

APPEAL NO. 141068
FILED JULY 10, 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 April 3, 2014, in Denton, Texas, with [hearing officer] presiding as hearing officer. The hearing officer resolved the disputed issues by deciding that: (1) the appellant (claimant) reached maximum medical improvement (MMI) on September 14, 2012; (2) the claimant's impairment rating (IR) is 14%; and (3) the claimant had disability during the period beginning September 15, 2012, and continuing through October 19, 2013. The claimant appealed, disputing the hearing officer's determinations of MMI and IR. The claimant contends that the hearing officer's determinations of MMI and IR are so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. The respondent (carrier) responded, urging affirmance of the disputed MMI and IR determinations.

The hearing officer's determination that the claimant had disability during the period beginning September 15, 2012, and continuing through October 19, 2013, 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 the claimant sustained a compensable injury on [date of injury]; the Texas Department of Insurance, Division of Workers' Compensation (Division) appointed (Dr. S), as the designated doctor on the issues of MMI and IR; and the statutory date of MMI is October 19, 2013.

MMI

The hearing officer's determination that the claimant's date of MMI is September 14, 2012, 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 designated doctor, Dr. S, examined the claimant on May 14, 2013, certified that the claimant reached MMI on September 14, 2012, and assessed a 14% 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. S assessed for the right wrist a 10% upper extremity (UE) impairment based on loss of range of motion (ROM), and for the right elbow an 6% UE impairment based on loss of ROM and an 8% UE impairment based on an ulnar head resection under Table 27, page 3/61 of the AMA Guides for a combined value of 14% UE. Dr. S combined the right wrist 10% UE with the right elbow 14% UE for a combined total of 23% UE of the AMA Guides which he converted to 14% whole person impairment using Table 3, page 3/20.

Dr. S included the ROM measurements for the right elbow and right wrist in his narrative report dated June 3, 2013. Dr. S reported the following ROM measurements for the right elbow: flexion 140 degrees; extension 20 degrees; pronation 6 degrees; and supination 10 degrees. Based on the right elbow ROM measurements that are noted in his narrative report, Dr. S incorrectly calculated a 6% UE impairment for the right elbow. Dr. S did not explain how he assessed a 6% UE impairment based on the right elbow loss of ROM measurements.

On page 3/39 of the AMA Guides the directions for rating elbow flexion and extension state that measurements must be rounded to the nearest 10 degrees. Using Figure 32, page 3/40, 140 degrees of flexion is 0% UE impairment, and 20 degrees of extension is 2% UE impairment.

On page 3/40 of the AMA Guides the directions for rating elbow pronation and supination state that measurements must be rounded to the nearest 10 degrees. Using Figure 35, page 3/41, 6 degrees of pronation is either rounded down to 0 degrees for a 12% UE impairment or rounded up to 10 degrees for an 8% UE impairment, and 10 degrees of supination is 3% UE impairment. The flexion, extension, pronation and supination impairments are added to obtain the percent of UE impairment based on loss of ROM, which results in either a 13% UE, by rounding down to 0 degrees for pronation or 17% UE by rounding up to 10 degrees for pronation. Dr. S incorrectly assessed a 6% UE impairment for loss of ROM of the right elbow based on his ROM measurements which result in either a 13% or 17% UE for loss of ROM of the right elbow.

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 Appeals Panel Decision (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. S's 6% UE impairment cannot be corrected. Rounding the measurements for pronation of the right elbow to derive the correct UE impairment requires medical judgment or discretion, so we cannot recalculate the correct IR using Dr. S's measurements. Accordingly, we reverse the hearing officer's determination that the claimant IR is 14%.

There are four certifications of MMI/IR in evidence. (Dr. H), the first designated doctor, examined the claimant on October 10, 2012, and certified that the claimant reached MMI on August 28, 2012, with a 3% IR. Dr. H's certification cannot be adopted because the IR is based on an MMI date different from the MMI date the hearing officer determined, and we have affirmed to be September 14, 2012.

(Dr. T), a referral doctor, examined the claimant on October 16, 2012, and certified that the claimant reached MMI on October 16, 2012, with a 15% IR. Dr. T's MMI/IR certification cannot be adopted because the IR is based on an MMI date different from the MMI date the hearing officer determined, and we have affirmed to be September 14, 2012.

(Dr. D), the post-designated doctor required medical examination doctor, examined the claimant on October 28, 2013, and certified that the claimant reached MMI on October 23, 2012, with an 11% IR. Dr. D's MMI/IR certification cannot be adopted because the IR is based on an MMI different from the MMI date the hearing officer determined, and we have affirmed to be September 14, 2012.

(Dr. I), a referral doctor, examined the claimant on January 30, 2014, and certified that the claimant reached MMI on January 30, 2014, with an 18% IR. Dr. I's MMI/IR certification cannot be adopted because the IR is based on an MMI date different from the MMI date the hearing officer determined, and we have affirmed to be September 14, 2012.

In this case, there are no other certifications with an MMI date of September 14, 2012, in evidence. Accordingly, we remand the IR issue to the hearing officer for further action consistent with this decision.

SUMMARY

We affirm the hearing officer's determination that the claimant's date of MMI is September 14, 2012.

We reverse the hearing officer's determination that the IR is 6% and remand the IR issue to the hearing officer for further action consistent with this decision.

REMAND INSTRUCTIONS

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.

The hearing officer is to request that the designated doctor rate the entire compensable injury based on the claimant's condition as of the date of MMI, September 14, 2012. The designated doctor is to round ROM figures as required by the AMA Guides.

The parties are to be provided with the correspondence to the designated doctor, the designated doctor's response, 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 78701-3218.**

Veronica L. Ruberto
Appeals Judge

CONCUR:

Carisa Space-Beam
Appeals Judge

Margaret L. Turner
Appeals Judge