APPEAL NO. 122475
FILED JANUARY 24, 2013

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 October 18, 2012, in [City], Texas, with [hearing officer] presiding as hearing officer. The hearing officer resolved the disputed issues by deciding that the respondent (claimant) reached maximum medical improvement (MMI) on April 3, 2012, with 19% impairment rating (IR) as certified by the Texas Department of Insurance, Division of Workers' Compensation (Division)-selected designated doctor, [Dr. B]. The appellant (carrier) appeals the hearing officer's determinations of the MMI date and of the IR, contending that the hearing officer erred in adopting the designated doctor's certification of MMI/IR rather than adopting the certification of MMI/IR by the post-designated doctor required medical examination doctor, [Dr. S]. The claimant responded, urging affirmance.

DECISION

Affirmed in part and reversed and remanded in part.

The parties stipulated that the claimant sustained a compensable injury on [date of injury]. It is undisputed that the carrier accepted a lumbar strain as the compensable injury.

In [Docket No.], the hearing officer determined that: (1) the compensable injury of [date of injury], extends to cervical radiculopathy/myelopathy; (2) the claimant has not reached MMI as certified by Dr. B; (3) because the claimant had not reached MMI, no IR is assignable; and (4) the claimant has disability from July 22, 2011, through November 4, 2011 (the date of the CCH). The hearing officer's extent of injury, MMI/IR, and disability determinations were appealed to the Division's Appeals Panel but became final on February 10, 2012.

The hearing officer's determination that the claimant reached MMI on April 3, 2012, is supported by sufficient evidence and is affirmed.

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.

The record indicates that Dr. B, the designated doctor, initially examined the claimant on April 18, 2011, considering that the compensable injury included a lumbar injury and cervical radiculopathy/myelopathy, opined that the claimant was not at MMI. A letter of clarification was sent by the Division to Dr. B, requesting an alternative certification of MMI/IR based only on a lumbar strain. Dr. B responded and alternatively certified, considering only a lumbar strain, that the claimant reached MMI on April 18, 2011, with 5% IR, based on placing the claimant in Diagnosis-Related Estimate (DRE) Lumbosacral Category II: Minor Impairment, 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).

Subsequent to the April 18, 2011, exam, the Division administratively determined that the claimant's [date of injury], compensable injury extends to cervical radiculopathy/myelopathy. Dr. B re-examined the claimant on April 3, 2012. In considering the lumbar injury as well as cervical radiculopathy/myelopathy, Dr. B certified that the claimant reached MMI on April 3, 2012, with 19% IR. Dr. B placed the claimant in DRE Lumbosacral Category II: Minor Impairment for 5% impairment and placed the claimant in DRE Cervicothoracic Category III: Radiculopathy for 15% impairment, and then combined 15% with 5%, resulting in 19% IR for the claimant's compensable injury. Dr. B also provided an alternative rating considering only cervical radiculopathy/myelopathy for 15%, placing the claimant in DRE Cervicothoracic Category III: Radiculopathy. The carrier contends that the hearing officer could not adopt Dr. B's 15% or his 19% IRs because Dr. B failed to follow AMA Guides by placing the claimant in DRE Cervicothoracic Category III: Radiculopathy.

The carrier contends that Dr. B did not document any significant signs of radiculopathy in his narrative report in order to rate radiculopathy under the AMA Guides. We agree.

Dr. B assessed 15% IR, placing the claimant in DRE Cervicothoracic Category III: Radiculopathy (in each of his assigned IRs based on the April 3, 2012, examination).

Page 3/104 DRE Cervicothoracic Category III: Radiculopathy has the following description and verification:

> Description and Verification: The patient has significant signs of radiculopathy, such as (1) loss of relevant reflexes or (2) unilateral atrophy with greater than a 2-cm decrease in circumference compared with the

> unaffected side, measured at the same distance above or below the elbow. The neurologic impairment may be verified by electrodiagnostic or other criteria (differentiators 2, 3, and 4, Table 71, p. 109).

