

APPEAL NO. 042543  
FILED DECEMBER 2, 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 August 5, 2004. The hearing officer resolved the disputed issue by deciding that the respondent's (claimant) impairment rating (IR) cannot be determined at this time. The appellant (carrier) appealed, contending that the designated doctor complied with 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 applicable statutes. The appeal file does not contain a response from the claimant.

DECISION

Reversed and remanded.

It is undisputed that the claimant sustained a compensable injury on \_\_\_\_\_, and that the claimant reached statutory maximum medical improvement (MMI) on September 14, 2003. The sole issue in dispute was the claimant's IR. The evidence reflects that the claimant had a cervical injury and has undergone cervical surgery. It was undisputed that the claimant underwent spinal surgery in September of 2000 prior to the compensable injury at issue. There is conflicting evidence in the record regarding whether the surgery the claimant underwent following his compensable injury was a one level or two level fusion. The claimant's operative reports were not in evidence.

Both of the IR's in evidence, including the IR certified by the Texas Workers' Compensation Commission (Commission)-appointed designated doctor, assessed impairment using the range of motion (ROM) model. 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 [Diagnosis-Related Estimate (DRE)] Model is not optional and is to be used unless there is a specific explanation why it cannot be used." In that case the Appeals Panel focused on language from page 3/94 of the AMA Guides 4th edition that states:

The evaluator assessing the spine should use the Injury Model, if the patient's condition is one of those listed in Table 70 (p.108). That model, for instance, would be applicable to a patient with a herniated lumbar disk and evidence of nerve root irritation. If none of the eight categories of the Injury Model is applicable, then the evaluator should use the [ROM] Model.

The first sentence in this paragraph suggests that if a claimant's condition is one of those listed in Table 70, then the claimant will fall within one of the DRE categories.

In his response to the Commission's request for clarification, the designated doctor stated "there is no DRE category that specifically addresses spinal surgery post injury. However, the ROM model specifically rates spinal surgery." It is clear from his response, that the designated doctor did not use the DRE model to assess impairment not because of any factor specific to the claimant's condition and treatment but simply because he had spinal surgery. Whether or not the designated doctor's explanation as to why he utilized the ROM model as opposed to the DRE model was sufficient presented a question of fact for the hearing officer to resolve. See Texas Workers' Compensation Commission Appeal No. 040620, decided May 11, 2004. The carrier's reliance on Texas Workers' Compensation Commission Appeal No. 033280, decided February 11, 2004, is misplaced. In Appeal Panel No. 033280, *supra*, the hearing officer determined that the designated doctor's explanation for assessing IR using the ROM model was sufficient as the designated doctor did not believe the DRE model reflected the true nature of the claimant's impairment resulting from his compensable injury. In the instant case, the hearing officer's finding that the designated doctor did not comply with the appropriate provisions of the AMA Guides in rating the claimant's impairment because he used the ROM to determine the IR and not as a differentiator is supported by the evidence in this case. However, the determination that the claimant's IR cannot be determined at this time is reversed and the issue of IR is remanded back to the hearing officer for further action consistent with this decision.

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. The evidence reflects that the designated doctor in this case responded to multiple letters of clarification. Given our affirmance of the finding that the designated doctor did not comply with the appropriate provisions of the AMA Guides, we find this case to be a rare situation where a second designated doctor should be appointed to determine the claimant's IR. Accordingly, a second designated doctor should be appointed to determine the claimant's IR, pursuant to Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.1(c)(3) (Rule 130.1(c)(3)).

Section 410.251 requires a party to exhaust its administrative remedies and be aggrieved by a final decision of the Appeals Panel before it seeks judicial review. Although the evidence as presented precluded the hearing officer from being able to make a final determination regarding MMI and IR, Section 410.163(b) requires that a hearing officer shall ensure the preservation of the rights of the parties *and the full development of facts required for the determinations to be made.* [Emphasis added.] Until a determination is made regarding MMI and IR there can be no final decision from which judicial review may be sought. Albertson's, Inc. v. Ellis, 131 S.W.3d 245 (Tex. App.-Fort Worth 2004, pet. denied).

We note that in Texas Workers' Compensation Commission Appeal No. 032399-s, decided November 3, 2003, we said that, for hearings held after July 22, 2003,

involving IRs for spinal surgery that would be affected by Advisory 2003-10, signed July 22, 2003, it is error not to consider and apply that advisory. However, in subsequent cases a determination of IR has been affirmed where it was clear that the designated doctor considered Advisory 2003-10 but declined to assess a rating based on DRE Category IV, where the hearing officer found that the great weight of the other medical evidence was not contrary to the report, or amended report, of the designated doctor. See Texas Workers' Compensation Commission Appeal No. 041894, decided September 22, 2004, and Texas Workers' Compensation Commission Appeal No. 041190, decided July 7, 2004. Further, Texas Workers' Compensation Commission Appeal No. 042108-s, decided October 20, 2004, stated rather than stripping the certifying doctor of the ability to exercise his or her independent medical judgment in assigning an appropriate IR in each individual case, Commission Advisories 2003-10 and 2003-10B, signed February 24, 2004, merely give the certifying doctor this additional option.

Advisory 2003-10B additionally states in 2.c. that “[h]ealth care providers may utilize the range-of-motion or other methodology if indicated (as with any condition in the 4<sup>th</sup> Edition Guides) that most accurately reflects the IR evident for each injured worker.” In the instant case, the designated doctor did not indicate why the range of motion most accurately reflected the claimant’s impairment other than the fact he had spinal surgery. Advisory 2003-10B provides that if preoperative x-rays were not performed, the rating may be determined using the following criteria:

- a. One level uncomplicated fusion meets the criteria for DRE Category II, Structural Inclusions. This spinal abnormality is equivalent to a healed “less than 25% Compression Fracture of one vertebral body.”
- b. Multilevel fusion meets the criteria for DRE Category IV, Structural Inclusions, as this multilevel fusion is equivalent to “multilevel spine segment structural compromise” per DRE IV.

Advisory 2003-10B specifically provides for assessment of impairment utilizing the DRE model and allows use of the ROM model to assess impairment only when a doctor indicates it more accurately reflects impairment in an individual case.

We affirm the hearing officer’s finding that the Commission-appointed designated doctor did not comply with the appropriate provisions of the AMA Guides because he used the ROM model to determine the IR and not as a differentiator. We reverse the determination that the claimant’s IR cannot be determined at this time and remand the case for the appointment of a second designated doctor and for further development of evidence by the hearing officer.

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, 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.

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.**

---

Margaret L. Turner  
Appeals Judge

CONCUR:

---

Thomas A. Knapp  
Appeals Judge

---

Robert W. Potts  
Appeals Judge