APPEAL NO. 011232
FILED JULY 17, 2001

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 April 26, 2001. The hearing officer resolved the disputed issues by deciding 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 and second quarters. The claimant appealed and the respondent (carrier) responded.

DECISION

The hearing officer's decision that the claimant has a 14% IR is reversed and a new decision is rendered that the claimant's IR is 15%. The hearing officer's decision that the claimant is not entitled to SIBs for the first and second quarters is affirmed.

IR ISSUE

The parties stipulated that the claimant sustained a compensable injury that included his cervical spine and left elbow. As a result of his injury, the claimant had surgery performed on his neck and left elbow. The parties stipulated that the claimant reached maximum medical improvement on November 26, 1999. In December 1999, the claimant's treating doctor assigned the claimant a 19% IR. The designated doctor chosen by the Texas Workers' Compensation Commission (Commission), examined the claimant in February 2000 and assigned the claimant a 20% IR. The Commission sent a letter from the carrier's doctor to the designated doctor, and the designated doctor then amended the IR to 14% in March 2000. The Commission then sent a letter from the treating doctor to the designated doctor, and the designated doctor amended the IR to 16% in September 2000. The Commission then sent another letter from the carrier's doctor to the designated doctor, and the designated doctor amended the IR to 15% on December 17, 2000. Each amendment was done to correct an error in the manner in which the IR was calculated. The claimant contended that the 15% IR assigned by the designated doctor in December 2000 was correctly calculated under the Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association (AMA Guides); and the carrier contended that in arriving at the 15% IR, the designated doctor did not properly convert the upper extremity impairment to a whole person impairment, and that when the upper extremity impairment is properly converted to a whole person impairment and combined with the impairment assigned for the cervical region, the claimant has a 14% IR.

The hearing officer erred in determining that the claimant's IR is 14%. Section 408.125(e) provides that the IR report of the designated doctor chosen by the Commission shall have presumptive weight, and the Commission shall base the IR on that report unless the great weight of the other medical evidence is to the contrary.

Neither party contends that the designated doctor erred in determining that the claimant has an 11% impairment of the whole person for impairment of the cervical region, nor that the claimant has a 5.5% impairment of the left upper extremity. The dispute centers on how the 5.5% impairment of the left upper extremity is to be converted to a whole person impairment. The designated doctor used Table 3 entitled "Relationship of Impairment of the Upper Extremity to Impairment of the Whole Person" to determine a 4% whole person impairment related to the upper extremity impairment. In order to do this, the designated doctor would have had to round the 5.5% upper extremity impairment up to 6% because Table 3 reflects that a 6% upper extremity impairment equates to a 4% whole person impairment (a 5% upper extremity impairment equates to a 3% whole person impairment). The designated doctor then used the Combined Values Chart to combine the 11% and 4% to determine a combined value whole person impairment of 15%.

Based on a report from a doctor who reviewed the reports of the designated doctor at the carrier's request, the carrier contended that the 5.5% upper extremity impairment should be multiplied by a conversion factor of 60%, which results in a 3.3% whole person impairment, and when rounded down results in a 3% whole person impairment. When the 11% impairment for the cervical region is combined with the 3% whole person impairment for the upper extremity, a combined value whole person impairment of 14% results. The hearing officer correctly rejected the carrier's method of converting the upper extremity impairment to whole person impairment because the AMA Guides state at page 35 "Use Table 3 to convert impairment of the upper extremity to impairment of the whole person." In addition, a footnote to Table 14, which was one of the tables the designated doctor used to determine the upper extremity impairment, states "See Table 3 for converting impairment of upper extremity to impairment of whole person." Furthermore, in Texas Workers' Compensation Commission Appeal No. 960031, decided February 20, 1996, the Appeals Panel noted that the AMA Guides instruct persons assigning IRs to use Table 3 to relate upper extremity impairment to impairment of the whole person. Thus, the designated doctor was correct in utilizing Table 3 to convert the upper extremity impairment to a whole person impairment.

Having rejected the carrier's contention, the hearing officer nevertheless found that the designated doctor made a mathematical error in the calculation of the whole person impairment that related to the upper extremity impairment. The hearing officer states in her decision:

> It is clear from the evidence the designated doctor rounded the 5.5% to 6% for a whole person conversion from Table 3 of 4%. However, the note at the bottom of Table 3 states, "Impairment of the whole person contributed by the upper extremity may be rounded to the nearest 5 percent only when it is the sole impairment involved." Which is not the situation in the present case, therefore, using Table 3, the 5.5% would convert to 3% for the whole person impairment contributed by the upper extremity. When this is combined with 11% for specific disorders it totals a whole person impairment of 14%.

Where the hearing officer erred in her analysis was in thinking that the designated doctor had rounded the impairment of the whole person contributed by the upper extremity to the nearest 5%. The designated doctor did not do that. The designated doctor determined that the whole person impairment contributed by the upper extremity was 4%; he did not then round 4% to 5%. Instead, he correctly combined the 4% whole person impairment contributed by the upper extremity to the 11% whole person impairment contributed by the cervical spine to determine a whole person IR of 15%.

