

APPEAL NO. 002598

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 October 20, 2000. With respect to the issues before him, the hearing officer determined that the appellant's (claimant) impairment rating (IR) is 14%, and that the claimant is not entitled to supplemental income benefits (SIBs) for the first quarter. In his appeal, the claimant contends that the hearing officer erred in giving the 14% IR, which was calculated by a peer review doctor selected by the respondent (carrier) using the designated doctor's examination data. The claimant asks that we reverse the hearing officer's decision and render a new decision that his IR is 19% as certified by the designated doctor and that we also render a new decision that he is entitled to SIBs for the first quarter. In its response to the claimant's appeal, the carrier urges affirmance of the IR issue. The carrier also argues in its response that the hearing officer's good faith determination is against the great weight of the evidence, but it does not challenge the hearing officer's direct result determination. The response was not timely filed to serve as an appeal. Section 410.202; Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 143.3(c) (Rule 143.3(c)). Therefore, the hearing officer's determinations that the claimant's unemployment in the qualifying period for the first quarter of SIBs was a direct result of his impairment from the compensable injury and that the claimant made a good faith effort to look for work commensurate with his ability to work during the qualifying period have become final because they were not timely appealed. Section 410.169.

DECISION

Reversed and rendered.

The parties stipulated that the claimant sustained a compensable injury on _____; that he reached maximum medical improvement (MMI) on June 25, 1999; that he did not commute his impairment income benefits; and that Dr. B, a chiropractor, is the designated doctor selected by the Texas Workers' Compensation Commission (Commission). In a Report of Medical Evaluation (TWCC-69) dated July 22, 1999, Dr. M certified that the claimant reached MMI on July 16, 1999, with an IR of 19%. Dr. M's certification was disputed and Dr. B was selected by the Commission to serve as the designated doctor. On August 16, 1999, Dr. B examined the claimant. In a TWCC-69 dated August 23, 1999, Dr. B assigned a 19% IR, which was comprised of 4% for a cervical specific disorder, 9% for lumbar specific disorder and loss of lumbar range of motion (ROM), and 8% for loss of ROM in the claimant's right shoulder.

The carrier had Dr. C conduct a peer review of the designated doctor's IR; however, Dr. C did not examine the claimant. In a report dated December 15, 1999, Dr. C stated that there were two reasons to question the shoulder IR. Initially, Dr. C noted that the designated doctor had stated in the narrative report accompanying his TWCC-69 that ROM of both shoulders was normal; however, the ROM measurements on the worksheets reflected significant ROM restrictions in the right shoulder. In addition, Dr. C noted that the designated doctor did not properly use the Guides to the Evaluation of Permanent

Impairment, third edition, second printing, dated February 1989, published by the American Medical Association (AMA Guides) because he did not properly use the contralateral, uninvolved joint as a comparative standard against which the impaired joint is measured. On April 24, 2000, a Commission benefit review officer (BRO) sent Dr. C's report to Dr. B. On August 9, 2000, Dr. B responded to the BRO's letter. He noted that his statement that the claimant's ROM of the shoulders was normal was made in error. In addition, Dr. B stated "[i]n my examination I did perform [ROM] of the left shoulder, and I do not feel that it has any effect on his injury of the right shoulder. Therefore, my opinion does not change, and I do not need [to] reevaluate [claimant]."

