

APPEAL NO. 161123
FILED AUGUST 3, 2016

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 May 10, 2016, in Lufkin, 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 August 21, 2015, with an impairment rating (IR) of 9% as determined by (Dr. F), the post-designated doctor required medical examination doctor.

The claimant appealed the hearing officer's determinations arguing that Dr. F's certification of MMI and assignment of IR was invalid and could not be adopted because he performed no range of motion (ROM) testing. The claimant further requested that the Appeals Panel recalculate his IR using the ROM measurements listed in the report of (Dr. D), the designated doctor appointed by the Texas Department of Insurance, Division of Workers' Compensation (Division). The respondent (carrier) responded, urging affirmance.

DECISION

Affirmed in part and reversed and remanded in part.

The parties stipulated that the carrier has accepted as compensable a right arm biceps tendon tear and right rotator cuff tear. The claimant was injured on (date of injury), while carrying a large piece of wood with a co-worker when the co-worker dropped one end of the load causing the injuries accepted by the carrier. The claimant has undergone surgical repair, a right shoulder arthroscopic rotator cuff repair and open biceps tenodesis.

MMI

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 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.

Dr. D examined the claimant on October 27, 2015, and certified that he had reached MMI on August 21, 2015, the date the claimant had been released by his

treating doctor after receiving treatment recommended by the Official Disability Guidelines-Treatment in Workers' Compensation published by Work Loss Data Institute (ODG). Dr. F examined the claimant on January 19, 2016, and indicated his agreement with Dr. D that the claimant attained MMI on August 21, 2015.

The hearing officer's determination that the claimant reached MMI on August 21, 2015, 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 hearing officer found that the preponderance of the other medical evidence in the case was contrary to Dr. D's assigned IR of 23% primarily because the ROM measurements recorded by Dr. D during his examination on October 27, 2015, were significantly different and more restricted than those obtained by the treating doctor, Dr. Jurist, (Dr. J) on August 21, 2015, and those obtained by Dr. F on January 19, 2016. The hearing officer further noted that the ROM figures recorded by Dr. J and Dr. F were very similar and concluded that the IR assigned by Dr. D fails to credibly reflect the claimant's right upper extremity (UE) impairment. The hearing officer further noted that Dr. D incorrectly utilized Figure 44 of 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) when he assigned a 4% UE impairment for right shoulder external rotation of 20° when such measurement properly yields a 1% UE impairment under Figure 44 of the AMA Guides. The hearing officer's finding that preponderance of the other medical evidence is contrary to the IR assigned by Dr. D is supported by sufficient evidence.

Dr. F assigned a whole person IR of 9% derived from an UE impairment of 15% comprised of 11% impairment for loss of ROM of the right shoulder together with 4% impairment for loss of ROM of the right elbow. In his narrative report, Dr. F indicated that, upon examination, the claimant had right shoulder extension of 40°; however, on the worksheets attached to his report, Dr. F indicated the claimant's right shoulder extension was 50°. Dr. F's calculation of 11% loss of ROM of the right shoulder is

obtained by using the 50° of extension which, pursuant to Figure 38 of the AMA Guides, yields a 0% UE impairment. An extension of 40°, on the other hand, yields a 1% UE impairment which, when combined with Dr. F's other ROM measurements would yield a total UE impairment of 16% which converts to a whole person impairment of 10% rather than the 9% assigned by Dr. F.

Because there is an internal inconsistency between the measurements recorded by Dr. F in his narrative report and those recorded in his worksheets and because the measurements noted in the narrative report yield a different IR than that entered on Dr. F's Report of Medical Evaluation (DWC-69), his assignment of IR is not adoptable. Accordingly, we reverse the hearing officer's determination that the IR is 9%.

There is no other certification of MMI and assignment of IR in evidence. Since 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 claimant reached MMI on August 21, 2015.

We reverse the hearing officer's determination that the claimant's IR is 9% and remand the issue of IR to the hearing officer.

REMAND INSTRUCTIONS

Dr. D is the designated doctor in this case. On remand, the hearing officer is to determine whether Dr. D is still qualified and available to be the designated doctor. If Dr. D is no longer qualified or is not 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 as of the August 21, 2015, date of MMI.

The hearing officer is to instruct the designated doctor that the date of MMI is August 21, 2015, and request that the designated doctor examine the claimant and assign an IR as of the date of MMI in accordance with Rule 130.1(c)(3) and the AMA Guides.

The parties are to be provided with the designated doctor's new IR certification and are to be allowed an opportunity to respond. The hearing officer is then to make a determination on IR consistent with the evidence and 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 Appeals Panel Decision 060721, decided June 12, 2006.

The true corporate name of the insurance carrier is **TEXAS MUTUAL INSURANCE COMPANY** and the name and address of its registered agent for service of process is

**RICHARD J. GERGASKO, PRESIDENT
6210 HIGHWAY 290 EAST
AUSTIN, TEXAS 78723.**

K. Eugene Kraft
Appeals Judge

CONCUR:

Carisa Space-Beam
Appeals Judge

Margaret L. Turner
Appeals Judge