APPEAL NO. 080805
FILED JULY 23, 2008

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 May 6, 2008. The hearing officer decided that the appellant's (claimant) impairment rating (IR) is 5%. The claimant appealed the hearing officer's determination on the claimant's IR, contending the adoption of the designated doctor's assigned IR of 5% is contrary to the preponderance of the other medical evidence and urging the adoption of the treating doctor's assigned IR. The respondent (self-insured) responded, urging affirmance.

DECISION

Reversed and remanded.

The parties stipulated that: (1) on _____, the claimant sustained a compensable injury; (2) the claimant reached maximum medical improvement (MMI) on June 30, 2000; (3) the Texas Department of Insurance, Division of Workers' Compensation (Division)-selected designated doctor is Dr. D; (4) on June 29, 2007, Dr. D, the designated doctor, assigned a 5% IR; and (5) on March 15, 2007, Dr. K, the treating doctor, assigned a 25% IR. The sole issue in dispute is the claimant's IR. It is undisputed that the claimant sustained a compensable repetitive trauma injury to her bilateral upper extremities and that the claimant underwent a right carpal tunnel release on June 19, 1999. It is undisputed 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) is the appropriate edition to be used for the assignment of the IR in this case.

IR

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 § 130.1(c) (Rule 130.1(c)) provides in part:

(2) A doctor who certifies that an injured employee has reached MMI shall assign an [IR] for the current compensable injury using the rating criteria contained in the appropriate edition of the AMA Guides to the Evaluation of Permanent Impairment, published by the American Medical Association (AMA Guides).

* * * *

(3) Assignment 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. The doctor assigning the [IR] shall:

(A) identify objective clinical or laboratory findings of permanent impairment for the current compensable injury;

(B) document specific laboratory or clinical findings of an impairment;

(C) analyze specific clinical and laboratory findings of an impairment;

(D) compare the results of the analysis with the impairment criteria and provide the following:

(i) A description and explanation of specific clinical findings related to each impairment, including zero percent (0%) [IR]; and

(ii) A description of how the findings relate to and compare with the criteria described in the applicable chapter of the AMA Guides. The doctor's inability to obtain required measurements must be explained.

In this case, the parties stipulated to the claimant's date of MMI, June 30, 2000. The designated doctor, Dr. D, examined the claimant on June 29, 2007, and using 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), certified in a Report of Medical Evaluation (DWC-69) that the claimant reached MMI on June 30, 2000, with a 5% IR. Dr. D noted the compensable injury and treated areas of the body as bilateral wrists and bilateral shoulders. Dr. D diagnosed "[b]ilateral [s]houlder [r]otator [c]uff [t]endonitis, [b]ilateral [c]arpal [t]unnel [s]yndrome, S/P surgery on the right, and [o]veruse [s]yndrome [b]ilaterally." Dr. D performed range of motion (ROM) testing on both of the wrists, elbows, and shoulders and noted that the overall impairment calculation with these values is 31% whole person, "based on a strict interpretation of the 'Guides.'" Dr. D stated, "It is my medical opinion that after 9 years post-injury the claimant's body should have recovered much more than is apparent on these

[designated doctor] exams, esp. considering blunt or explosive trauma. In reviewing [previous] IR results [running from 16%-24%] it is evident to me that the patient's effort is submaximal and the results of the methods used to establish her IR are invalid. Therefore, it is my medical opinion that a 5% IR is appropriate based upon my experience, the review of the records and my medical exam."

Dr. D's worksheets indicate no rating was assigned for any other impairment of the upper extremities other than the ROM testing, which Dr. D invalidated. There was no description or explanation as to Dr. D's assigned 5% IR based on the rating criteria of the AMA Guides as required by Rule 130.1(c). In a December 20, 2007, letter of clarification to Dr. D, the Division advised him that the AMA Guides 3rd edition was the appropriate edition to be used in this case. In a response dated January 28, 2008, Dr. D stated that he had reviewed the case, his notes, and his report along with the AMA Guides 3rd edition. Dr. D opined that the claimant's IR was still 5% using the AMA Guides 3rd edition and submitted an amended DWC-69 reflecting the appropriate edition. Again, there was no description or explanation as to Dr. D's assigned 5% IR based on the rating criteria of the AMA Guides as required by Rule 130.1(c).

