

APPEAL NO. 151803  
FILED NOVEMBER 4, 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 August 3, 2015, in Houston, 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 July 10, 2014; and (2) the claimant's impairment rating (IR) is 14%.

The claimant appealed the hearing officer's determinations, contending that the hearing officer erred in adopting the MMI/IR certification from (Dr. O), the post-designated doctor required medical examination (RME) doctor. The respondent (carrier) responded, urging affirmance.

DECISION

Reversed and rendered.

The parties stipulated that the claimant sustained a compensable injury on (date of injury), in the form of a right shoulder contusion, right shoulder rotator cuff tear, lumbar strain/sprain, and lumbar radiculopathy at L5-S1. The records show that the claimant injured his low back and right shoulder while lifting heavy bolts on the date of injury.

Section 401.011(30)(A) defines MMI as "the earliest date after which, based on reasonable medical probability, further material recovery from or lasting improvement to an injury can no longer reasonably be anticipated." Section 408.1225(c) provides that the report of the designated doctor has presumptive weight, and the Texas Department of Insurance, Division of Workers' Compensation (Division) shall base its determination of whether the employee has reached MMI on the report of the designated doctor unless the preponderance of the other medical evidence is to the contrary.

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.

(Dr. B) is the designated doctor most recently appointed by the Division to determine MMI and IR. Dr. B examined the claimant on October 2, 2014, and certified that the claimant reached MMI on July 1, 2014, with a 15% 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. B noted in his narrative report that July 1, 2014, was the claimant's last office visit with his treating doctor, and that work conditioning had been denied. Dr. B placed the claimant in Diagnosis-Related Estimate (DRE) Lumbosacral Category II: Minor Impairment for 5% impairment for the claimant's lumbar spine. Dr. B noted in his report that he was using the right shoulder range of motion (ROM) measurements taken on July 16, 2014, by (Dr. KM), the first designated doctor appointed to determine MMI and IR, in assigning impairment for the claimant's right shoulder.

Dr. KM noted in his narrative report and worksheet the following ROM measurements and impairments listed in Figures 38, 41, and 44 on pages 3/43, 3/44, and 3/45 of the AMA Guides: 140 degrees flexion for 3% impairment; 70 degrees extension for 0% impairment; 40 degrees adduction for 0% impairment; 120 degrees abduction for 3% impairment; 70 degrees of internal rotation for 1% impairment; and 70 degrees of external rotation for 0% impairment, for a total upper extremity (UE) impairment of 7%.

Dr. B correctly noted Dr. KM's measurements of 140 degrees flexion for 3% impairment, 70 degrees extension for 0% impairment, 40 degrees adduction for 0% impairment, and 120 degrees abduction for 3% impairment. Although Dr. B did not specifically mention 70 degrees of internal rotation, which we note results in 1% impairment as provided by Figure 44, or 70 degrees of external rotation, which we note results in 0% impairment as provided by Figure 44, Dr. B assessed an UE impairment of 7%, based on the ROM measurements taken by Dr. KM on July 16, 2014.

Dr. B also assessed a 10% impairment for a distal clavicle resection under Table 27 on page 3/61 of the AMA Guides. Dr. B combined the 7% UE impairment with 10% UE impairment for the distal clavicle resection for a 16% total UE impairment. Using Table 3 on page 3/20, Dr. B converted the 16% UE impairment to 10% whole person impairment (WPI). Dr. B then combined the 10% WPI for the claimant's right shoulder with 5% WPI for the claimant's lumbar spine, which results in 15% WPI.

The hearing officer found that the preponderance of the medical evidence is contrary to Dr. B's MMI/IR certification. The hearing officer noted in the Discussion portion of her decision that "[Dr. B] incorrectly added 3% for flexion with a 3% for abduction, and came up with a 7% [WPI] instead of a 6%." The hearing officer further noted that Dr. B "combined a 10% [WPI] for the distal clavicle with a 7% [WPI] and came up with 16% [UE] impairment; however, the UE impairment should have been 15% instead." The hearing officer then stated that Dr. B's MMI/IR certification cannot be adopted because his impairment evaluation was not performed in accordance with the AMA Guides.

