

APPEAL NO. 140608
FILED MAY 12, 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 (CCH) was held on August 22, 2013, and concluded on February 20, 2014, 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 a herniated disc impressing the cord at T11-12 and a protrusion at T3-4; (2) the appellant (claimant) reached maximum medical improvement (MMI) on September 20, 2012; and (3) the claimant's impairment rating (IR) is three percent.

The claimant appealed all of the hearing officer's determinations. The claimant argued that the hearing officer's determinations are against the great weight and preponderance of the evidence. The respondent (carrier) responded, urging affirmance of the hearing officer's determinations.

DECISION

Affirmed in part and reversed and remanded in part.

The parties stipulated that the claimant sustained a compensable injury on [date of injury], and the carrier acknowledged at the CCH that it has accepted as compensable a left shoulder SLAP tear, and a thoracic and lumbar strain. The claimant testified that she was injured when preventing a patient weighing approximately 400 pounds from falling to the ground.

EXTENT OF INJURY AND MMI

The hearing officer's determinations that the compensable injury of [date of injury], does not extend to a herniated disc impressing the cord at T11-12 and a protrusion at T3-4, and that the claimant reached MMI on September 20, 2012, are supported by sufficient evidence and are affirmed.

IR

Section 408.125(c) provides that the report of the designated doctor shall have presumptive weight, and the Texas Department of Insurance, Division of Workers' Compensation (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 reached MMI on September 20, 2012, with a three percent IR per [Dr. C], the designated doctor most recently appointed by the Division.

Dr. C initially examined the claimant on January 7, 2013, and certified that the claimant reached MMI on September 20, 2012, with a three percent 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. C placed the claimant in Diagnosis-Related Estimate (DRE) Category I: Complaints or Symptoms for zero percent impairment for the claimant's lumbar spine. We note that Dr. C did not specifically identify the DRE spinal region in which he placed the claimant for the lumbar spine. Dr. C also placed the claimant in DRE Cervicothoracic Category I: Complaints or Symptoms for zero percent impairment for the claimant's thoracic spine. However, we note that page 3/95 of the AMA Guides states that for purposes of the AMA Guides, the cervical region may be considered to represent the Cervicothoracic region, and the thoracic region to represent the Thoracolumbar region. See *also* Appeals Panel Decision (APD) 051306-s, decided August 3, 2005. Dr. C assessed five percent upper extremity (UE) impairment based on range of motion (ROM) measurements taken of the claimant's left shoulder, which he then converted to three percent whole person impairment (WPI).

Dr. C subsequently reexamined the claimant on December 3, 2013, and again certified that the claimant reached MMI on September 20, 2012, with a three percent IR. Dr. C again placed the claimant in DRE Category I: Complaints or Symptoms for zero percent impairment for the claimant's lumbar spine and in DRE Category I: Complaints or Symptoms for zero percent impairment for the claimant's thoracic spine. We note that Dr. C did not identify the specific DRE spinal regions in which he placed the claimant. Finding the same ROM measurements of the claimant's left shoulder as he had found in the previous examination, Dr. C again assessed five percent UE impairment, which he again converted to three percent WPI. We note that both narratives from Dr. C regarding the impairments given for the claimant's left shoulder ROM contain the same errors discussed below.

The directions found on pages 3/42 through 3/44 of the AMA Guides state that the shoulder ROM figures are to be rounded to the nearest 10 degrees. Dr. C found 95

degrees of flexion, which, using Figure 38 on page 3/43 of the AMA Guides, results in either five percent or six percent impairment, depending on how the 95 degrees is rounded. However, Dr. C incorrectly noted 95 degrees of flexion results in two percent impairment. Dr. C found 30 degrees of extension, and correctly found one percent impairment using Figure 38. Dr. C found 100 degrees of abduction, which, using Figure 41 on page 3/44, results in four percent impairment; however, Dr. C incorrectly noted 100 degrees of abduction results in two percent impairment. Dr. C found 20 degrees of adduction, which, using Figure 41 results in one percent impairment; however, Dr. C incorrectly noted 20 degrees of adduction results in zero percent impairment. Dr. C found 70 degrees of external rotation, which Dr. C correctly found results in zero percent impairment using Figure 44 on page 3/45. Finally, Dr. C found 75 degrees of internal rotation, which Dr. C found results zero percent impairment using Figure 44. We note that rounding 75 degrees to the nearest 10 degrees could result in either zero percent impairment or one percent impairment.

The Appeals Panel has previously stated that, where the certifying doctor's report provides the component parts of the rating that are to be combined and the act of combining those numbers is a mathematical correction which does not involve medical judgment or discretion, the Appeals Panel can recalculate the correct IR from the figures provided in the certifying doctor's report and render a new decision as to the correct IR. See APD 121194, decided September 6, 2012; APD 041413, decided July 30, 2004; APD 100111, decided March 22, 2010; and APD 101949, decided February 22, 2011. However, in the case on appeal, Dr. C's three percent IR cannot be corrected. As previously discussed, Dr. C incorrectly found that 95 degrees of flexion resulted in two percent impairment. The directions require shoulder ROM figures to be rounded to the nearest 10 degrees to determine impairment, which requires medical judgment or discretion, so we cannot recalculate the correct IR using Dr. C's figures. Accordingly, we reverse the hearing officer's determination that the claimant's IR is three percent.

As previously discussed, the hearing officer's determination that the claimant reached MMI on September 20, 2012, is supported by sufficient evidence and has been affirmed. There is only one other MMI/IR certification in evidence certifying the claimant reached MMI on September 20, 2012, which was Dr. C's first certification on January 7, 2013. However, because that certification contains the same errors as his subsequent certification, it cannot be adopted. As there is no assignment of IR in evidence that can be adopted, we remand the issue of IR to the hearing officer for further action consistent with this decision.

SUMMARY

We affirm the hearing officer's determination that the compensable injury of [date of injury], does not extend to a herniated disc impressing the cord at T11-12 and a protrusion at T3-4.

We affirm the hearing officer's determination that the claimant reached MMI on September 20, 2012.

We reverse the hearing officer's determination that the claimant's IR is three percent, and we remand the issue of IR to the hearing officer for further action consistent with this decision.

REMAND INSTRUCTIONS

Dr. C is the designated doctor in this case. On remand, the hearing officer is to determine whether Dr. C is still qualified and available to be the designated doctor. If Dr. C 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.

The hearing officer is to advise the designated doctor that the date of MMI in this case is September 20, 2012, and that the compensable injury does not extend to a herniated disc impressing the cord at T11-12 and a protrusion at T3-4 as administratively determined. The hearing officer is also to advise the designated doctor that the compensable injury extends to a left shoulder SLAP tear, and a thoracic and lumbar strain as stated by the carrier at the CCH. The hearing officer is to request the designated doctor to rate the entire compensable injury as of the September 20, 2012, date of MMI, in accordance with the AMA Guides considering the medical record and the certifying examination.

The parties are to be provided with the designated doctor's new MMI/IR certification and are to be allowed an opportunity to respond. The hearing officer is then to make a determination on the 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 **ZURICH AMERICAN 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 78701-3232.**

Carisa Space-Beam
Appeals Judge

CONCUR:

Veronica L. Ruberto
Appeals Judge

Margaret L. Turner
Appeals Judge