APPEAL NO. 043168
FILED JANUARY 20, 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 was held on November 9, 2004. The hearing officer determined that the appellant (claimant) reached maximum medical improvement (MMI) on May 21, 2003, with a zero percent impairment rating (IR) as assessed by the designated doctor whose reports and clarifications are not contrary to the great weight of the other medical evidence.

The claimant appealed, contending that certain exhibits should have been admitted, that the designated doctors report was premature; that he has not reached MMI; that the designated doctor was biased; and that the designated doctor refused to rate the entire compensable injury. The respondent (carrier) responded, urging affirmance.

DECISION

Reversed and remanded.

The claimant offered into evidence three exhibits (Claimant Exhibits 27, 28 and 29) which were other partially redacted hearing officer decisions involving other claimants, where (Dr. R) was the designated doctor. The exhibits were offered to show bias ("refuses to rate the compensable injury") on the part of the doctor in this case. The hearing officer excluded the documents as having "very little precedential value." To obtain reversal of a decision based on an error in the admission or exclusion of evidence, the appellant must show that the evidentiary ruling was reasonably calculated to cause and probably did cause the rendition of an improper decision. Hernandez v. Hernandez, 611 S.W.2d 732 (Tex. Civ. App.-San Antonio 1981, no writ). In this case, the hearing officer did not err in the exclusion of the completely unrelated decision and orders.

It is undisputed that the claimant sustained a compensable low back, right ankle and eventually a thoracic spine injury on _____, when he fell backward off of a ladder. As the hearing officer commented, the claimant treated conservatively with a chiropractor. The claimant was released to regular work with "pt to return if aggravated" in a note dated May 12, 2003. The claimant's treating doctor certified that the claimant was not at MMI on May 12, 2003. The carrier requested that a designated doctor be appointed and Dr. R examined the claimant on May 21, 2003. Dr. R was appointed as the Texas Workers' Compensation Commission's (Commission) designated doctor and examined the claimant's low back and right ankle and certified MMI on May 21, 2003, with a zero percent IR pursuant to 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). Dr. R assessed a Diagnosis-Related Estimate (DRE) Lumbosacral Category I zero percent impairment and zero percent impairment for the right ankle.

The claimant continued to have back pain and an MRI of the thoracic spine was performed on July 15, 2003. That MRI showed disc herniations at T3-4 and T5-6 with impingement on the spinal cord. The Commission sought clarification based on the MRI from the designated doctor and in a response dated August 10, 2003, Dr. R stated he "cannot relate the multi-level disc changes to the accident of _____" and that the claimant's complaints at the time of the exam were "far lower than the T3/4 and T5/6 levels indicated by the MRI study." In a second letter of clarification dated September 20, 2003, the designated doctor reiterated his opinion that the claimant had not sustained a thoracic spine injury. A CT scan of the thoracic spine performed on November 11, 2003, shows only "a very tiny disc bulge at approximately T5-6" with no spinal cord involvement. In a report dated November 12, 2003, a carrier required medical examination (RME) stated his opinion that the compensable injury "extended to the thoracolumbar spine." On December 17, 2003, the carrier authorized a thoracic epidural steroid injection. The carrier accepted a thoracic spine injury on February 23, 2004.

In March 2004 the Commission, through a clerical error, advised Dr. R that the carrier had not accepted a thoracic injury and in a response dated March 11, 2004, Dr. R said that information "does not alter my determination of [MMI] and [IR]." By letter dated March 16, 2004, the Commission corrected its error and advised Dr. R that the "carrier HAS accepted the thoracic spine" (emphasis in the original) as part of the compensable injury. Dr. R responded on March 29, 2004, with the same statement that the information does not change his determination of MMI and IR. Additional medical records, which include opinions regarding the claimant's thoracic injury were forwarded to Dr. R on September 1, 2004. Dr. R replied by letter report dated September 11, 2004, stating that the "thoracic herniations are unlikely results of the described accident." Additional medical records indicate that the claimant received multiple trigger point injections for his thoracic spine injury in September 2004 and an opinion dated October 4, 2004, from an orthopedic surgeon stated that the claimant has thoracic disc herniations at T3-4, and T5-6 as a result of his compensable injury and that he is not at MMI.

The hearing officer found that the claimant reached MMI on May 21, 2003, with a zero percent IR as assessed by Dr. R. Whether or not the claimant has thoracic disc herniations or "very tiny disc bulges" was in dispute. However, it is fairly clear that the claimant has a compensable thoracic spine injury (as accepted by the carrier) and that Dr. R has refused to rate that injury because he does not believe it is part of the compensable injury. As the claimant in his appeal points out, Dr. R could have rated the thoracic injury as a DRE Cervicothoracic Category I: Complaints or Symptoms with a zero percent IR but Dr. R refused to do so, instead insisting that any thoracic injury was not part of the compensable injury.

We hold that the hearing officer erred in giving presumptive weight to the designated doctors report and adopted that MMI date and IR. The designated doctor is required to rate the entire compensable injury. Texas Workers' Compensation Commission Appeal No. 951158, decided August 21, 1995. In this case Dr. R has refused to rate the thoracic injury in spite of several requests for clarification and being advised that the carrier had accepted a compensable thoracic injury. It would appear that nothing is to be gained by going back to the designated doctor a fifth or sixth time. The Appeals Panel has held that a designated doctor should not be replaced by a second designated doctor absent a substantial basis to do so, and that normally the appointment of a second designated doctor is appropriate only in those cases where the first designated doctor is unable or unwilling to comply with the required AMA Guides or requests from the Commission for clarification, or if he or she otherwise compromises the impartiality demanded of a designated doctor. In this case Dr. R has demonstrated that he is unwilling to rate the compensable thoracic injury in compliance with the Commission's direction. We have also previously held that when a designated doctor refuses to provide an IR for the compensable injury (whether the IR be zero or a significant percentage) based on the designated doctor's opinion that the claimant does not have a compensable injury and to determine MMI based on the entire compensable injury, one of the remedies is to appoint another designated doctor. Texas Workers' Compensation Commission Appeal No. 982402, decided November 23, 1998; Texas Workers' Compensation Commission Appeal No. 001733, decided September 13, 2000. In that Dr. R has refused to rate the claimant's entire compensable injury, and has been given ample opportunity to do so in the letters requesting clarification, the hearing officer's decision that Dr. R's reports are entitled to presumptive weight is against the great weight and preponderance of the evidence.

Accordingly, we reverse the hearing officer's decision and remand the case for the appointment of a second designated doctor. The second designated doctor is to be given all the medical records, including Dr. R's reports, and asked to assess an MMI date, and if the claimant is at MMI, an IR. The second designated doctor's report is then to be made available to the parties for comment and rebuttal evidence to the second designated doctor's report. The hearing officer may wish to hold a hearing on remand before issuing his decision.

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 **AMERICAN HOME ASSURANCE COMPANY** and the name and address of its registered agent for service of process is

CORPORATION SERVICE COMPANY
800 BRAZOS STREET, SUITE 750, COMMODORE 1
AUSTIN, TEXAS 78701-2554.

_____
Thomas A. Knapp
Appeals Judge

CONCUR:

_____
Robert W. Potts
Appeals Judge

_____
Margaret L. Turner
Appeals Judge