

APPEAL NO. 132323
FILED NOVEMBER 26, 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 initially on March 1, 2012, was reset to July 26, 2013, with the record closing on August 27, 2013, in [City], Texas, with [hearing officer] presiding as hearing officer. The hearing officer resolved the disputed issues by deciding that: (1) the compensable injury of [date of injury], does not extend to left hand/wrist carpal tunnel syndrome (CTS), left cubital tunnel syndrome (CuTS), or cervical radiculopathy; (2) per the parties' stipulation, the compensable injury of [date of injury], extends to cervical disc herniations at C3 through C7 and left shoulder rotator cuff tear; (3) the Texas Department of Insurance, Division of Workers' Compensation (Division) did not abuse its discretion in appointing a new designated doctor to replace [Dr. J] as designated doctor on this claim; (4) the appellant (claimant) reached maximum medical improvement (MMI) on May 16, 2011; and (5) the claimant's impairment rating (IR) is 12%.

The claimant appealed the hearing officer's extent-of-injury determination adverse to him, as well as the hearing officer's determination that the IR is 12%. The claimant argued that the preponderance of the medical evidence supports that the claimed extent-of-injury conditions are part of the [date of injury], compensable injury. The claimant also argued that [Dr. X], the designated doctor most recently appointed by the Division, IR cannot be adopted because it does not include a rating for a distal clavicle resection, a procedure the claimant contends he underwent as treatment for the compensable injury. The respondent (carrier) responded, urging affirmance of the appealed determinations. The hearing officer's determinations that: (1) the compensable injury of [date of injury], extends to cervical disc herniations at C3 through C7 and left shoulder rotator cuff tear; (2) the Division did not abuse its discretion in appointing a new designated doctor to replace Dr. J as designated doctor on this claim; and (3) the claimant reached MMI on May 16, 2011, have not been appealed and have become final pursuant to Section 410.169.

DECISION

Affirmed in part and reversed and remanded in part.

The parties stipulated that: (1) the claimant sustained a compensable injury on [date of injury]; (2) the compensable injury of [date of injury], extends to cervical disc herniations at C3 through C7 and left shoulder rotator cuff tear; (3) the most recently appointed designated doctor on the issues of MMI, IR, and extent of injury on this claim is Dr. X; and (4) the claimant's statutory MMI date on this claim is May 16, 2011. The

claimant testified that he was injured when a heavy object he reached to retrieve from an overhead shelf twisted his left arm and hit him on the left shoulder and neck.

EXTENT OF INJURY

The hearing officer's determination that the compensable injury of [date of injury], does not extend to left hand/wrist CTS, left CuTS, or cervical radiculopathy 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 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 hearing officer determined that the claimant's IR is 12% per Dr. X, the most recently appointed designated doctor on the issues of MMI, IR, and extent of injury. The hearing officer noted in the Background Information section of the decision that:

[Dr. X's] certification of MMI as of the May 16, 2011, statutory date and assigned IR of 12% comports with the compensable injury on this claim. [The] [c]laimant's contention that he is entitled to an additional rating for distal clavicle resection under Table 27, [page] 3/61 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)] was found not to be persuasive in light of evidence reflecting that the nature of the arthroscopic resection procedure he underwent would not qualify for a rating under that particular table.

[Dr. X's] opinion is that of a neutral examiner and his impairment evaluation was found to have been performed in accordance with the [AMA Guides]. As a preponderance of the evidence is held to support [Dr. X's] certification of MMI as of May 16, 2011, and 12% IR assignment, those determinations will be adopted.

The claimant contended at the CCH and on appeal that Dr. X's 12% IR is incorrect because it does not include a rating for a distal clavicle resection, a procedure the claimant states he underwent on September 29, 2009, as cited in an operative

report in evidence of that date, as treatment for the compensable injury. The hearing officer did not make a finding of fact as to whether the claimant actually underwent a distal clavicle resection, and the hearing officer's statement that "the nature of the arthroscopic resection procedure he underwent would not qualify for a rating under that particular table" is unclear as to whether the hearing officer believed the claimant did or did not undergo a distal clavicle resection. If the claimant received a distal clavicle resection for the compensable injury, he is entitled to an IR for a distal clavicle resection in accordance with the AMA Guides. We therefore reverse the hearing officer's determination that the claimant's IR is 12%, and we remand this case to the hearing officer to make a finding of fact whether or not the claimant underwent a distal clavicle resection for the [date of injury], compensable injury. Because we have remanded the case to the hearing officer for this issue, we also remand the issue of IR to the hearing officer for further action consistent with this decision.

In evidence are numerous MMI/IR certifications from multiple doctors. There are certifications from the following doctors: [Dr. T], the first designated doctor appointed by the Division; Dr. J, the second designated doctor appointed by the Division; [Dr. M], the treating doctor, and [Dr. P], the third designated doctor appointed by the Division. However, all of the certifications from Dr. T, Dr. J, Dr. M, and Dr. P certify that either the claimant has not reached MMI or that the claimant reached MMI on a date other than May 16, 2011. Given that the hearing officer's determination that the claimant reached MMI on May 16, 2011, has become final pursuant to Section 410.169, the certifications from Dr. T, Dr. J, Dr. M, and Dr. P cannot be adopted.

