

APPEAL NO. 060506
FILED MAY 8, 2006

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 January 25, 2006, with the record closing on January 31, 2006. With regard to the sole issue before her, the hearing officer determined that the respondent's (claimant) impairment rating (IR) is 19% as assessed by the designated doctor whose opinion was supported by a preponderance of the evidence.

The appellant (carrier) appealed, contending that the designated doctor's rating of a cervical injury was not supported by the evidence. The claimant responds, urging affirmance.

DECISION

Reversed and remanded.

The parties stipulated that the claimant (an airline flight attendant) sustained a compensable injury on ____, that the Texas Department of Insurance, Division of Workers' Compensation (Division) has appointed (Dr. P) as the designated doctor and that the claimant reached maximum medical improvement (MMI) on June 28, 2005. At a prior CCH it was determined that the claimant's compensable ____, injury included "cervical disc protrusions and/or herniations, cervical radiculopathy, cervical degenerative spondylosis" and similar lumbar disc protrusions and/or herniations, radiculopathy and degenerative spondylosis.

The claimant was treated (or seen) by several doctors, none of whom gave an IR. Although not in evidence apparently Dr. P saw the claimant on two occasions where she determined the claimant was not at MMI. In a report dated June 28, 2005, Dr. P certified MMI on that date and assessed a 19% IR utilizing 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. P assessed a 15% impairment for Diagnosis-Related Estimate (DRE) Cervicothoracic Category III: Radiculopathy and 5% for DRE Lumbosacral Category II: Minor Impairment combined to result in the 19% IR. The carrier challenges only the 15% impairment for the cervicothoracic DRE III asserting that there are no significant sign of radiculopathy as required for that rating by the AMA Guides. A carrier peer review doctor, in a report dated July 13, 2005, commented that the designated doctor had failed to find any "significant signs of radiculopathy" at the time of the examination." This report was apparently sent to the designated doctor for comment. Dr. P replied by letter dated August 18, 2005, stating that she had seen the claimant on three separate occasions and further commented:

On all three occasions, I noted decreased sensation to sharp touch in the right upper extremity consistent with her electrodiagnostic studies. [Appeal Panel Decision (APD)] 030091-s, [decided March 5, 2003], states that the impairment assessed the individual must be based upon a permanent condition. This means that the impairment cannot be based solely upon a diagnostic performed in the past. In this case, [the claimant] had an EMG/NCV study performed in November of 2004. The findings of the EMG/NCV correlate to those found on all three of [the claimant's] clinical examinations. Though the [deep tendon reflex] DTRs were intact and equal bilaterally, the 1.5 [centimeter] cm of atrophy between the right upper extremity and the left upper extremity coupled with the positive findings on the EMG/NCV, was enough evidence to substantiate awarding [the claimant] an impairment under DRE Category III for the cervical spine.

The carrier's peer review doctor responded that Dr. P's assessment "was performed based upon solely the EMG nerve condition studies of the past." The peer review doctor thought the claimant should have more accurately been assessed as DRE Cervicothoracic Category II: Minor Impairment. A second letter of clarification was sought from the designated doctor. In a response dated October 18, 2005, the designated doctor confirmed her 19% IR. The hearing officer in adopting Dr. P's 19% IR noted that the designated doctor

"acknowledges there was no loss of relevant reflexes and that the atrophy was less than two centimeters, however she also stated that the atrophy was considered based on her examination and took into consideration that Claimant was thin, and symptoms found in the right extremity."

The AMA Guides at page 104 discuss DRE Cervicothoracic Category III: Radiculopathy, and provides in pertinent part as follows:

Description and Verification: The patient has significant signs of radiculopathy, such as (1) loss of reflexes or (2) unilateral atrophy with greater than a 2-cm decrease in circumference compared with the unaffected side, measured at the same distance above or below the elbow. The neurologic impairment may be verified by electrodiagnostic or other criteria (differentiators 2, 3, and 4, Table 71 p. 109).

The differentiators in Table 71, page 109 include loss of reflexes as verified by "[u]nequivocal electrodiagnostic evidence exists of acute nerve root compromise" and atrophy of 2 cm or more above or below the elbow or knee. The designated doctor acknowledges no loss of relevant reflexes and the "1.5 cm of atrophy between the right upper extremity and the left upper extremity." APD 050729-s, decided May 23, 2005, APD 051456, decided August 16, 2005, and APD 051824, decided September 19, 2005, all reference APD 030091-s, *supra*, which hold that to find radiculopathy the doctors must look to see if there is a loss of relevant reflexes or unilateral atrophy with greater than a two centimeter decrease in circumference compared to the unaffected

side, measured at the same distance above or below the elbow. Such findings of neurologic impairment may then be verified by diagnostic studies. APD 051824, *supra*, was also a case where there was only 1.5 cm atrophy. In this case there is simply insufficient evidence of verification of radiculopathy to warrant an assessment of DRE Cervicothoracic Category III: Radiculopathy impairment.

Section 408.125(c) provides that the report of the designated doctor shall have presumptive weight, and the Division shall base the IR on that report unless the preponderance of the other medical evidence is to the contrary, and that, if the preponderance of the medical evidence contradicts the IR contained in the report of the designated doctor chosen by the Division, the Division shall adopt the IR of one of the other doctors. 28 TEX. ADMIN. CODE § 130.6(i) (Rule 130.6(i)) provides that the designated doctor's response to a Division request for clarification is considered to have presumptive weight as it is part of the doctor's opinion. We hold that the assessment of a 15% impairment based on DRE Cervicothoracic Category III: Radiculopathy is not supported by the AMA Guides and is reversed. Dr. P's assessment of a 5% impairment for DRE Lumbosacral Category II: Minor Impairment has not been appealed.

In that Dr. P, in her responses, has indicated that she is unwilling to change her position and because there were no other ratings from any other doctor that can be adopted we remand the case for the appointment of a second designated doctor to assess a rating based on the claimant's condition at the stipulated date of MMI, which conforms to the AMA Guides and which can be adopted.

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 Division, 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 APD 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.**

Thomas A. Knapp
Appeals Judge

CONCUR:

Veronica L. Ruberto
Appeals Judge

Margaret L. Turner
Appeals Judge