

APPEAL NO. 041413  
FILED JULY 30, 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 opened on December 8, 2003, resumed on March 2, 2004, and completed on May 17, 2004. The hearing officer resolved the disputed issues by deciding that the respondent (claimant) had disability for the entire disputed period from October 3, 2001, through March 25, 2003, and that the claimant reached maximum medical improvement (MMI) on March 25, 2003, with a 26% impairment rating (IR). The appellant (carrier) appealed, arguing that the hearing officer's decision on the disputed issues are against the great weight and preponderance of the evidence and should be reversed. The claimant responded, urging affirmance of the disputed determinations.

DECISION

Affirmed in part and reversed and rendered in part.

**MMI AND IR**

The parties stipulated that on \_\_\_\_\_, the claimant sustained a compensable injury; that the claimant's date of statutory MMI is March 25, 2003; that in a report dated October 2, 2001, Dr. M, the carrier's required medical examination doctor, certified the claimant reached MMI on October 2, 2001, with a 8% IR; and that in a Report of Medical Evaluation (TWCC-69) dated November 20, 2001, Dr. S, the first designated doctor appointed by the Texas Workers' Compensation Commission (Commission), certified that the claimant reached MMI on October 2, 2001, with a 9% IR. It was undisputed that the claimant had a two stage three level fusion and decompression on June 30, 2003. In evidence was correspondence from Dr. S dated August 25, 2003, which stated that he was not made aware of any surgical consultation or events that took place from the time he saw the claimant and her surgery, and therefore must state she was not at MMI and the IR was then not valid. Upon the conclusion of the proceeding held on December 8, 2003, the hearing officer determined a new designated doctor needed to be appointed because Dr. S rescinded his certification and no longer "fit the matrix." The Commission then selected Dr. A to be the second designated doctor. The hearing continued on March 2, 2004, but the report from Dr. A utilized 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 4th edition). The hearing officer wrote Dr. A on March 2, 2004, and informed him that the Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association (AMA Guides 3rd edition) had to be used because the first certification by Dr. M was made prior to October 15, 2001. Dr. A reexamined the claimant on May 3, 2004, and determined the claimant reached statutory MMI on March 25, 2003. In his report dated May 3, 2004, Dr. A stated:

if one uses the statutory date of [MMI] of March 25, 2003, then the [claimant's] [IR] at that time would be based upon loss of [range of motion (ROM)]. The [claimant] was not examined at that time; therefore [ROM] is not known...

Dr. A assessed a 7% IR based on Table 49 (II)(C) unoperated disc with medically documented injury, and did not provide any impairment based on loss of range of motion or neurological deficits. Dr. A additionally provided an alternate IR in his report based on the findings of the date of the examination, May 3, 2004, and assessed an IR based on Table 49 (II)(F) multiple operative levels, with or without residual symptomatology (12%), and impairment for loss of ROM (14%), and loss of sensation in the S1 nerve root (2%) combined for a whole person IR of 26%.

Sections 408.122(c) and 408.125(e) provide that where there is a dispute as to the date of MMI and IR, the report of the designated doctor chosen by the Commission shall have presumptive weight and the Commission shall base the date of MMI and the IR on that report unless it is contrary to the great weight of the other medical evidence. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.6(i) (Rule 130.6(i)) provides that the designated doctor's response to a request for clarification is also considered to have presumptive weight, as it is part of the designated doctor's opinion. Rule 130.1(c)(3), which became effective March 14, 2004, provides that "[a]ssignment of an [IR] for the current compensable injury shall be based on the injured employee's condition as of the MMI date considering the medical record and the certifying examination." That rule has been interpreted to mean that the IR shall be based on the condition as of the MMI date and is not to be based on subsequent changes, including surgery. See Texas Workers' Compensation Commission Appeal No. 040313-s, decided April 5, 2004.

