairment for the rib fracture that would be ratable. Taking the thoracic spine and rib fracture into consideration, does not have an impact on the MMI date and IR. For the entire compensable injury, the MMI date and IR will remain as July 20, 2011, with a [five percent] whole person impairment.

Dr. CL's amended certification of MMI/IR does not meet the requirements of Rule 130.1(c)(3) regarding the left shoulder injury, part of the compensable injury. Dr. CL documents his measurements, analyzes his clinical findings, and explains how he assigns zero percent impairment only for the left elbow. Dr. CL fails to show his work or specifically assign any impairment for the left shoulder. Therefore, the hearing officer erred in determining that the preponderance of the evidence supports Dr. CL's certification and in adopting Dr. CL's amended certification of MMI/IR by Dr. CL. See Appeals Panel Decision (APD) 110267, decided April 19, 2011.

We reverse the hearing officer's determination that the claimant reached MMI on July 20, 2011, with five percent IR.

There are two other certifications of MMI/IR in evidence. The initial certification of MMI/IR by Dr. CL did not rate the entire compensable injury, specifically the left

shoulder, the ribs, and the thoracic spine. Therefore, this certification of MMI/IR could not be adopted.

The other certification of MMI/IR in evidence is by [Dr. WL], a doctor selected by the treating doctor to act in place of the treating doctor. Dr. WL examined the claimant on December 15, 2011, and certified that the claimant was not at MMI, was expected to reach MMI on or about March 15, 2012. No IR was assigned. Dr. WL, in his narrative report dated December 15, 2011, stated that the claimant is diagnosed with cervical sprain/strain and that:

It is my opinion [the claimant] is not at MMI at this time. The [claimant] did have a medial branch block . . . and he did have results with this injection with decreased pain for several days

. . . . Based on the review of the [Official Disability Guidelines], it appears the [claimant] is a candidate for facet joint radiofrequency neurotomy. It is my opinion this [claimant] is not yet at MMI and should be referred back . . . for further care.

The certification of MMI/IR by Dr. WL does not rate the entire compensable injury and therefore, like the first and the amended certifications of MMI/IR by Dr. CL, cannot be adopted by the hearing officer.

Because there are no certifications of MMI/IR that can be adopted, the issues of MMI and IR are remanded to the hearing officer for further action consistent with this decision.

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

The hearing officer is to advise the designated doctor that the compensable injury of [date of injury], extends to an injury of the cervical spine, thoracic spine, left shoulder and rib(s).

The hearing officer is to advise the designated doctor that Rule 130.1(c)(3) provides that 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; and (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 zero percent [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 designated doctor is then to be requested to give a certification of MMI/IR for the claimant's compensable injury of [date of injury], based on the injured employee's condition as of the MMI date, which can be no later than the stipulated date of statutory MMI, June 11, 2012, considering the claimant's medical record and the certifying examination.

The hearing officer is to ensure that the designated doctor receives any medical records of the claimant that were not previously provided to the designated doctor in order for the designated doctor to address MMI and IR.

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 then to make a determination on MMI/IR 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 **OLD REPUBLIC 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:

Thomas A. Knapp
Appeals Judge

Margaret L. Turner
Appeals Judge