

APPEAL NO. 130185
FILED MARCH 21, 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 opened on August 8, 2012, continued on October 16, 2012, and concluded on December 11, 2012, in [City], Texas, with [hearing officer] presiding as hearing officer. With regard to the disputed issues, as amended, the hearing officer determined that: (1) the compensable injury of [date of injury], does not extend to right brachial plexus syndrome, T8-9 disc protrusion, C6-7 disc protrusion, L5-S1 disc protrusion, lumbar radiculopathy, cervical cord injury, or cervical myelopathy; and (2) the respondent (claimant) reached maximum medical improvement (MMI) on August 24, 2011, with a 17% impairment rating (IR).

The appellant (carrier) appealed the MMI/IR issues, contending that the designated doctor had failed to provide a proper basis for revising a previous IR and pointing to a perceived error in applying range of motion (ROM) figures regarding the right shoulder deficits. The appeal file does not contain a response from the claimant.

The hearing officer's determination that the compensable injury of [date of injury], does not extend to right brachial plexus syndrome, T8-9 disc protrusion, C6-7 disc protrusion, L5-S1 disc protrusion, lumbar radiculopathy, cervical cord injury, or cervical myelopathy was not appealed, and therefore has become final pursuant to Section 410.169.

DECISION

Reversed and remanded.

The claimant testified how he was injured trying to install a 400 pound hood above an overhead door when a coworker elevated his end of the hood too quickly, causing the hood to slide into the claimant and causing the claimant to fall six to eight feet to a concrete floor. The parties stipulated that: (1) the claimant sustained a compensable injury on [date of injury]; (2) the Texas Department of Insurance, Division of Workers' Compensation (Division) appointed Dr. [Dr. F] as a designated doctor to determine extent of injury and [Dr. Z] as a designated doctor to determine MMI and "[IR] (stricken);" and (3) the compensable injury extends to a right shoulder rotator cuff injury, cervical strain, thoracic strain, lumbar sprain/strain, impact injury to the chest, and single episode of hematuria. The hearing officer in an unappealed finding of fact found that in June 2012 "the Division properly redesignated from [Dr. Z] to [Dr. J] as designated doctor to determine [MMI] and [IR]."

MMI/IR

Section 401.011(30)(A) defines MMI as “the earliest date after which, based on reasonable medical probability, further material recovery from or lasting improvement to an injury can no longer reasonably be anticipated.” Section 408.1225(c) provides that the report of the designated doctor has presumptive weight, and the Division shall base its determination of whether the employee has reached MMI on the report of the designated doctor unless the preponderance of the other medical evidence is to the contrary. 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. J is the most recent designated doctor to render an opinion on MMI/IR. Dr. J examined the claimant on September 28, 2012, and certified clinical MMI on August 24, 2011, with an 11% IR. Dr. J rated the injury to the cervical, thoracic, lumbar spine, and the right shoulder. Dr. J placed the claimant in Diagnosis-Related Estimates (DRE) Cervicothoracic Category II: Minor Impairment, 5% impairment and DRE Lumbosacral Category II: Minor Impairment, 5% impairment, and DRE Thoracolumbar Category I: Complaints or Symptoms 0% impairment for the thoracic injury. Dr. J rated a 1% impairment for the right shoulder injury based on decreased ROM measuring the injured right side against the contralateral uninjured left side. The hearing officer, at that hearing (the October 16, 2012, CCH) expressed concern that Dr. J had not rated the entire compensable injury.

The hearing officer sent Dr. J a letter of clarification (LOC) dated October 16, 2012, stating:

The Division’s Appeals Panel is now insisting that the compensable injury be identified and rated by diagnosis.

The compensable injury is a right shoulder rotator cuff injury, cervical strain, thoracic strain, lumbar sprain/strain, impact injury to chest, and single episode of hematuria.

The compensable injury does not extend to . . . right brachial plexus syndrome, T8-9 disc protrusion, C6-7 disc protrusion, L5-S1 disc protrusion, lumbar radiculopathy, cervical cord injury, or cervical myelopathy.

Rate the compensable injury only. Rate each compensable condition separately. . . .

Dr. J responded with an amended Report of Medical Evaluation (DWC-69) and narrative dated October 18, 2012. Dr. J stated that he rated the claimant for “a herniated cervical disc without objective signs of radiculopathy and herniated thoracic disc without objective signs of radiculopathy, a right lumbar radiculopathy, and a torn rotator cuff of the right shoulder.” Dr. J summarized his findings as:

For lumbar sprain/strain with persistent disabling pain and muscle spasm documented in the record [DRE Lumbosacral] Category II for 5% whole person [(WP)] impairment.

For cervical sprain/strain with persistent neck pain and dysmetria [DRE Cervicothoracic] Category II for a 5% [IR].

