APPEAL NO. 130164
FILED FEBRUARY 28, 2013

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 December 11, 2012, in [City], Texas, with [hearing officer] presiding as hearing officer. With regard to the two issues before her, the hearing officer determined that the respondent (claimant) reached maximum medical improvement (MMI) on June 28, 2012, and that the claimant's impairment rating (IR) is seven percent.

The appellant (carrier) appealed, contending that the certification of MMI and IR adopted by the hearing officer does not rate the entire compensable injury. The claimant responded, urging affirmance.

DECISION

Reversed and rendered.

The evidence establishes that the claimant was a bus driver and was sleeping in the sleeping compartment of the bus that he was riding in when the bus was involved in a motor vehicle accident. The claimant testified that he sustained injuries to his neck, back, and left shoulder. The parties stipulated that: (1) the claimant sustained a compensable injury on [date of injury]; (2) the Texas Department of Insurance, Division of Workers' Compensation (Division)-selected designated doctor, [Dr. L] certified that the claimant reached MMI on June 18, 2012, with a zero percent IR; and (3) the treating physician certified that the claimant reached MMI on June 28, 2012, with a seven percent IR. After the accident the claimant began treating with [Dr. T].

The claimant had left shoulder rotator cuff repair surgery on March 1, 2012, by [Dr. H]. A functional capacity examination (FCE) was performed by Dr. T on May 24, 2012. That FCE indicated compliance by the claimant during the evaluation. After the designated doctor examination, to be discussed subsequently, another FCE was performed on July 2, 2012, by another doctor who commented "submaximal effort with poor effort noted during testing. If maximum effort were given [the claimant] would be capable of a greater degree of functioning."

The Request for Designated Doctor Examination (DWC-32) lists the injury accepted by the carrier as "left arm, back." At the CCH, on the record, the carrier stated that it had accepted a left shoulder rotator cuff tear and cervical sprain/strain injury.

MMI/IR

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. 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.

Nonetheless, the hearing officer adopted the MMI and IR assessed by Dr. T, the treating doctor, stating in the Background Information "the preponderance of the other medical evidence does not support the designated doctor's opinion." In Finding of Fact No. 3, the hearing officer found the certification by the designated doctor is contrary to the preponderance of the evidence.

Dr. T, the treating doctor, examined the claimant on July 31, 2012, certified clinical MMI on June 28, 2012, and assessed a seven percent IR. Dr. T based the date of MMI on the date the claimant had completed the post-operative physical therapy program. Dr. T's IR is based on loss of range of motion (ROM) of the left shoulder giving measurements and referring to tables in 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). Dr. T, in his report noted "[c]ervical spine spasm" and pain in the left shoulder. As the diagnoses, Dr. T lists the diagnostic codes 840.4 and 847, however, Dr. T did not rate an accepted cervical sprain/strain and consequently did not rate the entire compensable injury. The Appeals Panel has long held that the doctor evaluating permanent impairment must consider the entire compensable injury. See Appeals Panel Decision (APD) 043168, decided January 20, 2005; APD 080380 decided May 8, 2008; and APD 121244, decided August 16, 2012. Because Dr. T did not rate the accepted compensable cervical sprain/strain, Dr. T's certification of MMI and IR cannot be adopted.

Dr. L, the designated doctor, examined the claimant on June 30, 2012, certified clinical MMI on June 18, 2012, and assessed a zero percent IR. Dr. L based his date of MMI on the date of the claimant's "last treatment note received where it appears the [claimant's] condition had become static." Dr. L performed ROM measurements of the left shoulder but noted regarding the ROM of the upper extremities "[w]ithin normal

limits, [claimant] gave submaximal effort" and "[t]he [claimant] gave very submaximal effort with left shoulder examination. Normal median, radial and ulnar nerve of bilateral upper extremities." Dr. L rated "[l]eft [s]houlder [ROM] yields a [zero percent] whole person impairment due to submaximal effort given during measurements." As previously noted, a FCE performed on July 2, 2012, supported Dr. L's comments that the claimant was giving submaximal effort during left shoulder ROM testing. Dr. L rated the cervical spine as Diagnosis-Related Estimate Cervicothoracic Category I: Complaints or Symptoms zero percent impairment. We reverse the hearing officer's Finding of Fact No. 3 that the certification of the designated doctor is contrary to the preponderance of the evidence and we hold that the preponderance of the other medical evidence is not contrary to the designated doctor's opinion which has presumptive weight.

Accordingly, we reverse the hearing officer's determinations that the claimant reached MMI on June 28, 2012, with a seven percent IR and render a new decision that the claimant reached MMI on June 18, 2012, with a zero percent IR as assessed by the designated doctor whose opinion was not contrary to the preponderance of the other medical evidence.

The true corporate name of the insurance carrier is **NEW HAMPSHIRE 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.

Thomas A. Knapp
Appeals Judge

CONCUR:

Carisa Space-Beam
Appeals Judge

Margaret L. Turner

Appeals Judge