As previously explained, it is clear that what the designated doctor did do was to round the 5.5% upper extremity impairment to 6% and then use Table 3 to arrive at a 4% whole person impairment. The designated doctor's rounding of the 5.5% upper extremity impairment to 6% is in accordance with our previous decisions and is not in error. For example, in Texas Workers' Compensation Commission Appeal No. 980894, decided June 17, 1998, the Appeals Panel stated that, by requiring the use of the Combined Values Chart to calculate a whole body rating from component ratings, the AMA Guides contemplate that ratings will be expressed in whole numbers, and, in that case, the Appeals Panel remanded the hearing officer's decision to have the designated doctor recalculate the IR using whole numbers at each stage of the calculation. In Texas Workers' Compensation Commission Appeal No. 94736, decided July 19, 1994, the Appeals Panel noted that a 32.5% upper extremity impairment could be rounded up to 33% and that the 33% upper extremity impairment could then be converted to a whole person impairment using Table 3.

Although the hearing officer found that the designated doctor's report of December 17, 2000, wherein the designated doctor assigned a 15% IR, is entitled to presumptive weight and that that report is not contrary to the great weight of the other medical evidence, the hearing officer went on to find that the 15% IR assigned by the designated doctor contained a mathematical error and that using the designated doctor's report of December 17, 2000, and the AMA Guides, the IR, as properly calculated, is 14%. We conclude that it has not been shown that the designated doctor made a mathematical error or misapplied the AMA Guides in determining that the claimant has a 15% IR. We further conclude that the hearing officer erred in reducing the 15% IR to 14%. We render a decision that the claimant has a 15% IR as determined by the designated doctor in his report of December 17, 2000.

SIBs ISSUE

The hearing officer did not err in determining that the claimant is not entitled to SIBs for the first and second quarters. Eligibility criteria for SIBs entitlement are set forth in Section 408.142(a) and Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102 (Rule 130.102). Rule 130.102(b) provides that an injured employee who has an IR of 15% or greater, and who has not commuted any impairment income benefits, is eligible to receive SIBs if, during the qualifying period, the employee: (1) has earned less than 80% of the employee's average weekly wage as a direct result of the impairment from the compensable injury; and (2) has made a good faith effort to obtain employment commensurate with the employee's ability to work.

Rule 130.102(d)(4) provides that an injured employee has made a good faith effort to obtain employment commensurate with the employee's ability to work if the employee has been unable to perform any type of work in any capacity, has provided a narrative report from a doctor which specifically explains how the injury causes a total inability to work, and no other records show that the injured employee is able to return to work. Rule 130.102(e) provides that, except as provided in subsection (d)(1), (2), (3), and (4) of Rule 130.102, an injured employee who has not returned to work and is able to return to work in any capacity shall look for employment commensurate with his or her ability to work every week of the qualifying period and document his or her job search efforts.

The hearing officer wrote in her decision that the claimant is disqualified from receiving SIBs because he has a 14% IR. However, the hearing officer went on to state that had she determined that the claimant has a 15% IR, then the qualifying period for the first quarter would have begun on June 25, 2000, and the qualifying period for the second quarter would have ended on December 23, 2000. The parties do not take issue with those dates. The hearing officer noted that the claimant contended that he had no ability to work during the qualifying periods, and that the treating doctor indicated in medical reports that the claimant was in severe pain and may require further surgery, but that the evidence does not contain a narrative from the treating doctor or from any other doctor that explains how the injury causes the claimant to have a total inability to work.

In August 1999, the claimant was examined by a doctor at the carrier's request and that doctor reported that the claimant "certainly could do some light duty, in a sedentary to light fashion, but he has retired as noted above." That doctor also stated that, were the claimant to return to work, he would give him lifting restrictions of 5 to 10 pounds, put him in a sedentary position, and make sure that he avoided chronic neck flexion and tension across the upper back.

The claimant testified that he has been unable to work since his work-related injury, that the Texas Rehabilitation Commission told him that it could not do anything for him without a doctor's release, and that neither his former treating doctor nor his current treating doctor has released him to return to work. The claimant also said that he is scheduled for additional cervical surgery two weeks after the CCH and that he did not look for employment during the qualifying periods because he was unable to work and his doctor told him he cannot work. In several reports, the claimant's treating doctor noted the claimant's continuing neck pain and in October 2000 wrote that he was referring the claimant to another doctor for injections and that the claimant would be on a no-work status until further notice. In January 2001, the claimant's treating doctor noted that the claimant has a pseudoarthrosis at C6-7 and that he would be requesting authorization to proceed with a spinal fusion at that level (the claimant previously had a fusion at C4-5, C5-6, and C6-7 in January 1999).

The hearing officer found that the claimant failed to establish by specific, explanative medical evidence that he was unable to perform any work at all during the qualifying periods for the first and second quarters and that during those qualifying periods he did not make a good faith effort to seek employment. The hearing officer concluded that the

claimant is not entitled to SIBs for the first and second quarters. The hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). As the finder of fact, the hearing officer resolves the conflicts in the evidence. The hearing officer's determination that the claimant is not entitled to SIBs for the first and second quarters based on her finding against the claimant on the good faith criterion for SIBs is supported by sufficient evidence, is not so against the great weight and preponderance of the evidence as to be clearly wrong and unjust, and is affirmed.

The hearing officer's decision that the claimant has a 14% IR is reversed and a new decision is rendered that the claimant's IR is 15%. The hearing officer's decision that the claimant is not entitled to SIBs for the first and second quarters is affirmed.

Robert W. Potts
Appeals Judge

CONCUR:

Elaine M. Chaney
Appeals Judge

Philip F. O'Neill
Appeals Judge