

APPEAL NO. 992223

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 September 14, 1999. He determined that the respondent's (claimant) correct impairment rating (IR) was 16% from a compensable injury of _____. The appellant (carrier) appeals this determination, urging error and that the authority relied on by the hearing officer is distinguishable. The claimant replies that the decision is correct.

DECISION

Affirmed.

This case is decided as a matter of law. At issue is whether Dr. G, the designated doctor, properly applied the Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association (AMA Guides) to the calculation of specific portions of the claimant's IR resulting from a cervical spine injury and dealing with cervical extension and left rotation. Dr. G examined the claimant on July 28, 1998, and assigned a 14% IR. In this examination, he measured maximum cervical extension of 69E which he concluded yielded a zero percent IR and maximum left rotation of 75E which he also concluded yielded an IR of zero percent. At the request of the claimant's attorney, the Texas Workers' Compensation Commission (Commission) wrote to Dr. G, enclosing in the letter a copy of Texas Workers' Compensation Commission Appeal No. 980894, decided June 17, 1998, and asking him whether this decision and its interpretation of the AMA Guides required assigning some IR for the two values measured for cervical extension and rotation.

In Appeal No. 980894 we wrote:

under our reading of the spine impairment chapter of the AMA Guides, and unlike the upper extremity chapter, the evaluator is not given specific rounding instructions for calculating loss of ROM [range of motion] in the spine. Rather, the ROM charts for the spine speak in terms of lost and retained motion at a given angle and assign an IR based thereon. As a result, it does not appear that the spine ROM charts provide for rounding up, which results in the assignment of a lower IR. Where, as here, the designated doctor determines that the patient has ROM impairment in the spine, resulting from the compensable injury, our reading of the applicable ROM charts indicates that, unless the patient is able to obtain the degree measurement that corresponds to a given IR, the patient has lost a larger degree of motion than that which corresponds to a given rating. For example, turning to Table 53, it appears that unless the patient reaches 80E when his cervical right rotation ROM is measured, he has cervical motion

loss and a zero IR cannot properly be assigned because it would not accurately reflect that impairment. In Texas Workers' Compensation Commission Appeal No. 972475, decided January 14, 1998, and Texas Workers' Compensation Commission Appeal No. 971120, decided July 29, 1997 (Unpublished), the Appeals Panel affirmed a designated doctor's having rounded up and, consequently, his assignment of a lower IR for an element of lumbar ROM. However, after further consideration, and absent sound medical reasons justifying a different result, we have determined that the structure of the ROM charts for the spine does not provide for rounding up. Rather, they state that a given IR can be assigned only if, in his ROM testing, the patient is able to obtain the angle that corresponds to that rating in the chart.¹

Under our reading of Table 51 of the AMA Guides, an extension measurement of 69 reflects some impairment, that is, not until the measurement is at least 75 is there no deficit. Thus, the claimant, consistent with our opinion in Appeal No. 980894, *supra*, measured two percent whole person impairment. Similarly, under our reading of Table 53, a left rotation of 75 reflects some impairment, and it is not until rotation of 80 is reached that there is no deficit. Thus, the claimant measured a one percent whole person IR for this deficit.

When asked about the effect of Appeal No. 980894, Dr. G responded on December 16, 1998, that based on his reading of the AMA Guides, he disagreed with the Appeals Panel. He maintained this position in a September 13, 1999, response to a written deposition and further added with regard to cervical extension that a measurement of 69 "would be as close to normal as anyone could expect" despite the fact that the AMA Guides consider 75 to be "normal."

In response to these answers from Dr. G, the hearing officer determined that Dr. G did not comply with the AMA Guides as interpreted by the Appeals Panel in arriving at a 14% IR. He, therefore, simply took Dr. G's measurements and applied the relevant IR from Tables 51 and 53 as a mathematical correction of Dr. G's report and found a 16% IR.

Section 408.124 provides that an award of impairment income benefits "shall be made on an [IR] determined using the" AMA Guides. We have in the past approved a simple mathematical correction of a designated doctor's report to reflect the correct use of the AMA Guides, even though this results in what some may consider an anomaly of an IR not contained in any doctor's report. See, e.g., Texas Workers' Compensation Commission Appeal No. 950616, decided May 24, 1995; and Texas Workers' Compensation

¹Texas Workers' Compensation Commission Appeal No. 991731, decided September 29 1999 (Unpublished), relied on Appeal No. 980894 as precedent.

Commission Appeal No. 960844, decided June 20, 1996. See also Texas Workers' Compensation Commission Appeal No. 950558, decided May 24, 1995. The action of the hearing officer constituted an application of these decisions to effect a simple mathematical correction and is without error to the extent that the underlying rationale or reason for the correction is without legal error.

The carrier on appeal stresses that Appeal No. 980894, *supra*, by its terms, precluded rounding as Dr. G did only in the absence of "sound medical reasons justifying a different result." It contends that Dr. G did give sound medical reasons for doing what he did. We disagree. Dr. G simply reiterated his disagreement with Appeal No. 980894 and later added the contention that Table 51 was wrong in assuming normal cervical flexion at 75 instead of 69. These comments are not based on the specific medical condition of the claimant as found by Dr. G, but only reflect a generic disagreement. For this reason, we do not construe them to be "sound medical reasons" justifying what he did. Rather, his approach would render arbitrary such ratings and defeat a primary purpose of the use of the AMA Guides, that is, some uniformity in the calculations of IR. See Texas Workers' Compensation Commission Appeal No. 960844, decided June 20, 1996.

The carrier also asserts prejudicial error in the admission into evidence of three of claimant's exhibits. The first, Claimant's Exhibit No. 8, was a letter from Dr. H to another doctor about the meaning and effect of Appeal No. 980894 on an IR in a different case; the second, Claimant's Exhibit No. 9, was another doctor's opinion on the impact of Appeal 980894 as it related to another case; and the third, Claimant's Exhibit No. 10, was a decision and order in another case in which another hearing officer applied Appeal No. 980894 to those facts. The carrier objected to this evidence on the grounds of relevance and, with regard to Claimant's Exhibit No. 10, on the additional grounds that this decision and order had no precedential effect. The hearing officer agreed with the latter point and considered this evidence for the light it shed on the law applicable to the case before him. Given the nature of the objection on relevancy grounds, we are hard pressed to, and do not, find prejudicial error. Hernandez v. Hernandez, 611 S.W.2d 732 (Tex. Civ. App.-San Antonio 1981, no writ). The main thrust of this evidence was to help establish the applicable law. There was no dispute as to the facts of the case before the hearing officer. The carrier strove to meet this evidence with its own interpretation of the law, suggesting essentially that there was no precedential value in any of the Commission's prior resolutions of this question, whether by decision and order of a hearing officer or decision of the Appeals Panel. We believe that Appeal No. 980894 provided the correct method for determining impairment from a cervical injury and is precedent until properly overruled.

For the foregoing reasons, we affirm the decision and order of the hearing officer.

Alan C. Ernst
Appeals Judge

CONCUR:

Tommy W. Lueders
Appeals Judge

Elaine M. Chaney
Appeals Judge