

APPEAL NO. 021381  
FILED JULY 15, 2002

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 1, 2002. With respect to the single issue before her, the hearing officer determined that the appellant's (claimant) impairment rating (IR) is 1% as certified by the doctor selected by the respondent (self-insured). In his appeal, the claimant argues that the hearing officer erred in determining that the designated doctor's 20% IR was not entitled to presumptive weight because the great weight of the other medical evidence was contrary thereto. In its response to the claimant's appeal, the self-insured urges affirmance.

DECISION

Reversed and remanded.

The parties stipulated that the claimant sustained a compensable injury on June 1, 1999; that Dr. D is the designated doctor selected by the Texas Workers' Compensation Commission (Commission); and that the claimant reached maximum medical improvement (MMI) on June 15, 2001. On August 26, 1999, Dr. S, who examined the claimant at the request of the self-insured, certified that the claimant had reached MMI as of that date with an IR of 1% for loss of cervical range of motion (ROM). That certification was disputed and Dr. D was selected by the Commission to serve as the designated doctor. In a Report of Medical Evaluation (TWCC-69) dated October 27, 1999, Dr. D opined that the claimant had not reached MMI as of that date.

On August 9, 2000, the claimant underwent an arthroscopic arthroplasty of the left acromioclavicular joint. On June 27, 2001, Dr. D again examined the claimant for the purpose of determining his IR. Dr. D certified that the claimant reached statutory MMI, pursuant to Section 401.011(30)(B), on June 15, 2001. Dr. D assigned an IR of 20%, which is comprised of 6% for a specific disorder of the cervical spine and 15% whole person impairment for the left upper extremity. The left upper extremity impairment consisted of 1% upper extremity impairment for loss of ROM and 24% upper extremity impairment for a resection arthroplasty of the left shoulder pursuant to Table 19 of the Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association (AMA Guides). In the narrative report accompanying his TWCC-69, Dr. D specifically states that he used the third edition, second printing of the AMA Guides to calculate the claimant's IR. However, his ROM worksheets for both the cervical ROM and left shoulder ROM tests contain a footnote stating that the "[i]mpairments are based on the 'AMA's Guides to the Evaluation of Permanent Impairment', 3<sup>rd</sup> ed. rev."

The self-insured had Dr. B conduct a peer review of the designated doctor's IR. In a report dated February 1, 2002, Dr. B noted two specific problems with the

designated doctor's certification. Initially, Dr. B stated that the designated doctor incorrectly rated the resection arthroplasty of the left acromioclavicular joint as a left shoulder arthroplasty under Table 19. Dr. B also asserted that the designated doctor had not used the correct version of the AMA Guides to assess the claimant's IR. In support of his assertion to that effect, Dr. B noted that the ROM worksheets reference the 3<sup>rd</sup> edition revised of the AMA Guides. In addition, Dr. B noted that the designated doctor assigned a 1% upper extremity IR for loss of shoulder flexion ROM based upon measured ROM of 174°. Dr. B noted that if Figure 41 on page 36 of the correct version of the AMA Guides (the 3<sup>rd</sup> edition, second printing) is used, flexion of 170° or more correlates with a 0% IR for shoulder flexion. Apparently, Dr. D was never advised of Dr. B's criticism of his IR. Rather, on August 28, 2001, the Commission sent a letter of clarification to the designated doctor, which forwarded a peer review letter from Dr. S. Although that letter is not attached to the request for clarification, it appears from the record that Dr. S's letter is dated August 1, 2001. That letter does not raise the issue of whether the 3<sup>rd</sup> edition revised of the AMA Guides as opposed to the 3<sup>rd</sup> edition, second printing of the AMA Guides was used. Rather, Dr. S states that the cervical specific disorder rating was incorrect because the cervical injury was not part of the compensable injury and that Dr. D incorrectly used Table 19 to rate the resection arthroplasty of the acromioclavicular joint.