It is undisputed that the AMA Guides 3rd edition was the correct edition to be used in this case. The AMA Guides 3rd edition provides that to calculate total impairment of the whole person due to spine impairment, first the primarily impaired region should be selected and then if applicable Table 49 should be used to obtain a diagnosis based percentage of impairment, ROM should be tested and impairment due to neurological deficits should be identified. Information about how to measure and consistency requirements are also provided for. Finally, the combined values chart is to be used to obtain impairment of the whole person, combining the diagnosis based impairment with the impairment due to limited ROM. In the instant case, the 26% IR assessed by Dr. A considers impairment from the claimant's surgery which occurred after the date of statutory MMI and violates Rule 130.1(c)(3) as it has been interpreted. The 7% IR assessed by Dr. A fails to consider ROM as required by the AMA Guides 3rd edition. The claimant argues that the 7% IR fails to rate the entire injury to the lumbar spine.

In the instant case the designated doctor assessed two IRs based respectively on the claimant's condition at the time of the certifying examination and at the time of statutory MMI. The designated doctor acknowledged that using the statutory date of MMI, the IR would be based upon loss of ROM. However, because the designated

doctor did not examine the claimant on or near the date of statutory MMI he declined to assess impairment for loss of ROM with the 7% impairment he assessed under Table 49 (II)(c), impairments due to specific disorders of the spine, considering the claimant's condition prior to the date the claimant had surgery, which was after reaching statutory MMI.

We cannot agree as the carrier suggests that the 7% is the appropriate IR in this case because it does not rate the condition as required by the AMA Guides 3rd edition in that it does not include a rating for ROM or neurological deficits. It would be a practical impossibility for any doctor to assess impairment for loss of ROM on a specific date that has since passed. Although the measurements were taken during the examination on May 3, 2004, the designated doctor provided impairment for loss of ROM and loss of sensation in the S1 nerve root in the same report in which he assessed impairment due to specific disorders considering the claimant's condition on the date of statutory MMI.

We have previously stated that, where the designated doctor's report provides the component parts of the rating that are to be combined in accordance with the Combined Values Chart, the act of combining those numbers is a mathematical correction which does not involve medical judgment or discretion. Thus, we have recalculated the correct IR from the figures provided in the designated doctor's report and rendered a new decision as to the correct IR. Texas Workers' Compensation Commission Appeal No. 950472, decided May 8, 1995. Similarly, we have approved the hearing officer's decision to follow that same procedure. Texas Workers' Compensation Commission Appeal No. 960608, decided May 3, 1996. Under the guidance of those cases, we note that the claimant's 7% impairment for specific disorders under Table 49 (II)(c) combined with the 14% impairment for loss of ROM and the 2% impairment for loss of sensation in the S1 nerve root for a combined whole person IR of 22% IR. Therefore, we conclude that the correct IR in this instance is 22%.

## **DISABILITY**

The claimant had the burden to prove that she had disability as defined by Section 401.011(16). Conflicting evidence was presented at the CCH on the issue of whether the claimant had disability for the period at issue. 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. Although there is conflicting evidence in this case, we conclude that the hearing officer's determination that the claimant had disability from October 3, 2001, through March 25, 2003, is supported by sufficient evidence and is 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).

We affirm the hearing officer's disability determination. We reverse the hearing officer's determination that the claimant's IR is 26% and render a new determination that the claimant's IR is 22%. The carrier is ordered to pay benefits in accordance with

this decision, the 1989 Act, and the Commission's rules.

The true corporate name of the insurance carrier is **ST. PAUL FIRE & MARINE INSURANCE COMPANY** and the name and address of its registered agent for service of process is

**CORPORATION SERVICE COMPANY  
701 BRAZOS, SUITE 1050  
AUSTIN, TEXAS 78701.**

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Margaret L. Turner  
Appeals Judge

CONCUR:

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Elaine M. Chaney  
Appeals Judge

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Veronica L. Ruberto  
Appeals Judge