APPEAL NO. 012117
FILED OCTOBER 25, 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 July 24, 2001. The hearing officer resolved the disputed issues by determining that the appellant's (claimant) date of maximum medical improvement (MMI) is February 24, 2000; the claimant's correct impairment rating (IR) is 11%; and, because the claimant does not have a 15% or greater IR, he is not entitled to supplemental income benefits (SIBs). The respondent (carrier) conceded that the claimant timely filed his Application for [SIBs] (TWCC-52) for the second quarter and that determination has become final. The claimant appealed, asserting several points of error on the part of the hearing officer, and the carrier responded, urging affirmance.

DECISION

Affirmed in part, reversed and rendered in part, and reversed and remanded in part.

FACTS

The claimant sustained a compensable injury in the form of a torn rotator cuff to his right shoulder while employed as a waiter. The claimant's doctors determined that he was not a surgical candidate, in part due to his age, and that surgery would not repair the damage nor improve his function or motion. The claimant underwent two arthroscopic debridements in June 1999 and February 2001.

Dr. C, the Texas Workers' Compensation Commission (Commission) selected designated doctor (DD), certified that the claimant had reached MMI on February 24, 2000, with a 15% IR. During her examination of the claimant, the designated doctor took range of motion (ROM) measurements of both shoulders. In issuing her IR, the designated doctor did not make a deduction in the IR due to her comparison between the affected right shoulder and the unaffected left shoulder. In response to two inquiries from the Commission, the designated doctor indicated that she understood that the Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association (AMA Guides) states that the contra-lateral uninvolved joint should serve as a comparative standard, but, citing clinical judgement:

> with clinical findings of muscle wasting and painful motion of the right shoulder relative to the left, I felt a more fair impairment was warranted with direct tabulation of the measured ROM of the right shoulder. The AMA Guide is just a guide. The physician's clinical judgment should also count for something.

The claimant's treating doctor agreed with the 15% IR, but disagreed with the date of MMI, stating that it should be April 10, 2000.

ADDITION OF THE ISSUE OF IR

The claimant asserts that the hearing officer abused his discretion in adding the issues of MMI and IR. However, we would note that the issue of MMI was added on the claimant's own motion; therefore, far from preserving any error on this point, the claimant arguably invited the error of which he now complains. The carrier has not appealed the addition of this issue and we will not consider it further. However, the IR issue was added pursuant to the carrier's request in a written response to the benefit review conference (BRC) report. We cannot agree that this was error.

A review of the record shows that within six weeks after the designated doctor's April 2000 IR report, the carrier began seeking clarification of the designated doctor's IR certification through the Commission. The carrier also requested a BRC; the request was denied by the Commission on December 5, 2000. Alternatively, the Commission offered to send the designated doctor another request for clarification. However, a BRC was eventually held on May 21, 2001, to consider the claimant's entitlement to SIBs for the first and second quarters. On May 30, 2001, the BRC report was sent to the parties indicating that a CCH was scheduled for June 19, 2001, to resolve three disputed issues, all related to SIBs entitlement for the first and second quarters. On June 11, 2001, the carrier filed a Motion for Continuance and a Response to the BRC report, requesting addition of the issue of IR, on the grounds that the issue was discussed at the BRC, but not resolved. On June 15, 2001, the hearing officer issued an order granting the carrier's Motion for Continuance, but no action was taken on the carrier's request to add the issue of IR.

At the start of the CCH, the carrier re-urged its request to add the IR issue. The attorney who represented the carrier at the CCH was also in attendance at the BRC, and argued again that it was discussed at the BRC and furthermore that the issue of IR had to be raised when entitlement to the first quarter of SIBs was disputed, or it would be waived. The claimant objected, asserting that he was not prepared to proceed on IR, although he admitted he had received a copy of the carrier's response to the BRC report. The claimant's attorney had not been present at the BRC, but indicated his understanding that IR was not raised then. After these arguments, the hearing officer added the IR issue and then granted the claimant's motion (over carrier's objection) to add MMI.

Section 410.151(b)(2) provides that an issue that was *not raised at the BRC* may not be considered unless the Commission determines that good cause existed for not raising the issue at the conference. (Emphasis added.) Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 142.7(e) (Rule 142.7(e)) sets out a procedure whereby a party may request the hearing officer to include additional issues not identified as unresolved in the benefit review officer's report. However, Rule 142.7(b) provides that the "statement of disputes" for a hearing held after a BRC includes the parties' responses to that report. In this case, the crux of the carrier's response was not a request to add an additional issue, but to include an issue omitted from the BRC report. As we noted above, the record indicates that the dispute over IR was not an eleventh-hour request, but a continuation of the carrier's ongoing dispute. As correctly noted, the matter of IR would be waived if raised beyond the first SIBs quarter. Under these facts, we agree that the hearing officer

properly applied Rule 142.7(b) in allowing the issue to be added. *See* Texas Workers' Compensation Commission Appeal No. 92181, decided June 25, 1992; Texas Workers' Compensation Commission Appeal No. 002210, decided November 10, 2000.

