

APPEAL NO. 132849
FILED FEBRUARY 6, 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 30, 2013, in [City], Texas, with [hearing officer] presiding as hearing officer. The hearing officer resolved the sole disputed issue by deciding that the respondent's (claimant) impairment rating (IR) is 14%. The appellant (carrier) appealed the hearing officer's determination, contending that the 14% IR is contrary to the preponderance of the other medical evidence, fails to properly apply 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), or is otherwise invalid and cannot be adopted. The claimant responded, urging affirmance of the hearing officer's determination.

DECISION

Reversed and remanded.

The parties stipulated that: (1) the claimant sustained a compensable injury on [date of injury]; (2) [Dr. S] is the designated doctor appointed by the Texas Department of Insurance, Division of Workers' Compensation (Division) to determine maximum medical improvement (MMI) and IR; and (3) the date of MMI is February 11, 2013. We note that Dr. S was not appointed to determine the extent of the claimant's injury. It is undisputed, and the carrier maintains in its appeal, that the carrier has accepted as compensable a left shoulder rotator cuff tear and a left wrist sprain/strain.

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.

The hearing officer determined that the claimant's IR is 14% per Dr. S, the designated doctor. Dr. S examined the claimant on March 8, 2013, and in a Report of Medical Evaluation (DWC-69) of that date certified that the claimant reached MMI on February 11, 2013, with a 14% IR. In an attached narrative report, Dr. S stated that the claimant's confirmed compensable diagnoses are as follows: left shoulder SLAP lesion, left shoulder rotator cuff, left shoulder pain, and left wrist sprain/strain. Dr. S then stated that:

Based on this examination as well as other studies and documentation received and reviewed, I have determined with reasonable medical certainty and probability that [the claimant] did in fact receive the above stated injuries and he has reached a level of clinical [MMI]. . . .

Dr. S's 14% IR is based on range of motion (ROM) measurements of the claimant's left shoulder and left wrist.

There is one other DWC-69 in evidence, from [Dr. O], the post-designated doctor required medical examination doctor, dated June 6, 2013. On that same date, Dr. O examined the claimant and certified that he reached MMI on February 11, 2013, with a 5% IR. Dr. O's IR is based on ROM measurements of the claimant's left shoulder. Regarding the claimant's left wrist, Dr. O noted in an attached narrative report that he disagreed with Dr. S's 14% IR because Dr. S included ROM loss at the left wrist in his evaluation. Dr. O explained that the claimant had a previous injury to the left wrist requiring surgery, and it was the surgery that caused the claimant's loss of ROM in the left wrist. Dr. O does not mention a left shoulder SLAP lesion in his report.

As previously mentioned, it is undisputed that the carrier has accepted a left wrist sprain and a left shoulder rotator cuff tear. The carrier contended that it has never accepted a left shoulder SLAP lesion, and the claimant contended that the carrier has never denied a left shoulder SLAP lesion.

The Appeals Panel has held that when raised, an extent-of-injury issue is a threshold issue that must be resolved before MMI and IR can be resolved, and that the resolution of the MMI and IR issues will flow from the resolution of the extent issue. See Appeals Panel Decision (APD) 110854, decided August 15, 2011. See *also* APD 120180, decided April 2, 2012.

In APD 002675, decided December 21, 2000, the sole issue before the hearing officer was IR. There were multiple certifications of MMI/IR in which differing body parts were rated as the compensable injury. There was no prior Division determination of the extent of the compensable injury or agreement by the parties. In that case, the Appeals Panel held that "[w]henver the issue is an IR, by necessity the extent of injury is subsumed in that issue." Further, the Appeals Panel held that "[w]hile a designated doctor can state an opinion whether a certain condition is or is not part of the injury," it is the Division "that determines what the injury is and the extent of the injury, not the doctor." The Appeals Panel reversed the hearing officer's decision on IR and remanded the case for the hearing officer to first determine the extent of injury and then for the designated doctor to be advised what the extent of the injury was and to be requested to rate only the compensable injury as determined by the hearing officer. See *also* APD 101539, decided December 27, 2010, and APD 111610, decided December 9, 2011.

With the issue of IR before her and with the MMI/IR certifications in evidence differing as to the extent of the compensable injury, we reverse the hearing officer's determination that the claimant's IR is 14% and remand the issue of IR for further action consistent with this decision.

There was no stipulation by the parties as to whether the compensable injury extended to a left shoulder SLAP lesion. As previously discussed, whenever the issue is IR and there is a dispute regarding the extent of the injury, the extent issue must be resolved first. Accordingly, we remand the case to the hearing officer to determine whether the compensable injury extends to a left shoulder SLAP lesion.

REMAND INSTRUCTIONS

On remand, the hearing officer is to add the issue of whether the compensable injury extends to a left shoulder SLAP lesion and make a decision regarding the compensability of this condition which is consistent with and is supported by the evidence.

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 claimant's IR for the [date of injury], compensable injury.

After the hearing officer determines whether or not the compensable injury extends to a left shoulder SLAP lesion, the hearing officer is to advise the designated doctor of that determination. The hearing officer is also to advise the designated doctor that the [date of injury], compensable injury extends to a left shoulder rotator cuff tear and a left wrist sprain/strain. The hearing officer is also to advise the designated doctor that the date of MMI in this case is February 11, 2013, as stipulated to by the parties.

The hearing officer is to request the designated doctor to give an opinion on the claimant's IR by rating the entire compensable injury in accordance with the AMA Guides considering the medical record and the certifying examination, as of February 11, 2013, the date of MMI.

The parties are to be provided with the designated doctor's new IR and are to be allowed an opportunity to respond. The hearing officer is then to make a determination on extent of injury and IR 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

**RICHARD J. GERGASKO
6210 EAST HIGHWAY 290
AUSTIN, TEXAS 78723.**

Carisa Space-Beam
Appeals Judge

CONCUR:

Cristina Beceiro
Appeals Judge

Margaret L. Turner
Appeals Judge