Dr. B, in his narrative report dated April 3, 2012, stated that the "[n]euro examination reveals sensation to be subjectively decreased in the left fifth digit. Deep tendon reflexes are +3 at the bilateral biceps and triceps." Dr. B concludes that the claimant's rating is "based on DRE Category III for the cervical spine of 15%." We note that at the time Dr. B initially examined the claimant on April 18, 2011, there was a EMG/NCV, dated that same day, which revealed an impression of cervical radiculopathy/myelopathy. For the April 3, 2012, examination of the claimant, there is no documentation by Dr. B of testing or measurements of loss of relevant reflexes or unilateral atrophy. The description/verification criteria only states that the neurologic impairment "may be verified by electrodiagnostic testing."

In Appeals Panel Decision (APD) 030091-s, decided March 5, 2003, the Appeals Panel held that the AMA Guides indicate that to find radiculopathy, doctors must look to see if there is a loss of relevant reflexes or unilateral atrophy to find radiculopathy. The Appeals Panel went on to state that the findings of neurologic impairment may be verified by electrodiagnostic studies but the AMA Guides do not state that electrodiagnostic studies showing nerve root irritation, without loss of reflexes or atrophy, constitutes undeniable evidence of radiculopathy. *See also* APD 110382, decided May 5, 2011; APD 072220-s, decided February 5, 2008.

To clarify, we note that there may be a diagnosis of radiculopathy and/or an administrative determination by the Division that the compensable injury extends to radiculopathy; however, in order to rate radiculopathy under the AMA Guides, it is necessary for the certifying doctor to identify and document the "significant signs of radiculopathy" as provided in the appropriate category and as provided in Table 71 on page 3/109, such as loss of relevant reflexes and/or unilateral atrophy of 2 cm or greater.

The hearing officer erred in adopting Dr. B's IR of 19% that placed the claimant in DRE Lumbosacral Category III: Radiculopathy. Neither can Dr. B's IR of 15% be adopted for this same rationale as well as not rating the entire compensable injury extending to a lumbar strain. Therefore, we reverse the hearing officer's determination that the claimant's IR is 19%.

As previously discussed, we have affirmed the hearing officer's determination that the claimant reached MMI on April 3, 2012. There is no other certification of MMI/IR in evidence with the MMI date of April 3, 2012, that can be adopted. We note

that the certification of MMI/IR by Dr. S, in addition to containing a different MMI date, could not be adopted because it does not rate the entire compensable injury, specifically the administratively determined cervical radiculopathy/myelopathy.

Because there is no assigned IR that can be adopted, we remand the IR issue to the hearing officer for further action consistent with this decision.

SUMMARY

We affirm the hearing officer's decision that the claimant reached MMI on April 3, 2012.

We reverse the hearing officer's decision that the claimant's IR is 19% and remand the IR issue to the hearing officer for further action consistent with this decision.

REMAND INSTRUCTIONS

Dr. B is the designated doctor. On remand, the hearing officer is to determine whether Dr. B is still qualified and available to be the designated doctor. If Dr. B is no longer qualified or available to serve as the designated doctor, then another designated doctor is to be appointed to determine the claimant's 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], includes a lumbar strain (as accepted) and cervical radiculopathy/myelopathy (as administratively determined).

The hearing officer is then to request that the designated doctor assign an IR for the claimant's compensable injury of [date of injury], based on the claimant's condition as of April 3, 2012, the MMI date administratively determined, considering the claimant's medical record and the certifying examination and in accordance with Rule 130.1(c)(3).

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 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 **TEXAS MUTUAL INSURANCE COMPANY** and the name and address of its registered agent for service of process is

RON O. WRIGHT, PRESIDENT
6210 EAST HIGHWAY 290
AUSTIN, TEXAS 78723.

Cynthia A. Brown
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Margaret L. Turner
Appeals Judge