RECALCULATION OF THE DESIGNATED DOCTOR'S IR

The hearing officer determined that the designated doctor's report, as corrected by him, is not contrary to the great weight of the other medical evidence. He characterized his recomputation as a "mathematical recalculation." Because we agree that the hearing officer made a substantive recomputation of the IR in a manner not required by the AMA Guides, we reverse and render a decision that the claimant's IR is 15%, in accordance with the designated doctor's report, and that it is not against the great weight of the contrary medical evidence.

The hearing officer's statement that the Appeals Panel has held that a comparison with the unaffected joint is mandatory and that an adjustment to the IR is therefore required under the AMA Guides is incorrect. Indeed, one of the cases cited as support by the hearing officer, Texas Workers' Compensation Commission Appeal No. 972210, decided December 5, 1997, reversed a similar action by a hearing officer. In that case, the Appeals Panel specifically stated that where a doctor has indicated that a comparison was made between the affected shoulder and the contra-lateral shoulder, the AMA Guides did not then mandate the subtraction method put forth by another doctor that the hearing officer used to invalidate a designated doctor's rating. We note that Texas Workers' Compensation Commission Appeal No. 960016 decided February 16, 1996,states, "[T]he AMA Guides are not to be applied mechanically and professional judgment must inform every assigned rating, including the components of that rating." That decision further refers to the portion of the AMA Guides that provides, "[f]or evaluating the extremities, the contra lateral uninvolved joint should serve as a comparative standard against which the impaired joint is measured."

However, although the AMA Guides state that the contra-lateral, uninvolved joint is to be used as a comparative standard, they do not provide any specifics as to the effects of such a comparison. In this case, the designated doctor did measure both shoulders and determined that a comparison would not give a fair result. The designated doctor could properly compare the affected and unaffected shoulders and determine that the comparison did not require her to reduce the IR. The designated doctor could do this under the exercise of her professional judgment, without abandoning the requirement that she calculate the claimant's IR in accordance with the AMA Guides. *See also* Texas Workers' Compensation Commission Appeal No. 002598, decided December 18, 2000. Because the AMA Guides do not require a deduction, the hearing officer, in effect, superceded the designated doctor's professional judgment by undertaking to recalculate the IR for ROM. The hearing officer was correct in giving weight to the designated doctor's report, but the IR rendered in that report was 15%, not 11%. We therefore reverse, and render the decision that the claimant's IR is 15%, in accordance with the report of the designated doctor.

DATE OF MMI

In deciding the claimant's correct date of MMI to be February 24, 2000, the hearing officer determined that the designated doctor's report, as it relates to MMI is not against the great weight of the other medical evidence. The hearing officer's determination on the date of MMI is supported by sufficient evidence and it is not so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust. Accordingly, no sound basis exists for us to disturb that determination on appeal.

CLAIMANT'S ENTITLEMENT TO SIBs FOR THE FIRST AND SECOND QUARTERS

Because he reduced the IR to 11%, below the IR threshold for SIBs eligibility, the hearing officer did not consider the entitlement for the quarters in issue. We therefore reverse and remand the case back to the hearing officer for further proceedings to make any and all determinations necessary to resolve the issue of eligibility for those quarters.

We affirm the hearing officer's adding the issue of IR (which action was appealed in this case by the aggrieved party). We affirm the decision that the designated doctor's report on MMI and IR is entitled to presumptive weight, although we reverse the hearing officer's decision that the IR in that report is 11%, and render a decision that the IR is 15% as certified in the designated doctor's report. The hearing officer's decision that because the claimant does not have a 15% or greater IR, he is not entitled to SIBs is reversed and the case is remanded to the hearing officer to determine the claimant's entitlement to SIBs for the first and second quarters.

Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Commission's Division of Hearings, pursuant to Section 410.202 (amended June 17, 2001). *See* Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

The true corporate name of the insurance carrier is **ZENITH INSURANCE COMPANY** and the name and address of its registered agent for service of process is

JAMES H. MOODY II
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DALLAS, TEXAS 75202.

Susan M. Kelley
Appeals Judge

CONCUR:

Gary L. Kilgore
Appeals Judge

Robert E. Lang
Appeals Panel
Manager/Judge