Although Dr. B did not specifically state in his narrative report that he assigned a 1% impairment for 70 degrees of internal rotation, Dr. B clearly included this impairment in his UE impairment: 3% impairment for flexion + 0% impairment for extension + 0% impairment for adduction + 3% impairment for abduction + 1% impairment for internal rotation + 0% impairment for external rotation = 7% UE impairment. As discussed above these are the ROM measurements and impairments contained in Dr. KM's narrative report and worksheet, which Dr. B used in making his IR determination. Dr. B correctly combined the 7% UE impairment with 10% UE impairment for the distal clavicle resection for a 16% total UE impairment, then correctly converted the 16% UE impairment to 10% WPI under Table 3 on page 3/20, and then correctly combined the 10% WPI for the claimant's right shoulder with 5% WPI for the claimant's lumbar spine, for a total IR of 15%. Dr. B's IR was performed in accordance with the AMA Guides, and the hearing officer has misread his report. Accordingly, we reverse the hearing officer's Finding of Fact that the preponderance of the medical evidence is contrary to Dr. B's MMI/IR certification.

The hearing officer adopted the MMI/IR certification from Dr. O, the post-designated doctor RME doctor. Dr. O examined the claimant on February 16, 2015, and certified that the claimant reached MMI on July 10, 2014, with a 14% IR. Dr. O stated in his narrative report that ". . . [July 10, 2014], . . . was the last office visit with the treating doctor and noted the [claimant] would be referred for an [IR]. In my opinion, [Dr. B] correctly rated the clinical MMI date as of [July 10, 2014]." However, as noted above Dr. B opined the claimant reached MMI on July 1, 2014, because that was the claimant's last office visit with his treating doctor, and that work conditioning had been denied. Dr. O agreed with Dr. B's MMI date; however, he incorrectly recorded Dr. B's July 1, 2014, MMI date as July 10, 2014. We note Dr. O's summary of records does not contain a reference to July 10, 2014. There is no Report of Medical Evaluation (DWC-69) from Dr. O in evidence certifying an MMI date of July 1, 2014. Accordingly, we reverse the hearing officer's determination that the claimant reached MMI on July 10, 2014.

Dr. O stated in his narrative report that he agreed with Dr. B's use of Dr. KM's right shoulder ROM measurements, and also stated that Dr. B properly found 3% impairment for 140 degrees of flexion and 3% impairment for abduction. However, Dr. O stated that Dr. B erred in adding 3% impairment for flexion and 3% impairment for abduction to result in 7% UE impairment. Dr. O noted that "[i]f you add those two together, you get 6% instead of 7%." Dr. O further stated that:

When you combine the 10% with the 6%, you get 15% of the [UE], not the 16% as [Dr. B] recorded. The 15% of the [UE] is 9% of the whole person, and not 10%. This is a simple addition error made by [Dr. B] in this case. Finally, combining the 9% for the shoulder with the 5% for the low back [under DRE Lumbosacral Category II: Minor Impairment] [results] in a 14% [WPI].

However, as discussed above, Dr. B did not make an error in his 15% WPI assignment. Although he did not specifically state in his narrative report that he assigned a 1% impairment for 70 degrees of internal rotation, Dr. B clearly included this impairment in his 7% UE impairment. Dr. O stated he used Dr. KM's ROM measurements in assessing his IR. However, Dr. O failed to include the 1% impairment for 70 degrees of internal rotation that was contained in Dr. KM's narrative report and accounted for in Dr. B's 15% IR. Dr. O's 14% IR is not in accordance with the AMA Guides. Accordingly, we reverse the hearing officer's determination that the claimant's IR is 14%.

