

APPEAL NO. 023251
FILED JANUARY 27, 2003

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 November 21, 2002. The hearing officer determined that the compensable injury sustained by the respondent/cross-appellant (claimant) on _____, includes a cervical sprain/strain and a right shoulder rotator cuff tear; that the claimant had disability from July 10 through October 2, 2001; and that the claimant's impairment rating (IR) cannot be determined. The appellant/cross-respondent (carrier) appeals the extent-of-injury and disability determinations and asserts that the hearing officer erred in excluding four of its offered exhibits. The claimant responds to the carrier's appeal urging affirmance of the extent-of-injury and disability determinations and, additionally, disputes the hearing officer's determination that the IR cannot be determined.

DECISION

Affirmed in part, reversed and remanded in part.

EXCLUDED EXHIBITS

The hearing officer did not err in excluding four of the carrier's offered exhibits on the basis that they had not been timely exchanged with the claimant. We have frequently held that to obtain reversal of a judgment based upon the hearing officer's abuse of discretion in the exclusion of evidence, an appellant must first show that the admission or exclusion was in fact an abuse of discretion, and also that the error was reasonably calculated to cause and probably did cause the rendition of an improper judgment. Texas Workers' Compensation Commission Appeal No. 92241, decided July 24, 1992; see *also Hernandez v. Hernandez*, 611 S.W.2d 732 (Tex. Civ. App.-San Antonio 1981, no writ). The record reflects that the carrier asserted that it timely exchanged the exhibits in question with the claimant via certified mail. However, the mail was not sent to the claimant's correct address and the carrier provided no proof that the claimant received the package. Under these facts, we cannot agree that the hearing officer abused his discretion by excluding the exhibits based on the fact that they had not been timely exchanged with the claimant.

EXTENT OF INJURY AND DISABILITY

Whether the claimant's compensable injury included a cervical sprain/strain and a right shoulder rotator cuff tear and whether he had resulting disability were factual questions for the hearing officer to resolve. 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 and determines what facts have been established from the evidence presented. Nothing in our review of the record indicates that the hearing officer's decision is so against the great weight and

preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

IMPAIRMENT RATING

The evidence reflects that on November 10, 1997, the claimant's treating doctor certified that the claimant reached maximum medical improvement (MMI) on October 28, 1997, with an 8% IR. The certification was made using the Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association (third edition). The claimant was subsequently examined by the Texas Workers' Compensation Commission (Commission)-appointed designated doctor, Dr. V on June 13, 2002. Dr. V certified that the claimant reached MMI statutorily on October 26, 1999, with a 12% IR. The 12% IR was calculated using the Guides to the Evaluation of Permanent Impairment, fourth edition (1st, 2nd, 3rd, or 4th printing, including corrections and changes as issued by the American Medical Association prior to May 16, 2000) (fourth edition). For reasons that are not apparent from the record, Dr. V again examined the claimant on October 2, 2002, at which time Dr. V confirmed the statutory MMI date and, using the third edition, indicated on two separate Report of Medical Evaluation (TWCC-69) forms that the claimant's IR was 4%, presumably the rating assigned for the cervical spine only, and 11%, presumably the rating assigned for the upper extremity and the cervical spine.

The hearing officer determined the following:

FINDINGS OF FACT

6. The designated doctor in this case did not assign an impairment rating for both components of the injury utilizing the [fourth edition].
7. The first certification of an [IR] in this case was after October 15, 2001.

CONCLUSIONS OF LAW

6. The correct [IR] in this case cannot be determined pending a certification of the [IR] for the entire compensable injury utilizing the [fourth edition].

Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.1(c)(2)(B)(ii) (Rule 130.1(c)(2)(B)(ii)) provides that the appropriate edition of the AMA Guides to use for certifying examinations conducted on or after October 15, 2001 is:

the third edition, second printing, dated February, 1989 if, at the time of the certifying examination, there is a certification of MMI by a doctor pursuant to subsection (b) of this section made prior to October 15, 2001

which has not been previously withdrawn through agreement of the parties or previously overturned by a final decision.

Given that the first MMI certification was made in this case in 1997, and there is no evidence to suggest that this certification was withdrawn through agreement of the parties or overturned by a final decision, we reverse the hearing officer's Findings of Fact Nos. 6 and 7, and Conclusion of Law No. 6, and remand the case for the hearing officer to determine the correct IR under the third edition. If the correct IR cannot be determined from the evidence in the record, clarification should be sought from the designated doctor, if necessary, requesting that he rate the entire compensable injury, using the third edition.

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.

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

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

Chris Cowan
Appeals Judge

CONCUR:

Judy L. S. Barnes
Appeals Judge

Elaine M. Chaney
Appeals Judge