APPEAL NO. 043155
FILED JANUARY 28, 2005

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 September 30, 2004. The record closed on November 12, 2004. The hearing officer resolved the disputed issue by deciding that the respondent (claimant) has a 35% impairment rating (IR). The appellant (carrier) appealed, arguing that the hearing officer erred in determining that Dr. H, the designated doctor, 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). The carrier further contends that the findings, methods, and measurements of Dr. H were incorrect. The appeal file did not contain a response from the claimant.

DECISION

Reversed and remanded.

It was undisputed that the claimant sustained a compensable injury on _____, and reached maximum medical improvement (MMI) statutorily on May 9, 2002. The sole issue to be decided at the CCH was the claimant's IR. After the conclusion of the CCH, the hearing officer reopened the record to request additional clarification from Dr. H. In response, Dr. H amended his certification to assess a 35% IR utilizing the AMA Guides. The carrier contends the findings, methods, and measurements of Dr. H were incorrect, pointing to other medical records, which also contained measurements of the claimant's range of motion (ROM) of the affected areas. The 35% IR consisted of impairment assessed for both the right and left upper extremities. The carrier contends that Dr. H failed to correctly apply the AMA Guides in assessing impairment for the right wrist and argues that it was error for the hearing officer to determine that Dr. H properly applied the AMA Guides. Dr. H calculated the impairment assessed for the right wrist by combining 16% upper extremity impairment for loss of motion with 10% upper extremity impairment for mild median nerve entrapment neuropathy under Table 16.

The hearing officer noted in the Discussion portion of her decision that the AMA Guides state that one should not use both entrapment neuropathy (Table 16) and diminished ROM to evaluate impairment to the wrist. The hearing officer noted that in her opinion, since the AMA Guides use the word "should" rather than "must" Dr. H's certification was not rendered in contravention of the applicable provisions of the AMA Guides. The AMA Guides specifically provide on page 3/56 that "[i]mpairment of the hand and upper extremity secondary to entrapment neuropathy may be derived by measuring the sensory and motor deficits . . . ." The AMA Guides further provide that "[a]n alternative method is provided in Table 16. The evaluation *should not* use both methods" (emphasis in the original). We can't agree that the hearing officer's

interpretation of "should not" is correct in the context in which it is used. *See* Texas Workers' Compensation Commission Appeal No. 030288-s, decided March 18, 2003. However, the language cited refers to impairment assessed for sensory and motor deficits rather than ROM deficits. The designated doctor did not assess impairment for sensory and motor deficits as well as rating under Table 16 but rather assessed impairment for both ROM and Table 16.

The AMA Guides provide on page 3/46:

> *If an impairment results strictly from a peripheral nerve lesion, the physician should* not *apply impairment percents from Section 3.1f through 3.1j (pp. 24 through 45) of this chapter,* and *this section, because a duplication and an unwarranted increase in the impairment percent would result.* [Emphasis in the original.]

We note that the next paragraph of the AMA Guides, page 3/46, states that:

> If the restricted motion cannot be attributed to a peripheral nerve lesion, the motion impairment should be evaluated according to Section 3.1f through 3.1j and the nerve impairment according to this section. Then the motion impairment percent should be *combined* (Combined Values Chart, p. 322) with the peripheral nerve system impairment percent.

Although the records indicate that the designated doctor based his assessment of impairment for the right wrist solely on the diagnosis of carpal tunnel syndrome, the designated doctor assessed impairment for abnormal motion of the right wrist under Section 3.1h and then combined that rating with impairment he assessed for the right wrist under Table 16 based on mild impairment of the median nerve of the wrist. Clarification should be sought from the designated doctor to determine whether or not the impairment for the right wrist results strictly from a peripheral nerve lesion.

We note Dr. N, a carrier required medical examination doctor, also examined the claimant. However, in correspondence dated September 29, 2004, Dr. N stated that he would not be able to determine the claimant's IR from the records provided using the date of MMI of May 9, 2002. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.1(c)(3) (Rule 130.1(c)(3)) provides that an assignment of an IR for the current compensable injury shall be based on the injured employee's condition as of the MMI date.

We reverse the hearing officer's determination that the claimant's IR due to his compensable injury of _____, is 35% and remand the case to the hearing officer for the hearing officer to seek clarification from the designated doctor and request the designated doctor provide an IR report that is in compliance with the AMA Guides. Both parties should be allowed an opportunity to respond to the amended certification and rating provided in reply by the designated doctor. The carrier contended in its post-hearing response that Dr. H is no longer listed as a designated doctor. If the designated

doctor is no longer qualified or is unwilling to provide the clarification, certification and rating as requested, then another designated doctor should be appointed.

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.

The true corporate name of the insurance carrier is **LIBERTY MUTUAL FIRE INSURANCE COMPANY** and the name and address of its registered agent for service of process is

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

_____
Margaret L. Turner
Appeals Judge

CONCUR:

_____
Thomas A. Knapp
Appeals Judge

_____
Robert W. Potts
Appeals Judge