

APPEAL NO. 031862
FILED SEPTEMBER 4, 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 June 18, 2003. The hearing officer determined that the impairment rating (IR) of respondent (claimant) is 16%, in accordance with the report of the Texas Workers' Compensation Commission (Commission)-selected designated doctor. Appellant (carrier) appealed this determination, contending that the designated doctor improperly applied 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), and improperly rated the cervical injury. Carrier also complains about one finding of fact concerning the shoulder injury and also contends that the hearing officer abused his discretion in excluding an exhibit. The file does not contain a response from claimant.

DECISION

We reverse and remand.

Carrier contends the hearing officer erred in determining that claimant's IR is 16% and that the designated doctor's IR is not contrary to the great weight of the other medical evidence. Carrier also contends that the designated doctor did not properly apply the AMA Guides.

It appears undisputed that claimant sustained compensable neck and bilateral shoulder injuries on _____, and that claimant reached maximum medical improvement (MMI) on August 21, 2002. In his initial report dated August 21, 2002, the designated doctor determined that claimant's IR is 15%. The designated doctor placed claimant in DRE category III "per page 110, Table 73" of the AMA Guides. In his reports, the designated doctor did not note any atrophy or loss of reflexes. In a letter dated October 7, 2002, written in response to a request for clarification, the designated doctor said that it is technically correct that claimant's May 16, 2002, EMG did not show radiculopathy; that claimant had a C6 sensory loss and he used this to place claimant in DRE category III; that the "differentiators on page 109 [of the AMA Guides] act as guides"; that clinical judgment is not to be ignored; and that DRE category III is appropriate. In a letter dated February 17, 2003, the designated doctor said:

As far as utilizing the DRE III versus a DRE II rating, the [AMA Guides] and the courses I have attended indicate that when you are dealing with pathology and treatment that was obviously in excess of what the DRE module specifically rates, then it is appropriate to look for the most closely related number, and then extrapolate that to the impairment rating. In this case, the patient had a two level [fusion], and I believe that 5% would be inappropriate and based on the previous edition of the guides . . . , a number

much closer to 15% was always the norm. For this reason, I elected to use the DRE III module.

The designated doctor reexamined claimant and noted in his March 20, 2003, report that her deep tendon reflexes were intact and that there was no muscle wasting. The designated doctor amended his report on March 20, 2003, and certified that claimant's IR is 16%. The designated doctor continued to use DRE category III for the cervical injury, but also added one percent impairment for the right shoulder injury.

Regarding the impairment for the cervical spine, carrier complains that claimant should have been placed in DRE category II because there were no verifiable signs of radiculopathy. In peer review reports, which were sent to the designated doctor, Dr. C and Dr. S both stated that claimant did not have radiculopathy and that DRE category II should have been used for that reason.

On page 104 of chapter 3 of the AMA Guides, it states:

DRE Cervicothoracic category III: Radiculopathy

Description and verification: The patient has significant signs of radiculopathy, such as (1) loss of relevant reflexes or (2) unilateral atrophy with greater than a 2-cm decrease in circumference compared with the unaffected side, measured at the same distance above or below the elbow. The neurologic impairment may be verified by electrodiagnostic or other criteria (differentiators 2, 3, 4, Table 71, p. 109).

It appears that the designated doctor placed claimant in DRE category III even though in his own examination he did not find atrophy or loss of reflexes and even though he acknowledged that there was no EMG evidence of radiculopathy. There is no provision in the AMA Guides for placing an injured worker in DRE category III for sensory loss alone with no atrophy, loss of reflexes, or electrodiagnostic evidence of radiculopathy. There is also no provision in the AMA Guides for "extrapolating" or certifying a higher IR just because the injured worker would have had a higher IR under another version of the AMA Guides. The designated doctor did not properly apply the AMA Guides in this case and should have considered page 104 of chapter 3 of the AMA Guides, regarding "DRE Cervicothoracic category III: Radiculopathy." See Texas Workers' Compensation Commission Appeal No. 030288-s, decided March 18, 2003; Texas Workers' Compensation Commission Appeal No. 030308, decided March 26, 2003.

Carrier next contends the hearing officer erred in determining that the designated doctor's initial IR did not include impairment for claimant's compensable bilateral shoulders.

Carrier asserts that, in his initial report, the designated doctor had actually declined to award impairment for the shoulders because of inconsistencies in observed

motion. We note that carrier contends that the report of Dr. S should be adopted, which includes impairment for the bilateral shoulders. Carrier does not allege any further error regarding the impairment for the shoulders beyond its appeal stating that the hearing officer erred in making Finding of Fact No. 10. In our view, the hearing officer could find as he did that “the initial rating certification by [the designated doctor] did not [include] claimant’s compensable bilateral shoulder injury of _____.” It was accurate to state that there was no rating included for the shoulders in the designated doctor’s first report. Considering carrier’s assignment of error, we perceive no reversible error.

Carrier contends that the hearing officer erred in excluding its exhibit number five, which was an EMG report. However, the same essential evidence was otherwise admitted without objection in that Dr. C discussed the EMG report. We conclude that any possible error was not reasonably calculated to cause nor did it probably 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).

We reverse the hearing officer’s decision and remand the case to the hearing officer for the hearing officer to request the designated doctor to provide an IR report that is in compliance with the AMA Guides, fourth edition. The hearing officer should ask the designated doctor if a reexamination of the claimant is necessary to complete his report. The hearing officer should provide the parties with a copy of any amended report of the designated doctor and allow the parties an opportunity to respond to any such report. After a response is obtained from the designated doctor, the hearing officer should reconsider the IR issue.

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.

According to information provided by carrier, the true corporate name of the insurance carrier is **AMERICAN HOME ASSURANCE COMPANY** and the name and address of its registered agent for service of process is

**CORPORATION SERVICE COMPANY
800 BRAZOS, SUITE 750, COMMODORE 1
AUSTIN, TEXAS 78701.**

Judy L. S. Barnes
Appeals Judge

CONCUR:

Gary L. Kilgore
Appeals Judge

Margaret L. Turner
Appeals Judge