APPEAL NO. 130187
FILED MARCH 18, 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 was held on May 7, 2012, with the record closing on December 4, 2012, in [City], Texas, with [hearing officer] presiding as hearing officer. The hearing officer resolved the disputed issues by deciding that the respondent (claimant) reached maximum medical improvement (MMI) on July 27, 2011, with a 16% impairment rating (IR) per the report of the Texas Department of Insurance, Division of Workers' Compensation (Division) appointed designated doctor, [Dr. J]. The appellant (carrier) appeals the hearing officer's determinations. The claimant responds, urging affirmance.

DECISION

Reversed and rendered.

The parties stipulated that on [date of injury], the claimant sustained a compensable low back and right shoulder injury while in the course and scope of his employment, and that Dr. J is the designated doctor appointed in this case regarding the issues of MMI and IR. The claimant testified that on the date of injury he was pulling a pallet jack backwards and fell over forklift blades, landing on his low back and right shoulder.

Section 408.0041(c) provides in pertinent part that the treating doctor and the insurance carrier are both responsible for sending to the designated doctor all of the injured employee's medical records relating to the issue to be evaluated by the designated doctor that are in their possession. 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.

28 TEX. ADMIN. CODE § 130.1(c)(3) (Rule 130.1(c)(3)) provides in pertinent part that the assignment of an IR shall be based on the injured worker's condition as of the MMI date considering the medical record and the certifying examination and 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;

(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 [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 doctor's inability to obtain required measurements must be explained.

Dr. J, the designated doctor, examined the claimant on August 16, 2011, and certified that the claimant reached MMI on June 7, 2011, with a 7% IR. Prior to his examination with Dr. J, the claimant underwent right shoulder surgery on March 10, 2011, and had post-operative physical therapy from April 18 through July 27, 2011.

At the hearing, the claimant contended that the post-operative physical therapy he received for his shoulder yielded significant improvement in his right shoulder. The hearing officer notified the parties she was going to send a letter of clarification (LOC) to Dr. J notifying him about the claimant's March 10, 2011, shoulder surgery, and the post-operative physical therapy he received. On May 8, 2012, the hearing officer sent Dr. J the LOC, and asked whether this information changed his opinion regarding the claimant's date of MMI, what the date of MMI was, and if Dr. J still maintained his MMI date of June 7, 2011, for him to explain specifically the basis of his opinion.

Dr. J responded on May 10, 2012. In his response Dr. J noted that the physical therapy records referenced by the hearing officer were not available to him at the time of his examination, and that his June 7, 2011, date of MMI was "that of the most recent physical therapy progress note available" to him. Dr. J then stated:

I have compared the range of motion [ROM)] figures from that physical note with the final figures recorded by the physical therapist on July 27, 2011, and find that there is a substantial difference which would result in a significant decrease in the final [IR]. I

am therefore amending my [MMI] date to July 27, 2011, on the basis of these additional records.

The hearing was reconvened on December 4, 2012. It was undisputed that Dr. J changed the MMI date from June 7, 2011, to a later date of July 27, 2011, based on records not previously available to him, and that he did not physically reexamine the claimant prior to changing his MMI date to the later date of July 27, 2011. The hearing officer adopted Dr. J's amended certification of MMI and IR, and determined that the claimant reached MMI on July 27, 2011, with a 16% IR.

The Appeals Panel has held that an amended certification of MMI/IR done without a medical examination is a violation of Rules 130.1(b)(4)(B) and 130.1(c)(3), which require the certifying doctor to perform a complete medical examination of the injured employee for the explicit purpose of determining MMI/IR. *See* Appeals Panel Decision (APD) 100152, decided April 8, 2010; *See also* APD 010297-s, decided March 29, 2001. As Dr. J's amended certification was made without a physical examination of the claimant, it cannot be adopted. Accordingly, we reverse the hearing officer's determination that the claimant reached MMI on July 27, 2011, with a 16% IR.