The hearing officer determined that the designated doctor's 19% IR was not entitled to presumptive weight because the designated doctor failed to calculate the claimant's right shoulder ROM IR in accordance with the AMA Guides. The hearing officer determined, based on Dr. C's report, that the designated doctor failed to properly consider the claimant's ROM in the left shoulder as a "baseline" for determining his IR for loss of ROM in the right shoulder. The AMA Guides provide on page 13 that "[f]or evaluating the extremities, the contralateral *uninvolved* joint should serve as a comparative standard against which the impaired joint is measured." (Emphasis in original.) In his peer review report, Dr. C stated that the claimant had a total of 9% upper extremity impairment on the unaffected side and he subtracted this from the claimant's 13% upper extremity rating for the right shoulder, leaving a 4% upper extremity rating for loss of shoulder ROM, which converted to a 2% whole person rating. While the AMA Guides state that the contralateral, uninvolved joint is to be used as a comparative standard, they do not provide any specifics as to the effects of such a comparison. Dr. C does not point to any provision of the AMA Guides that necessitates his outcome from such a comparison. In his response to the BRO's letter, the designated doctor stated that he had compared the left shoulder ROM to the right shoulder ROM and had determined that a change to the measured right shoulder ROM IR was not indicated based upon that comparison. In Texas Workers' Compensation Commission Appeal No. 972420, decided January 5, 1998, we noted that the AMA Guides require a comparison of the opposite extremity in calculating an IR for an extremity, citing the above-quoted language from page 13 of the AMA Guides. Nevertheless, Appeal No. 972420 further stated "[t]his sound statement, however, then provides no added direction. Should the uninvolved joint be used as a baseline of normal so that any limitation of the affected joint is limited to the difference between it and the uninvolved joint, or are there any other considerations to take into account; it does not say. In addition, it does not say what should be done when the condition, such as here, is bilateral. We cannot say that the AMA Guides make any ROM figures invalid when the opposite joint is not considered." (Emphasis in original.) See *a/so* Texas Workers' Compensation Commission Appeal No. 980615, decided May 11, 1998 (Unpublished). Thus, we cannot agree that Dr. B failed to properly use the AMA Guides in not reducing the claimant's right shoulder IR as Dr. C suggested he should. Dr. B stated that he compared the claimant's left shoulder with the right shoulder and determined that the comparison did not require him to reduce the IR. Under the guidance of Appeal No. 972420, *supra*, Dr. B could do us under the exercise of his professional judgment, without abandoning the requirement that he calculate the claimant's IR in accordance with the AMA Guides.

In addition, we note that we are concerned with the hearing officer's having determined that the claimant's IR was 14% in accordance with Dr. C's report. As noted above, Dr. C conducted a peer review of the designated doctor's IR and did not examine the claimant. We have long held that the Commission cannot adopt an IR that does not result from an "examination" of the injured worker. Texas Workers' Compensation Commission Appeal No. 941640, decided January 13, 1995 (a decision which discusses in detail the rules and policies underlying the holding that an IR must result from a doctor who has conducted an examination). In this instance, the hearing officer appears to believe that there is not a problem in adopting Dr. C's 14% IR because Dr. C used the ROM figures measured by Dr. B in calculating the IR. Specifically, the hearing officer found that "[u]sing the appropriate [AMA Guides] and [Dr. B's] examination data, an accurate assessment of the claimant's whole body impairment would be 14%." We cannot agree that Dr. C's use of Dr. B's data is all that is required in order to adopt Dr. C's rating. Rather, we reaffirm that "the 1989 Act and Commission rules contemplate that an injured employee's IR will be based on the IR of a doctor who has examined the employee, whether the doctor is a treating doctor, a designated doctor, or a doctor other than a treating doctor or designated doctor." Appeal No. 941640, *supra*.

Based upon our determination that the hearing officer erred in determining that Dr. B did not properly use the AMA Guides in calculating the claimant's right shoulder IR, we reverse his determination that the claimant's IR is 14% and render a new decision that the claimant's IR is 19% as certified by the designated doctor selected by the Commission. We likewise reverse the determination that the claimant is not entitled to SIBs for the first quarter and render a new decision that he is entitled to those benefits because his IR is greater than 15% and, as noted above, the hearing officer's good faith and direct result determinations were not timely appealed by the carrier and, thus, became final.

Elaine M. Chaney
Appeals Judge

CONCUR:

Gary L. Kilgore
Appeals Judge

Robert W. Potts
Appeals Judge