There are two other MMI/IR certifications in evidence. The first is from Dr. KM, the first designated doctor. Dr. KM examined the claimant on July 16, 2014, and certified that the claimant reached MMI on June 23, 2014, with a 10% IR. Dr. KM noted the compensable injury consisted of the following diagnoses: a lumbar sprain/strain, lumbar radiculitis, a right shoulder contusion, and a right shoulder rotator cuff tear. The parties in this case stipulated that the compensable injury is a right shoulder contusion, right shoulder rotator cuff tear, lumbar strain/sprain, and lumbar radiculopathy at L5-S1. Dr. KM considered and rated lumbar radiculitis, a condition that has not been determined to be part of the compensable injury. Accordingly, Dr. KM's MMI/IR certification cannot be adopted.

The remaining MMI/IR certification in evidence is from (Dr. C), a referral doctor acting in place of the treating doctor. Dr. C examined the claimant on April 15, 2015, and in a DWC-69 dated April 16, 2015, Dr. C certified that the claimant reached statutory MMI on "[September 5, 2014]," with a 15% IR. However, in her narrative report Dr. C opined that the claimant reached "[s]tatutory [MMI] on [September 15,

2014].” Dr. C does not state in her narrative report that she opined the claimant reached statutory MMI on September 5, 2014. We note that the parties did not stipulate or discuss the date of statutory MMI at the CCH. There is no DWC-69 in evidence from Dr. C certifying that the claimant reached MMI on September 15, 2014. There is an internal inconsistency between the MMI date Dr. C certified in her narrative report and the MMI date Dr. C certified on the DWC-69. Accordingly, Dr. C’s MMI/IR certification cannot be adopted. See Appeals Panel Decision (APD) 141281, decided August 7, 2014.

We note that Dr. C stated in her narrative report that she placed the claimant in DRE Lumbosacral Category II: Minor Impairment, but she assessed 10% impairment for the claimant’s lumbar spine. The AMA Guides provide on page 3/102 that DRE Lumbosacral Category II: Minor Impairment results in 5% WPI, not 10% WPI as stated by Dr. C. Page 3/102 also provides that DRE Lumbosacral Category III: Radiculopathy results in 10% WPI, and that an injured employee is placed in that category when he or she “has significant signs of radiculopathy, such as loss of relevant reflex(es), or measured unilateral atrophy of greater than 2 cm above or below the knee. . . .” Dr. C noted in her narrative report that the claimant had a loss of reflex in the patella, and 2.0 cm of atrophy in the left thigh. Based on her examination findings, it appears Dr. C intended to place the claimant in DRE Lumbosacral Category III: Radiculopathy rather than DRE Lumbosacral Category II: Minor Impairment.

We also note that Dr. C assessed 9% UE impairment based on ROM of the claimant’s right shoulder, which converts to 5% WPI using Table 3 on page 3/20 of the AMA Guides. Dr. C combined 5% WPI for the claimant’s right shoulder with 10% WPI for the claimant’s lumbar spine for a total IR of 15%. We note that Dr. C did not include a 10% IR for a distal clavicle resection under Table 27 on page 3/61. It was undisputed by the parties that the claimant underwent a distal clavicle resection in January of 2014 for his compensable injury. The Appeals Panel has previously held that impairment for a distal clavicle resection that was received as treatment for the compensable injury results in 10% UE impairment under Table 27 of the AMA Guides, which is then combined with ROM impairment, if any, as provided by the AMA Guides. The Appeals Panel also noted that the manner of assessing loss of ROM, including but not limited to whether or not loss of ROM should be invalidated or the comparison of ROM of a contralateral joint, remains within the discretion of the certifying doctor. See APD 151158-s, decided August 4, 2015. Dr. C failed to rate the distal clavicle resection, which the claimant received as treatment for the compensable injury.

The hearing officer in this case misread the MMI/IR certification from Dr. B, the most recently-appointed designated doctor who is entitled to presumptive weight. Dr. B’s MMI/IR certification was performed in accordance with the AMA Guides, and there

is no other MMI/IR certification in evidence that can be adopted. Accordingly, we render a new decision that the claimant reached MMI on July 1, 2014, with a 15% IR, as certified by Dr. B.

The true corporate name of the insurance carrier is **INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA** 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.**

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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