

APPEAL NO. 141367  
FILED AUGUST 28, 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 May 19, 2014, in San Antonio, Texas, with [hearing officer] presiding as hearing officer. The hearing officer resolved the disputed issues by deciding that the appellant (claimant) reached maximum medical improvement (MMI) on April 9, 2013, with a 12% impairment rating (IR). The claimant appealed the hearing officer's determinations on a sufficiency of the evidence point of error. The appeal file does not contain a response from the respondent (carrier) to the claimant's appeal.

DECISION

Reversed and remanded.

The parties stipulated that the claimant sustained a compensable injury in the form of a compression fracture of L1 and L4, a head contusion, and a right wrist sprain on [date of injury]. The claimant testified he injured his right wrist, low back, and head when he slipped and fell approximately four to five feet to the ground.

The hearing officer determined that the claimant reached MMI on April 9, 2013, with a 12% IR as certified by (Dr. P), the designated doctor appointed by the Texas Department of Insurance, Division of Workers' Compensation (Division) to determine MMI and IR. However, Dr. P's MMI/IR certification contains numerous errors, as explained below.

Dr. P examined the claimant on June 18, 2013, and noted in his narrative report diagnoses of lumbar spine compression fractures at L1 and L4, a right wrist sprain, and a head contusion. As mentioned above, the parties stipulated that the claimant sustained a compensable injury in the form of compression fractures at L1 and L4, a head contusion, and a right wrist sprain. Although Dr. P mentioned a diagnosis of a head contusion in his narrative report, Dr. P did not otherwise discuss or rate a head contusion. Dr. P failed to consider and rate the entire compensable injury. The hearing officer erred in adopting Dr. P's MMI/IR certification.

Dr. P opined that the claimant reached MMI on April 9, 2013. Dr. P explained that the claimant had completed 16 sessions of physical therapy as of early April, and that the claimant's condition had become static. However, Dr. P stated that "[n]o physical therapy notes are available for review."

28 TEX. ADMIN. CODE § 127.10(b) (Rule 127.10(b)) provides that before examining an injured employee, the designated doctor shall review the injured employee's medical records, including any analysis of the injured employee's medical condition, functional abilities and return to work opportunities provided by the insurance carrier and treating doctor in accordance with subsection (a) of this section, and any materials submitted to the doctor by the Division. Rule 127.10(b) further provides that the designated doctor shall also review the injured employee's medical condition and history as provided by the injured employee, any medical records provided by the injured employee, and shall perform a complete physical examination of the injured employee. The designated doctor shall give the medical records reviewed the weight the designated doctor determines to be appropriate.

The evidence established that Dr. P did not have all of the claimant's necessary medical records for his examination before making a determination on MMI and IR, the issues Dr. P was appointed to determine. See Appeals Panel Decision (APD) 132258, decided November 20, 2013. Under the facts of this case, this is another reason why Dr. P's MMI/IR certification should not have been adopted.

Dr. P assigned 12% whole person impairment (WPI). 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. P placed the claimant in Diagnosis-Related Estimate (DRE) Lumbosacral Category III for 10% WPI of the claimant's lumbar spine for 25-50% compression one vertebral body.

Dr. P also assigned 2% impairment based on range of motion (ROM) measurements taken of the claimant's right wrist. However, Dr. P improperly utilized Figure 29 on page 3/38 of the AMA Guides. Dr. P measured 25° of ulnar deviation of the wrist and assessed 1% impairment; Dr. P failed to round the measurements of ulnar deviation of the wrist to the nearest 10° to determine the upper extremity impairment. Figure 29 on page 3/38, which is used to rate impairment based upon these measurements, uses increments of 5°, whereas the general directions on page 3/37 state to round the measurements of ulnar deviation to the nearest 10°. 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 provide 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 are on page 3/37 and 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 APD 022504-s, decided November 12, 2002; APD 111384, decided November 23, 2011. See *also* APD 131541, decided August 29, 2013.

Given that Dr. P's MMI/IR certification contains the errors explained above, and because rounding ulnar deviation to derive the correct upper extremity impairment requires medical judgment or discretion, we cannot recalculate the correct IR using Dr. P's figures.

For all of the above reasons, we reverse the hearing officer's determination that the claimant reached MMI on April 9, 2013, with a 12% IR.

There is one other MMI/IR certification in evidence, which is from (Dr. C), the treating doctor. Dr. C examined the claimant on December 23, 2013, and certified that the claimant reached MMI on December 23, 2013, with a 22% IR. Dr. C assigned 8% impairment based on ROM measurements taken of the claimant's right wrist. Dr. C also placed the claimant in DRE Thoracolumbar Category III for 15%. Dr. C testified at the CCH that she placed the claimant in DRE Thoracolumbar Category III based on 25-50% compression fracture at one vertebral body. Dr. C also testified that the DRE Thoracolumbar region is the proper region to determine the claimant's lumbar compression fractures. 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. In APD 051306-s, decided August 3, 2005, the Appeals Panel applied this language and held as follows:

Applying the language from the bottom of page 3/95 of the AMA Guides, if the injury is primarily to the cervical spine the rating would be under part 3.3h, page 3/103 cervicothoracic spine impairment, if the injury was primarily to the thoracic area of the spine the rating would be under part 3.3i page 3/106 for thoracolumbar spine impairment and if the injury is primarily to the lumbar portion of the spine, the impairment would be under part 3.3g page 3/101 lumbosacral spine impairment.

Pursuant to part 3.3f, page 3/101, paragraph 8, if more than one spine region is impaired, the doctor is to determine the impairment of the other regions and combine the regional impairments using the Combined Values Chart to express the patients total spine impairment.

Furthermore, DRE Thoracolumbar Category III provides a 15% IR, whereas DRE Lumbosacral Category III provides a 10% IR. Dr. C failed to place the claimant in the correct spinal region for the lumbar compression fractures; therefore, her MMI/IR certification cannot be adopted.

Because there is no MMI/IR certification in evidence that can be adopted, we remand the issues of MMI and IR to the hearing officer for further action consistent with this decision.

### **REMAND INSTRUCTIONS**

Dr. P is the designated doctor in this case. On remand, the hearing officer is to determine whether Dr. P is still qualified and available to be the designated doctor. If Dr. P 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 MMI and IR for the [date of injury], compensable injury.

On remand, the hearing officer should ensure that the treating doctor and the carrier shall send to the designated doctor all of the claimant's medical records that are in their possession relating to the issues of MMI and IR.

The hearing officer is to advise the designated doctor that the compensable injury extends to compression fractures at L1 and L4, a head contusion, and a right wrist sprain. The hearing officer is to request the designated doctor to rate the entire compensable injury 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 MMI 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 **LIBERTY INSURANCE CORPORATION** and the name and address of its registered agent for service of process is

**CORPORATION SERVICES COMPANY  
211 EAST 7TH STREET, SUITE 620  
AUSTIN, TEXAS 78701.**

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Carisa Space-Beam  
Appeals Judge

CONCUR:

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Veronica L. Ruberto  
Appeals Judge

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Margaret L. Turner  
Appeals Judge