The hearing officer determined that the great weight of the other medical evidence is contrary to the designated doctor's 20% IR because he used the incorrect version of the AMA Guides, namely the 3<sup>rd</sup> edition revised, in assessing the claimant's IR. Thus, she adopted the 1% IR of Dr. S, which was assigned in August 1999, a year before the claimant underwent shoulder surgery for the compensable injury and nearly 22 months prior to the date the parties stipulated that the claimant reached statutory MMI on June 15, 2001. The hearing officer erred in so doing for several reasons. We have previously stated that where, as here, a question exists as to whether the designated doctor used the statutorily mandated version of the AMA Guides to determine the IR, the preferred course of action is to inquire of the designated doctor and to ensure that the IR was assigned in accordance with the correct version of the AMA Guides. Texas Workers' Compensation Commission Appeal No. 951922, decided December 28, 1995; Texas Workers' Compensation Commission Appeal No. 941237, decided October 31, 1994; Texas Workers' Compensation Commission Appeal No. 94055, decided February 22, 1994; Texas Workers' Compensation Commission Appeal No. 93045, decided March 3, 1993. In this instance, Dr. D was never asked to clarify his reference to the 3<sup>rd</sup> edition revised in the ROM worksheets and likewise was not advised of Dr. B's assertion that he used the incorrect version of the AMA Guides based upon his assignment of a 1% upper extremity rating for loss of shoulder flexion ROM, which Dr. B contends is inconsistent with Figure 41. Accordingly, we believe that a remand is in order to have Dr. D address the issue of whether he assigned the claimant's IR in accordance with the statutorily mandated version of the AMA Guides.

Although a hearing officer has the option to adopt the rating of another doctor where she determines that the great weight of the other medical evidence is contrary to the report of the designated doctor, the hearing officer's action of so doing in this case

was error. It is axiomatic that an IR cannot be assessed until MMI is reached. Texas Workers' Compensation Commission Appeal No. 93720, decided September 29, 1993; Texas Workers' Compensation Commission Appeal No. 92517, decided November 12, 1992. As noted above, Dr. S's rating was assigned on August 26, 1999, and the parties stipulated that the claimant reached MMI on June 15, 2001. In Texas Workers' Compensation Commission Appeal No. 960771, decided June 7, 1996, we affirmed a hearing officer's determination that an IR assigned by a doctor on a date prior to the date the claimant reached MMI was invalid. In Texas Workers' Compensation Commission Appeal No. 972212, decided December 12, 1997 (Unpublished), we affirmed a hearing officer's determination that the claimant needed to be reexamined by the designated doctor where the designated doctor's examinations of the claimant "were all done prior to the date the claimant reached MMI." In Texas Workers' Compensation Commission Appeal No. 990011, decided February 12, 1999, the parties stipulated that the claimant's IR was 13%, in accordance with the designated doctor who had been appointed for purposes of determining IR only. The designated doctor in Appeal No. 990011 opined that the claimant had reached MMI on May 23, 1996. Nevertheless, the hearing officer determined that the claimant reached MMI on July 11, 1997, in accordance with the certification of another doctor. Appeal No. 990011 reversed the July 11, 1997, date of MMI and rendered a new decision that the claimant reached MMI on May 23, 1996. In so doing, we stated "[t]he determination and agreement of the parties that the claimant had a 13% IR, as assessed on May 23, 1996, cannot be reconciled with a July 11, 1997, date of MMI. [The designated doctor] could not assess the claimant's IR without him having reached MMI." Under the reasoning of Appeal Nos. 960771, 972212, and 990011, the hearing officer could not adopt the 1% of Dr. S, which was assigned well before the claimant reached MMI by stipulation of the parties.

On remand, the hearing officer should specifically ask Dr. D if he used the statutorily mandated version of the AMA Guides to assess the claimant's IR. In asking for that clarification, the hearing officer should ask Dr. D to explain the reference to the 3<sup>rd</sup> edition, revised version of the AMA Guides in his ROM worksheets and to address the issue of his assignment of a 1% IR for shoulder flexion ROM in apparent contravention of Figure 41 on page 36 of the correct version of the AMA Guides. Finally, on remand, Dr. D should be advised that the claimant's resection arthroplasty of the acromioclavicular joint cannot be rated using Table 19 as the designated doctor did in assigning his rating to the claimant. Texas Workers' Compensation Commission Appeal No. 021312, decided July 3, 2002. Thus, the designated doctor should also be instructed to decide if the claimant's left shoulder acromioplasty caused permanent impairment. If the designated doctor decides that it did, he should determine whether there is a method, consistent with the statutorily mandated version of the AMA Guides, for assigning a rating for that impairment. If the designated doctor continues to use the incorrect version of the AMA Guides, or continues to rate the claimant's left shoulder injury under Table 19, a second designated doctor must be appointed because there is no other valid rating to adopt.

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, which was amended June 17, 2001, to exclude Saturdays and Sundays and holidays listed in Section 662.003 of the Texas Government Code in the computation of the 15-day appeal and response periods. See Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

The true corporate name of the self-insured is **(SELF-INSURED)** and the name and address of its registered agent for service of process is

**CT CORPORATION SYSTEMS  
350 NORTH ST. PAUL  
DALLAS, TEXAS 75201.**

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Elaine M. Chaney  
Appeals Judge

CONCUR:

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Judy L. S. Barnes  
Appeals Judge

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Daniel R. Barry  
Appeals Judge