

APPEAL NO. 150283
FILED APRIL 10, 2015

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 November 24, 2014, in Houston, Texas, with [hearing officer] presiding as hearing officer. The hearing officer resolved the disputed issues by deciding that: (1) the respondent (claimant) reached maximum medical improvement (MMI) on October 16, 2013, and (2) the claimant's impairment rating (IR) is 10%. The appellant (carrier) appealed the hearing officer's MMI and IR determinations, arguing that the designated doctor assigned a 10% IR without documenting significant signs of radiculopathy as required by 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). The appeal file does not contain a response from the claimant.

DECISION

Affirmed in part, reversed and remanded in part.

The claimant testified that he was rear-ended in a motor vehicle accident on [Date of Injury]. The parties stipulated that the claimant sustained a compensable injury on [Date of Injury]. The parties also stipulated that (Dr. W) was the designated doctor for MMI and IR. Dr. W examined the claimant on April 6, 2012, and certified that the claimant reached MMI on that same date with a 5% IR for the lumbar spine. In evidence is a decision and order issued December 19, 2013, in which the hearing officer determined that the compensable injury of [Date of Injury], extends to lumbar disc herniation at L5-S1. The medical records in evidence indicate that the claimant had lumbar surgery at L5-S1 on May 30, 2014. Dr. W re-examined the claimant on June 27, 2014, and certified that the claimant reached MMI statutorily on October 16, 2013, with a 10% IR for the lumbar strain/sprain and disc herniation at L5-S1. It is undisputed that the carrier accepted as the compensable injury a lumbar strain/sprain and it was administratively determined that the compensable injury extends to a disc herniation at L5-S1.

MMI

The hearing officer's determination that the claimant reached MMI on October 16, 2013, 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 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 adopted Dr. W's certification that the claimant reached MMI on October 16, 2013, with a 10% IR, using the AMA Guides. Dr. W examined the claimant on June 27, 2014, and he placed the claimant in Diagnosis-Related Estimate (DRE) Lumbosacral Category III: Radiculopathy for 10% impairment. We note, as pointed out by the carrier in its appeal, that Dr. W did not document any significant signs of radiculopathy to rate radiculopathy under the AMA Guides. See Appeals Panel Decision (APD) 072220-s, decided February 5, 2008, in which the Appeals Panel held that to receive a rating for radiculopathy the claimant must have significant signs of radiculopathy, such as loss of relevant reflex(es), or measured unilateral atrophy of 2 cm or more above or below the knee, compared to measurements on the contralateral side at the same location.

In his narrative report dated June 27, 2014, Dr. W states that the claimant had signs and symptoms of radiculopathy at statutory MMI and "there were objective signs of mild neurologic impairment" citing to the AMA Guides on page 3/102. Also, Dr. W states that he assessed a 10% IR based on physical findings of (Dr. E) near the statutory date of MMI. In evidence is a medical report from Dr. E dated September 11, 2013, that states that the claimant still has back pain with radiating pain down his legs, right greater than left, that the examination continues to show weakness in the right extensor hallucis longus, and that the claimant has decreased sensation over the dorsum of the right foot. Neither Dr. E's medical report dated September 11, 2013, nor Dr. W's narrative report dated June 27, 2014, show clinical findings to support a rating for radiculopathy. Dr. W's IR certification is not adoptable because the clinical findings do not support a DRE Lumbosacral Category III: Radiculopathy. Accordingly, we reverse the hearing officer's determination that the claimant's IR is 10% IR.

There are three other certifications of MMI/IR in evidence. (Dr. KM), a referral doctor, examined the claimant on March 21, 2012, and certified that the claimant

reached MMI on that same date with a 5% IR. Dr. KM'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 October 16, 2013. Also, Dr. KM only rated the claimant's compensable lumbar strain/sprain. Dr. KM's certification does not rate the entire compensable injury which includes a herniated disc at L5-S1.

Dr. W, the designated doctor, initially examined the claimant on April 6, 2012, and certified that the claimant reached MMI on that same date, with a 5% IR. Dr. W'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 October 16, 2013. Furthermore, Dr. W only rated the claimant's compensable lumbar strain/sprain. Dr. W's certification does not rate the entire compensable injury which includes a herniated disc at L5-S1.

(Dr. WA), the post-designated doctor required medical examination doctor, examined the claimant on September 9, 2014, and certified that the claimant reached MMI on July 27, 2012, with a 5% IR. Dr. WA's certification cannot be adopted because the IR is based on a MMI date different from the MMI date the hearing officer determined, and we have affirmed, to be October 16, 2013.

In this case, there are no other certifications which can be adopted. 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 October 16, 2013.

We reverse the hearing officer's determination that the IR is 10% and remand the IR issue to the hearing officer for further action consistent with this decision.

REMAND INSTRUCTIONS

Dr. W is the designated doctor in this case. On remand, the hearing officer is to determine whether Dr. W is still qualified and available to be the designated doctor. If Dr. W 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 compensable injury of [Date of Injury].

The hearing officer is to advise the designated doctor that the compensable injury of [Date of Injury], includes a lumbar strain (as accepted) and a disc herniation at L5-S1 (as administratively determined).

The hearing officer is to request that the designated doctor rate the entire compensable injury based on the claimant's condition as of the MMI date of October 16, 2013, considering the claimant's medical record and the certifying examination and in accordance with Rule 130.1(c)(3). The hearing officer is to advise the designated doctor that Rule 130.1(c)(3) provides that the doctor assigning the IR shall: (A) identify objective clinical or laboratory findings of permanent impairment for the current compensable injury; (B) document specific laboratory or clinical findings of an impairment; (C) analyze specific clinical and laboratory findings of an impairment; and (D) compare the results of the analysis with the impairment criteria and provide the following: (i) a description and explanation of specific clinical findings related to each impairment, including 0% IRs; and (ii) a description of how the findings relate to and compare with the criteria described in the applicable chapter of the AMA Guides.

The hearing officer is to advise the designated doctor that a rating for DRE Lumbosacral Category III: Radiculopathy requires significant signs of radiculopathy such as loss of relevant reflex(es), or measured unilateral atrophy of 2 cm or more above or below the knee, compared to measurements on the contralateral side at the same location.

The parties are to be provided with the hearing officer's letter to the designated doctor and the designated doctor's response. The parties are to be allowed an opportunity to respond. The hearing officer is then to make a determination on IR supported by the evidence and 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 **AMERICAN ZURICH 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