There are also numerous MMI/IR certifications from Dr. X, the most recently appointed designated doctor in this case, in response to letters of clarification (LOC) sent by the hearing officer.

Dr. X certified on January 7, 2013, that the claimant reached MMI statutorily on May 21, 2011, with a 21% IR. Dr. X then certified on August 7, 2013, that the claimant reached MMI statutorily on May 21, 2011, with a 24% IR. Neither of these certifications can be adopted because the hearing officer's determination that the claimant reached MMI on May 16, 2011, has become final pursuant to Section 410.169.

In a response dated June 24, 2013, to an LOC sent by the hearing officer, Dr. X provided four alternate MMI/IR certifications dated June 24, 2013, other than the certification adopted by the hearing officer, certifying that the claimant reached MMI statutorily on May 16, 2011. In the first certification Dr. X assigned a 21% IR based on Diagnosis-Related Estimate (DRE) Cervicothoracic Category III: Radiculopathy and for left shoulder range of motion (ROM) without rating a distal clavicle resection. In the second certification Dr. X assigned a 26% IR based on DRE Cervicothoracic Category

III: Radiculopathy, left shoulder ROM, and a rating for distal clavicle resection. The hearing officer's determination that the compensable injury does not extend to cervical radiculopathy has been affirmed; therefore, neither Dr. X's 21% IR nor Dr. X's 26% IR can be adopted.

In the third certification Dr. X assigned a 13% IR. Dr. X initially indicated in his response that the 13% is based on ROM measurements of the claimant's left shoulder and a rating for a distal clavicle resection. Dr. X later stated in his response that the 13% IR is based on DRE Cervicothoracic Category II: Complaints or Symptoms, left shoulder ROM, and a rating for distal clavicle resection. Based on the measurements contained in Dr. X's response, the 13% IR does not include the 5% impairment assessed under DRE Cervicothoracic Category II: Complaints or Symptoms for the cervical disc herniations at C3 through C7; therefore, Dr. X's 13% IR does not consider the entire compensable injury and cannot be adopted.

In the fourth certification Dr. X assigned a 17% IR based on DRE Cervicothoracic Category II: Complaints or Symptoms, left shoulder ROM, and a rating for distal clavicle resection. Dr. X based the 17% IR in part on 12% upper extremity (UE) impairment for ROM of the claimant's left shoulder. However, in a response dated August 7, 2013, to another LOC sent by the hearing officer, Dr. X noted that the correct UE impairment for the claimant's left shoulder ROM is 11%, not 12%. Based on the ROM measurements taken of the claimant's shoulder and the figures in the AMA Guides, Dr. X was correct in his assessment of 11% UE impairment. Therefore, Dr. X's 17% IR is based on an incorrect UE impairment for the claimant's left shoulder ROM.

SUMMARY

We affirm the hearing officer's determination that the compensable injury of [date of injury], does not extend to left hand/wrist CTS, left CuTS, or cervical radiculopathy.

We reverse the hearing officer's determination that the claimant's IR is 12%, and we remand this case for the hearing officer to make a finding of fact whether the claimant underwent a distal clavicle resection for the [date of injury], compensable injury, and we also remand the issue of IR to the hearing officer for further action consistent with this decision.

REMAND INSTRUCTIONS

Dr. X is the designated doctor in this case. On remand, if the hearing officer determines it is necessary to go back to the designated doctor in this case, the hearing officer is to determine whether Dr. X is still qualified and available to be the designated doctor. If Dr. X 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 [date of injury], compensable injury.

On remand the hearing officer is to determine whether or not the claimant underwent a distal clavicle resection for the [date of injury], compensable injury. If the hearing officer determines that the claimant has undergone a distal clavicle resection for the [date of injury], compensable injury, the hearing officer is to request the designated doctor to rate a distal clavicle resection in accordance with the AMA Guides. We note that the AMA Guides provide on page 3/61 in Table 27, that a distal clavicle resection results in a 10% UE impairment.

Once the hearing officer makes a determination whether or not the claimant underwent distal clavicle resection for the [date of injury], compensable injury, the hearing officer is then to advise the designated doctor that the compensable injury extends to cervical disc herniations at C3 through C7 and left shoulder rotator cuff tear, but does not extend to left hand/wrist CTS, left CuTS, or cervical radiculopathy. The hearing officer is to request the designated doctor assign an IR for the claimant's compensable injury as of May 16, 2011, the date of MMI.

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 Appeals Panel Decision 060721, decided June 12, 2006.

The true corporate name of the insurance carrier is **AMERICAN ZURICH 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.**

Carisa Space-Beam
Appeals Judge

CONCUR:

Cristina Beceiro
Appeals Judge

Margaret L. Turner
Appeals Judge

