

APPEAL NO. 040531  
FILED APRIL 12, 2004

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 December 9, 2003, with the record closing on February 17, 2004. The hearing officer resolved the disputed issues by deciding that the impairment rating (IR) is 10% and the appellant (claimant) is not entitled to first or second quarter supplemental income benefits (SIBs), as his IR is less than 15%. The claimant appeals, asserting that the first designated doctor chosen by the Texas Workers' Compensation Commission (Commission) properly 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 that the hearing officer erred in having a second designated doctor appointed. The claimant urges that the hearing officer's decision be reversed, arguing that the previous IR of 18% was correct, and that he is entitled to first and second quarter SIBs. The respondent (self-insured) requests affirmance.

DECISION

Affirmed, as reformed.

The claimant sustained a lumbar injury on \_\_\_\_\_. The parties stipulated that the date of maximum medical improvement is May 16, 2002. It is undisputed that the fourth edition is the appropriate edition of the AMA Guides to use in this case to evaluate the claimant's IR. The first designated doctor, Dr. R, examined the claimant on May 16, 2002. He used Table 75, Whole-person Impairment Percents Due to Specific Spine Disorders, Part I, Fractures, Line B, to assess an IR of 5% for a fracture at L2 and an IR of 5% for a fracture at L4, yielding a 10% impairment, and Table 81, Impairment Due to Abnormal Motion of the Lumbrosacral Region: Flexion and Extension, assessing 8% impairment for loss of lumbar flexion range of motion (ROM). He combined these impairments and assessed an 18% whole person IR.<sup>1</sup> The treating doctor and a carrier-required medical examination doctor both opined that a Diagnosis-Related Estimate (DRE) category should have been used instead of the ROM Model to assign impairment. At the CCH, the self-insured argued that Dr. R improperly combined use of the DRE and ROM models to arrive at an invalid IR and urged the hearing officer to appoint a second designated doctor to assess the proper IR.

In Texas Workers' Compensation Commission Appeal No. 030288-s, decided March 18, 2003, the Appeals Panel held that, although there are instances when the ROM model may be used, "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." While the record in this case indicates that letters of clarification were sent to Dr. R, his two-line responses on

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<sup>1</sup> We note that Dr. R added the specific disorder and ROM impairments when he should have used the Combined Values Chart, which would have yielded a 17% whole person impairment.

August 14, 2003, and October 23, 2003, merely state that he stands by his findings and do not explain why he used the ROM model instead of placing the claimant's injury in a DRE category. Since Dr. R never provided an explanation and the hearing officer believed that it was useless to attempt to get a usable IR from Dr. R (apparently because he had relocated out of state), the hearing officer decided that another designated doctor needed to be appointed. Dr. S was subsequently appointed by the Commission as designated doctor and, on January 8, 2004, he certified that the claimant had a 10% IR, based on DRE Lumbosacral Category III: Radiculopathy. The hearing officer held the record open until he received the second designated doctor's Report of Medical Evaluation (TWCC-69), provided it to the parties, and allowed the parties to provide written responses to that report. The hearing officer adopted the 10% IR assessed by Dr. S, and determined that the great weight of the other medical evidence is not contrary to the 10% IR from Dr. S.

The claimant contends that Dr. R properly used the ROM Model and that his certification of IR should be afforded presumptive weight. The hearing officer found that Dr. R improperly applied the AMA Guides, giving impairment under both the DRE and ROM models. Because both of the Tables used by Dr. R fall within the portion of the AMA Guides that discuss the ROM Model, we believe that a portion of Finding of Fact No. 4 is in error, and we reform that Finding to read: "Dr. [R] improperly applied the AMA Guides in arriving at the [IR], giving impairment under the [ROM] Model without providing a specific explanation as to why the DRE Model could not be used." We find that the evidence sufficiently supports the hearing officer's IR and SIBs determinations, which are not so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175 (Tex. 1986).

The claimant additionally argued that the hearing officer erred in determining that it was appropriate to have a second designated doctor appointed. In Texas Workers' Compensation Commission Appeal No. 022492, decided November 13, 2002, the Appeals Panel noted that a second designated doctor is rarely appropriate and should be limited to situations where, for example, the first designated doctor cannot or refuses to properly apply the AMA Guides, particularly after being asked for clarification or additional information concerning the report. In the instant case, we conclude that sufficient evidence supports the hearing officer's determination that it was appropriate to appoint a second designated doctor. Cain, supra.

We affirm the decision and order of the hearing officer, as reformed.

According to information provided by the carrier, the true corporate name of the insurance carrier is **(a certified self-insured)** and the name and address of its registered agent for service of process is

**CT CORPORATION  
350 NORTH ST. PAUL STREET, SUITE 2900  
DALLAS, TEXAS 75201.**

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Michael B. McShane  
Manager/Judge  
Appeals Panel

CONCUR:

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Gary L. Kilgore  
Appeals Judge

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Thomas A. Knapp  
Appeals Judge