

APPEAL NO. 132794
FILED JANUARY 17, 2014

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 October 16, 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 right shoulder adhesive capsulitis; (2) the appellant (claimant) reached maximum medical improvement (MMI) on August 30, 2010; and (3) the claimant's impairment rating (IR) is 2%.

The claimant appealed, disputing the hearing officer's determinations that the claimant's compensable injury does not extend to right shoulder adhesive capsulitis and that the claimant's IR is 2%. The claimant argues that a preponderance of the evidence showed that the claimant's compensable injury was a substantial factor in bringing about the right shoulder adhesive capsulitis. Additionally, the claimant argues that the hearing officer erred in determining that the claimant's IR is 2%. The respondent (carrier) responded, urging affirmance of the disputed extent of injury and IR determinations.

The hearing officer's determination that the claimant reached MMI on August 30, 2010, was not appealed and has become final pursuant to Section 410.169.

DECISION

Affirmed in part and reversed and remanded in part.

The parties stipulated that: (1) on [date of injury], the claimant sustained a compensable injury in the form of a right shoulder strain and right wrist tenosynovitis while lifting a tray in a restaurant; (2) [Dr. R] was appointed by the Texas Department of Insurance, Division of Workers' Compensation (Division) to determine MMI and IR; and (3) the claimant reached MMI on August 30, 2010.

EXTENT OF INJURY

The hearing officer's determination that the compensable injury of [date of injury], does not extend to right shoulder adhesive capsulitis 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. See 28 TEX. ADMIN. CODE § 130.1(c)(3) (Rule 130.1(c)(3)).

Dr. R examined the claimant on January 18, 2012, and certified that the claimant reached MMI on August 30, 2010, with a 2% IR 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). Dr. R noted in his narrative report that the range of motion (ROM) of the claimant's right shoulder was normal as compared to the contralateral side and that the right shoulder injury did not "support impairment." Dr. R assessed a 3% upper extremity (UE) impairment based on the following ROM measurements of the claimant's right wrist: 60° for extension (0% UE impairment); 60° for flexion (0% UE impairment); 15° for radial deviation (1% UE impairment); and 22° for ulnar deviation (2% UE impairment after rounding to 20°). Dr. R then converted the 3% UE impairment to whole person impairment using Table 3, on page 3/20 of the AMA Guides and assessed a 2% impairment.

The 1% assessed for radial deviation was based on the ROM measurement of 15°. On page 3/37 of the AMA Guides the directions for rating radial and ulnar deviation measurements must be rounded to the nearest 10°. However, Figure 29 on page 3/38 which is used to rate impairment based upon these measurements, uses increments of 5°. This conflict is resolved by looking to the general directions of interpolating, measuring, and rounding off which are found on page 2/9 of the AMA Guides and which provides as follows in relevant part:

In general, an impairment value that falls between those appearing in a table or figure of the *Guides* may be adjusted or interpolated to be proportional to the interval of the table or figure involved, unless the book gives other directions.

Here the AMA Guides do give other directions than applying the values given in Figure 29 on page 3/38. Those directions provide that the measurements be rounded to the nearest 10°. Using the language cited above from page 2/9 of the AMA Guides, these directions control over Figure 29 and should have been applied in calculating the claimant's IR. See Appeals Panel Decision (APD) 022504-s, decided November 12,

2002. Because the designated doctor did not properly apply the AMA Guides in assessing the claimant's IR, we must reverse the decision of the hearing officer adopting the designated doctor's IR of 2%.

In evidence are three other certifications. [Dr. D], the first designated doctor, examined the claimant on June 22, 2010, and certified that the claimant reached MMI on that date with a 4% IR. However, as previously noted the hearing officer's determination (as well as the parties' stipulation) that the claimant reached MMI on August 30, 2010, has become final. The 4% IR assessed by Dr. D is based on a different MMI date.

[Dr. G], a referral doctor acting in place of the treating doctor, examined the claimant on August 1, 2012, and certified that the claimant reached MMI on August 30, 2010, and assessed a 13% IR. Dr. G assessed 8% UE impairment based on loss of ROM of the claimant's right shoulder and 15% UE impairment based on loss of ROM of the claimant's right wrist. Dr. G assessed 2% UE impairment for loss of ROM for radial deviation and 3% UE impairment for loss of ROM for ulnar deviation. The impairment assessed for loss of ROM for ulnar deviation is based on a ROM measurement of 16° which Dr. G rounded to 15°. As previously noted, the AMA Guides provide that for rating radial and ulnar deviation measurements must be rounded to the nearest 10°. Dr. G did not do this and his IR cannot be adopted. APD 022504-s, *supra*.

[Dr. T], a carrier-selected required medical examination doctor, examined the claimant on October 11, 2011, and certified that the claimant reached MMI on August 30, 2010, with a 0% IR. Dr. T stated the claimant "has normal sensation and muscle function of the hands and upper extremities. She has no loss of motion in the hands or wrists from surgery or a work related disease. The shoulder motion is equal bilaterally. She cannot receive an impairment, as there is no loss of function." Although Dr. T states that the shoulder motion is equal bilaterally, the ROM reported for the left and right shoulder are not the same. The ROM measurements for extension of the left and right shoulders differ by 20°. Dr. T based his assessment of 0% IR in part on his conclusion that the shoulder motion is equal bilaterally. However, the measurements contained in his narrative report do not reflect that the shoulder motion is the same for both the left and right. Accordingly, Dr. T's certification of IR cannot be adopted.

REMAND INSTRUCTIONS

There are no certifications of IR that can be adopted. Therefore, we remand the IR issue to the hearing officer for further action consistent with this decision. The hearing officer is to determine if Dr. R is still qualified and available to be the designated doctor. If Dr. R is no longer qualified or available to serve as the designated doctor then

another designated doctor is to be appointed. The hearing officer is to instruct the designated doctor to assess impairment for the claimant's compensable injury as of the date of MMI, August 30, 2010, in accordance with the AMA Guides, which includes round ROM measurements taken for the right wrist flexion, extension, radial deviation and ulnar deviation to the nearest 10°. The parties are to be provided with the hearing officer's letter to the designated doctor and the designated doctor's response and to be allowed an opportunity to present evidence and respond. The hearing officer is then to make a determination on the claimant's IR for the [date of injury], compensable injury as of the MMI date of August 30, 2010.

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 **INDEMNITY INSURANCE COMPANY OF NORTH AMERICA** and the name and address of its registered agent for service of process is

**CT CORPORATION
350 NORTH ST. PAUL STREET
DALLAS, TEXAS 75201.**

Margaret L. Turner
Appeals Judge

CONCUR:

Cristina Beceiro
Appeals Judge

Carisa Space-Beam
Appeals Judge