There are three other MMI/IR certifications in evidence. The first certification is Dr. J's original MMI/IR certification. It is undisputed that Dr. J did not have the post-operative physical therapy records when assessing the claimant's MMI/IR. In APD 062068, decided December 4, 2006, the Appeals Panel held that the 1989 Act and the Division rules require that the designated doctor conduct an examination of the claimant and review the claimant's medical records. The Appeals Panel stated that ". . . Rules 130.1(b)(4)(A) and 130.1(c)(3) specifically require that the certifying doctor, including the designated doctor, review the medical records before certifying an MMI date and assigning an IR." As Dr. J did not have the post-operative physical therapy medical records prior to making his first MMI/IR certification, that certification cannot be adopted.

The second MMI/IR certification in evidence is from [Dr. St], the post-designated doctor required medical examination doctor. Dr. St examined the claimant on June 15, 2012, and certified that the claimant reached clinical MMI on July 20, 2011, with a 13% IR. Dr. St noted the following regarding his opinion on MMI:

> It is my opinion that [MMI] took place 20 weeks after [the claimant] underwent repair of his partial right rotator cuff tear. This is based on the [Medical Disability Advisor, Workplace Guidelines for Disability Duration, excluding all sections and tables relating to rehabilitation published by the Reed Group, Ltd (MDA)], which has been attached. For an individual involved in very heavy work, a total of 20 weeks would be needed for recovery. Therefore, I have chosen the date of [July 20, 2011], to be the date of MMI.

The Appeals Panel has previously held that the MDA cannot be used alone, without considering the claimant's physical examination and medical records, in determining a claimant's date of MMI. *See* APD 130191, decided March 13, 2013. As Dr. St based his date of MMI on the MDA without considering the claimant's physical examination and medical records, his MMI/IR certification cannot be adopted.

The third and final MMI/IR certification in evidence is from [Dr. S], the claimant's treating doctor. Dr. S examined the claimant on September 23, 2011, and certified that the claimant reached MMI on September 2, 2011, with a 15% IR. The hearing officer noted correctly in the Background Information section of the decision that Dr. S does not indicate in his Report of Medical Evaluation (DWC-69) whether his assigned MMI date is clinical or statutory, or what edition of the Guides to the Evaluation of Permanent Impairment he used in assessing the claimant's IR. However, Dr. S did state in his narrative report dated September 23, 2011, that the claimant reached MMI statutorily on September 2, 2011, and that he used the fourth edition of the AMA Guides. *See* Rule 130.1(d)(1)(B). Dr. S' date of MMI is supported by the evidence.

In assessing the 15% IR, Dr. S placed the claimant in Diagnosis-Related Estimates (DRE) Lumbosacral Category III: Radiculopathy for a 10% whole person (WP) impairment. Dr. S took ROM measurements of the claimant's right shoulder. In his narrative report Dr. S stated he assessed a 5% WP impairment for the claimant's right shoulder based on loss of ROM. However, we note that in Dr. S's worksheet, he correctly combined ROM measurements of the claimant's right shoulder for a 10% upper extremity impairment, which converted to a 6% WP impairment per Table 3, page 3/20 of the AMA Guides. Using the Combined Values Chart on page 322 of the AMA Guides, combining 10% with 5% yields a 15% impairment. Combining 10% with 6% also yields a 15% impairment. As both values listed by Dr. S for the right shoulder combine to the same 15% impairment, we find no fault with his IR on this basis.

The carrier contended that the claimant does not meet the requirements of DRE III Lumbosacral Category III: Radiculopathy. In his narrative report, Dr. S noted measurements of the claimant's calves revealed the claimant's right calf two inches below the knee was 2 cm smaller than that of his left calf. In APD 072220-s, decided February 5, 2008, 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. The 15% IR assigned by Dr. S was in accordance with the AMA Guides. Accordingly, we render a new decision that the claimant reached MMI on September 2, 2011, with a 15% IR.

The true corporate name of the insurance carrier is **OLD REPUBLIC 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.

Carisa Space-Beam
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Margaret L. Turner
Appeals Judge