

APPEAL NO. 030999
FILED JUNE 5, 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 April 10, 2003. The hearing officer resolved the disputed issue by deciding that the respondent's (claimant) impairment rating (IR) is 25% as reported by the designated doctor chosen by the Texas Workers' Compensation Commission (Commission). The appellant (carrier) appealed, and the claimant responded.

DECISION

Reversed and remanded.

The parties stipulated that on _____, the claimant sustained a compensable lumbar disc herniation at L5-S1 and that he reached maximum medical improvement (MMI) statutorily on March 13, 2002. The claimant underwent an operation for his herniated disc at L5-S1 on September 18, 2000, consisting of a laminectomy, discectomy, and interbody fusion. The surgeon noted in the operative report that the claimant had an increased amount of motion to the L5-S1 area with an increased amount of instability.

In a Report of Medical Evaluation (TWCC-69) dated March 13, 2002, the claimant's treating doctor certified that the claimant has a 25% IR 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) (AMA Guides fourth edition). It appears that the treating doctor used the Range of Motion (ROM) Model of the AMA Guides fourth edition to assess the IR. In Texas Workers' Compensation Commission Appeal No. 030288-s, decided March 18, 2003, the Appeals Panel held that, although there are instances in the AMA Guides fourth edition when the ROM Model may be used, such as if none of the categories of the DRE Model (Diagnosis-Related Estimates Model also called the Injury Model) are applicable, or as a differentiator, the use of the DRE Model is not optional and is to be used unless there is a specific explanation why it cannot be used. In the instant case, the treating doctor did not explain why he used the ROM Model instead of the DRE Model.

In a TWCC-69 dated April 24, 2002, the designated doctor certified that the claimant has a 25% IR based on DRE lumbosacral category V of the AMA Guides fourth edition for radiculopathy and loss of motion segment integrity. The designated doctor noted that a lumbar MRI had revealed an L5-S1 herniation pressing against the S1 nerve root; that an EMG revealed S1 radiculopathy; and that according to the operative report, there was an increased amount of motion to the L5-S1 level area with an increased amount of instability.

The carrier had several peer review reports done that noted that there was no evidence of instability demonstrated by x-rays. Apparently, the Commission sent one of the peer review reports to the designated doctor, who responded that it would be highly inappropriate and dangerous to stop an operation to get flexion and extension x-rays and that the instability was noted in the operative report. The designated doctor wrote that it is his opinion that the claimant had instability and radiculopathy and that his 25% IR is unchanged.

In response to written questions from the ombudsman, the surgeon indicated that instability at the L5-S1 level met the criteria for loss of motion segment integrity on page 98 of the AMA Guides fourth edition because, during the surgical procedure, the degree of slipping was greater than 3.5 mm. By referencing 3.5 mm, it appears that the surgeon was referring to a definition for loss of motion segment integrity for a cervical vertebra, and not for a lumbar vertebra (see page 98 and Table 71, No. 5, page 109 of the AMA Guides fourth edition).

For a claim for workers' compensation benefits based on a compensable injury that occurred before June 17, 2001, Section 408.125(e) provides that, if the designated doctor is chosen by the Commission, the report of the designated doctor 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. The hearing officer found that the claimant's increased motion segment instability met the criteria of loss of motion segment integrity as identified in the AMA Guides fourth edition and that there is not a great weight of medical evidence contrary to the opinion of the designated doctor that the claimant's IR is 25%. The hearing officer concluded that the claimant's IR is 25%. The carrier contends that there is no objective evidence of loss of motion segment integrity as defined in the AMA Guides fourth edition, and that there was no evidence of any instability in the low back at the time of the designated doctor's examination and at the date of MMI.

In Texas Workers' Compensation Commission Appeal No. 022509-s, decided November 21, 2002, the Appeals Panel noted that the AMA Guides fourth edition provides that motion of the spine segments is evaluated with flexion and extension roentgenograms (x-rays), citing page 98 and Table 71, No. 5, page 109 of the AMA Guides fourth edition. In Appeal No. 022509-s, the Appeals Panel held that a hearing officer erred in affording presumptive weight to the 25% IR assigned by the designated doctor under DRE lumbosacral category V in part because it appeared that the designated doctor failed to base the assessment of loss of motion segment integrity on flexion and extension x-rays. In the instant case, there are references to x-rays in the medical records, but none of them refer to flexion and extension x-rays. The surgeon noted that x-rays done several months after the surgery revealed a good interbody fusion. The designated doctor appears to have based his assessment of loss of motion segment integrity solely on the operative report of the surgery done in September 2000.

In Texas Workers' Compensation Commission Appeal No. 030091-s, dated March 5, 2003, the Appeals Panel noted that a hearing officer had referenced page 100

of the AMA Guides fourth edition regarding surgery. Page 100 states that with the injury model, surgery to treat an impairment does not modify the original impairment estimate, which remains the same in spite of any changes in signs or symptoms that may follow the surgery and irrespective of whether the patient has a favorable or unfavorable outcome. The Appeals Panel noted, however, that impairment has to be “permanent” to be included in an IR, citing Section 401.011(23) and the AMA Guides fourth edition pages 9, 94, and 101 regarding permanent impairment. The Appeals Panel then stated:

Therefore, it follows that a claimant’s IR may not be based on impairment that the claimant no longer has at the time of the designated doctor’s IR examination. Tex. W.C. Comm’n, 28 TEX. ADMIN. CODE § 130.1(c)(2) (Rule 130.1(c)(2)) states that “a doctor who certifies that an employee has reached [MMI] shall assign an [IR] for the current compensable injury using the rating criteria contained in the appropriate edition of the [AMA Guides].” However, despite the wording on page 3-100 of the AMA Guides, the AMA Guides do not control over our applicable rules and the 1989 Act and only permanent impairment may be rated.

We hold that the hearing officer erred in basing the claimant’s IR on the report of the designated doctor because it appears that the designated doctor did not base his finding of loss of motion segment integrity on flexion and extension x-rays as required by the AMA Guides fourth edition. We remand the case to the hearing officer for the hearing officer to seek additional clarification from the designated doctor on the claimant’s IR and to advise the designated doctor that the Appeals Panel has held in Appeal No. 022509-s that motion of the spine segments is evaluated with flexion and extension x-rays (pages 98 and Table 71, No. 5, page 109 of the AMA Guides fourth edition), and that the Appeals Panel has also held in Appeal No. 030091-s that only permanent impairment may be rated, despite the wording on page 100 of the AMA Guides fourth edition regarding surgery.

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 **TEXAS MUTUAL INSURANCE COMPANY** and the name and address of its registered agent for service of process is

**MR. RUSSELL R. OLIVER, PRESIDENT
221 WEST 6TH STREET
AUSTIN, TEXAS 78701.**

Robert W. Potts
Appeals Judge

CONCUR:

Judy L. S. Barnes
Appeals Judge

Edward Vilano
Appeals Judge