For a torn rotator cuff for which the [claimant] underwent arthroscopic rotator cuff repair surgery, and with persistent restricted active [ROM], 8% [WP] [IR].

These combined, yield 17% [WP] impairment. . . .

Although Dr. J stated that he was rating a herniated thoracic disc without objective signs of radiculopathy, he did not include that in his summarized findings. Dr. J also did not rate the stipulated “impact injury to chest” and “single episode of hematuria.” Dr. J explained the increased right shoulder ROM impairment from his September 28, 2012, report by noting that in his original report he had compared the injured right shoulder with the contralateral uninjured left shoulder and in the response to the LOC, Dr. J subsequently determined that it was “unnecessary to apply the comparison correction in this case” because the claimant had unspecified “non-work related issues which are interfering with his left shoulder motion.” Dr. J correctly noted that the fourth edition (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)) has no provision for using ROM of the contralateral joint. The Appeals Panel has held that there is no provision in the AMA Guides which require or prohibit that method and it is in the discretion of the certifying doctor to do so or not. See Appeals Panel Decision (APD) 120897, decided July 10, 2012.

Using only the ROM figures in Dr. J’s amended October 18, 2012, report, there appears to be an error in calculating the impairment resulting from internal rotation deficit in the right shoulder. The hearing officer, however, compared Dr. J’s October 18, 2012, right shoulder ROM figures with the September 28, 2012, right shoulder ROM figures and in the Background Information commented that: “[t]here was a clerical error in the addendum report in that the measurements for right shoulder internal and

external rotation were reversed, however the impairment assigned, 0% upper extremity for each, was based on the correct measurements.”

The hearing officer adopted Dr. J's amended MMI date of August 24, 2011, with a 17% IR. However, Dr. J's IR cannot be adopted. Several times during the CCH the hearing officer commented it was necessary to rate the entire compensable injury which was the reason the hearing officer sent the October 16, 2012, LOC specifically listing the conditions included, and excluded, in the compensable injury to ensure that the entire compensable injury was rated. Nonetheless, Dr. J failed to rate, or even mention the stipulated compensable “impact injury to chest, and single episode of hematuria.” The amended October 18, 2012, response to the LOC also failed to rate the stipulated thoracic strain although a herniated thoracic disc is mentioned at the beginning of that report and Dr. J's September 28, 2012, report does rate a thoracic injury under DRE Thoracolumbar Category I: Complaints or Symptoms for a 0% impairment.

Neither Dr. J's September 28, 2012, report nor the amended October 18, 2012, report rate the entire compensable injury as stipulated to by the parties. Because the entire compensable injury was not rated Dr. J's certification of MMI and IR cannot be adopted. See APD 110267, decided April 19, 2011. Accordingly, we reverse the hearing officer's determination that the claimant's MMI is August 24, 2011, with a 17% IR.

In evidence are a number of other certifications of MMI and IR including that of Dr. Z, a designated doctor appointed to determine MMI and IR. In a report dated November 7, 2011, Dr. Z certified MMI on November 7, 2011, with an 18% IR. [Dr. O], a carrier required medical examination doctor, in a report dated December 27, 2011, certified MMI on August 24, 2011, with a 10% IR. The hearing officer rejected both those certifications because either the MMI date was not explained or that Dr. O had made a misstatement regarding the AMA Guides. We also note that neither Dr. Z nor Dr. O rated the entire compensable injury as stipulated to by the parties.

Because there is no certification of MMI and assignment of IR that can be adopted, we remand the issues of MMI and IR for further action consistent this decision.

REMAND INSTRUCTIONS

The designated doctor for MMI and IR is Dr. J. On remand, the hearing officer is to determine if Dr. J is still qualified and available to serve as the designated doctor. If Dr. J is no longer qualified or available to serve as the designated doctor, another designated doctor is to be appointed.

The designated doctor is again to be advised that the compensable injury is a right shoulder rotator cuff injury, cervical strain, thoracic strain, lumbar sprain/strain, impact injury to chest, and single episode of hematuria. The designated doctor is also to be advised that the compensable injury does not extend to right brachial plexus syndrome, T8-9 disc protrusion, C6-7 disc protrusion, L5-S1 disc protrusion, lumbar radiculopathy, cervical cord injury, or cervical myelopathy. The designated doctor is also to record the ROM deficits found for the right shoulder. The designated doctor is to give an opinion on MMI and IR for the compensable injury as stipulated to by the parties based on the claimant's condition as of the date of MMI in accordance with the AMA Guides and Rule 130.1(c)(3) considering the claimant's medical record and the 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 MMI and IR that is supported by the evidence and is 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
6210 EAST HIGHWAY 290
AUSTIN, TEXAS 78723.**

Thomas A. Knapp
Appeals Judge
CONCUR:

Carisa Space-Beam
Appeals Judge

Margaret L. Turner
Appeals Judge