

APPEAL NO. 122275
FILED DECEMBER 19, 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 was held on September 19, 2012, in [City], Texas, with [hearing officer] presiding as hearing officer. With regard to the disputed issues before her, the hearing officer determined that the appellant (claimant) reached maximum medical improvement (MMI) on June 6, 2012, with a 0% impairment rating (IR).

The claimant appealed, contending that the designated doctor had misapplied 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 he had failed to document measurements of upper and lower extremities to support his opinion of "no muscle atrophy." The respondent (carrier) responded, urging affirmance.

DECISION

Affirmed in part and reversed and remanded in part.

The claimant testified that he was working in the oil field and was pulling on a pipe wrench, while in an awkward position, when he felt a pop in his neck. The carrier, on a Request for Designated Doctor Examination (DWC-32) dated April 20, 2012, accepted as the compensable injury "neck" and "lower back." The medical records indicated that the claimant had cervical surgery in the form of the anterior cervical discectomy and fusion at C5-6 on September 30, 2011, performed by [Dr. Su]. It is undisputed that [Dr. S] was the designated doctor appointed to address MMI and IR. The parties stipulated that the statutory MMI date was June 14, 2012. [Dr. R], the treating doctor, on a Report of Medical Evaluation (DWC-69) and narrative, dated February 29, 2012, certified that the claimant was not at MMI but was expected to reach MMI on May 29, 2012. Dr. S, the designated doctor, examined the claimant on June 6, 2012, and certified the claimant had reached MMI on that date. [Dr. D], a post-designated doctor required medical examination doctor, certified that the claimant reached MMI on February 29, 2012. [Dr. L], a referral doctor acting in place of the treating doctor, certified that the claimant reached MMI on June 14, 2012.

MMI

The hearing officer's determination that the claimant reached MMI on June 6, 2012, 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 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.

Dr. S, the designated doctor, examined the claimant three times. In the first examination of December 8, 2010, Dr. S certified that the claimant was not at MMI. In the second examination Dr. S certified the claimant at MMI on June 30, 2011, with a 10% IR based on 5% impairment for Diagnosis-Related Estimate (DRE) Cervicothoracic Category II: Minor Impairment and 5% for DRE Lumbosacral Category II: Minor Impairment. In the third report, dated June 15, 2012, Dr. S addressed his prior June 30, 2011, report and explained that he had received a "carrier's analysis letter" (not in evidence) and that the claimant had additional treatment in the form of epidural steroid injection of the lumbar spine, cervical surgery, physical therapy, and work hardening, with some lasting improvement reported primarily as a result of surgery. Dr. S rescinded his previous MMI date of June 30, 2011, explaining his reasons for finding the new June 6, 2012, MMI date which we have affirmed.

In a DWC-69 and narrative report dated June 15, 2012, Dr. S certified the claimant at MMI on June 6, 2012 (a date that we have affirmed) and assessed a 0% IR. Dr. S, in his narrative, referenced Dr. Su's surgery and treatment, a EMG/NCV performed on January 6, 2012, and the treating doctor's reports. Regarding the IR, Dr. S stated:

[The claimant] qualified for DRE Cervicothoracic Category I according to the guidelines on [page 3/103] of the [AMA Guides]. DRE Category I relates to cervical pain without radicular symptoms in an anatomic distribution, muscular atrophy greater than 2 cm at or above the elbow, or loss of reflexes. By guidelines, a 0% [IR] is assigned for DRE Cervicothoracic Category I.

Dr. S's description of DRE Cervicothoracic Category I does not match the description and verification found under DRE Cervicothoracic Category I: Complaints or Symptoms in the AMA Guides. Dr. S's description more nearly matches the description and verification of DRE Cervicothoracic Category III: Radiculopathy. Because of the

inconsistency of the description of DRE Cervicothoracic Category I, it is not clear from Dr. S's narrative report whether he intended to place the claimant in DRE Cervicothoracic Category I, II, or III.

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 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. See Appeals Panel Decision (APD) 121193, decided August 17, 2012.

We note that Dr. S's report does not document measurements of the upper or lower extremities. The only mention of muscle atrophy is under the section entitled "Physical Examination" where Dr. S states: "Extremities: no muscle atrophy of major upper or lower extremity muscle groups." It is not clear if Dr. S measured the extremities or how he came to his assessment.

There are no other certifications of MMI/IR in evidence with the MMI date of June 6, 2012, the date of MMI which we have affirmed. Therefore, there is no assigned IR which can be adopted.

We reverse the hearing officer's determination that the claimant's IR is 0% because of the inconsistencies in the description and verification of DRE Cervicothoracic Category I: Minor Complaints. We remand the IR issue to the hearing officer to seek clarification from the designated doctor regarding his IR and to make a finding of fact and a conclusion of law regarding the claimant's IR supported by the evidence and consistent with this decision.

REMAND INSTRUCTIONS

Dr. S is the designated doctor in this case. On remand, the hearing officer is to determine whether Dr. S is still qualified and available to be the designated doctor. If Dr. S is no longer qualified or available to serve as the designated doctor, then another designated doctor is to be appointed to determine the IR for the compensable injury of [date of injury]. The hearing officer is to advise the designated doctor that the provisions of Rule 130.1(c)(3) are to be applied. The designated doctor is then requested to give an assessment of the IR for the claimant's compensable injury of [date of injury], based on the injured employee's condition as of the affirmed MMI date

of June 6, 2012, considering the claimant's medical records and certifying examination. 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 the IR supported by the evidence and 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 **FIDELITY AND GUARANTY 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 78701-3232.**

Thomas A. Knapp
Appeals Judge

CONCUR:

Cynthia A. Brown
Appeals Judge

Margaret L. Turner
Appeals Judge