The hearing officer determined that the report of the designated doctor has presumptive weight and adopted it because it was not contrary to "the great weight of the other medical evidence." She further noted that there was a difference of medical opinion between the designated doctor and the treating doctor but that Dr. D's assigned IR of 5% is supported by a preponderance of the evidence.

The claimant appealed, contending that the designated doctor's assigned 5% IR cannot be adopted because the designated doctor admitted in his narrative report that the claimant met the criteria for a 31% IR under the AMA Guides 3rd edition but that he would not assign the 31% IR due to his belief that the claimant could not still be injured such a long time after her date of injury. The claimant contended that based solely upon the designated doctor's belief and his "experience," the designated doctor decided to give her a 5% IR without any legal or medical basis, which is contrary to the AMA Guides 3rd edition. The claimant argued that the designated doctor's assigned 5% IR should not be given presumptive weight.

We have long recognized that a designated doctor can invalidate ROM based upon observations. *See* Appeals Panel Decision (APD) 011235, decided July 17, 2001. However, Dr. D did not explain how he applied the rating criteria in the AMA Guides 3rd edition in assigning a 5% IR after invalidating his ROM testing and it is unclear how he arrived at the 5% IR from his report and worksheets. A review of his report and worksheets do not indicate any rating for any impairment for peripheral nerve system or for any other disorder other than the ROM testing (which he invalidated) for the upper extremities. Therefore the 5% IR is not supported by the evidence and cannot be adopted. Accordingly, we reverse the hearing officer's determination that the claimant's IR is 5%.

A review of the record shows that there are three other assignments of IR, one by Dr. A (the then treating doctor) and two by the current treating doctor (Dr. K). Dr. A examined the claimant on January 7, 2000, and certified that the claimant reached MMI on that date with a 7% IR, using the AMA Guides 3rd edition. Dr. A's certification cannot be adopted because the parties have stipulated that the claimant reached MMI on June 30, 2000. Dr. K examined the claimant on March 15, 2007. Dr. K initially used the AMA Guides 4th edition and certified that the claimant reached MMI on June 30, 2000, with a 24% IR. Dr. K's initial assignment of a 24% IR cannot be adopted because the AMA Guides 3rd edition was not used. Subsequently, Dr. K amended his DWC-69 and narrative report and certified the same MMI date of June 30, 2000, with an IR of 25%, using the AMA Guides 3rd edition. However, Dr. K's assignment of a 25% IR cannot be adopted because in utilizing his ROM measurements, Dr. K incorrectly calculated the claimant's IR. A review of Dr. K's worksheets indicates that in calculating the impairment of the left shoulder using ROM measurements, the internal rotation measured 5 degrees which equated to a 5% impairment. A review of Figure 46, page 38 of the AMA Guides 3rd edition (and instructions on page 33), indicates that 5 degrees of internal rotation equates to a 2% impairment of the left upper extremity. Thereafter, the remainder of Dr. K's calculations was in error in reaching the impairment of the left upper extremity and the conversion of the impairment for the left upper extremity to whole person. Using the proper impairment value for internal rotation of the left shoulder throughout the calculations should have equated to 23% whole person impairment for the entire compensable injury.

Additionally, we note that Dr. K's assigned 25% IR cannot be adopted because after Dr. K determined the upper extremity impairments of the wrist and shoulder, Dr. K added the impairments instead of combining the impairments of the upper extremity contributed by each region (the wrist and the shoulder) using the Combined Values Chart as set out in the instructions on page 35 in the AMA Guides 3rd edition. Furthermore, Dr. K's narrative report is internally inconsistent. He refers to the whole person impairment assigned for the left upper extremity as 14% in one place and as 15% in another.

Since the hearing officer's determination that the claimant's IR is 5% has been reversed and there is no other assignment of IR in evidence which we can adopt, we remand the IR issue to the hearing officer.

The designated doctor in this case is Dr. D. The hearing officer is to determine whether Dr. D is still qualified and available to be the designated doctor, and if so, request that Dr. D rate the compensable injury in accordance with the rating criteria in the AMA Guides 3rd edition based on the claimant's condition as of the stipulated date of MMI of June 30, 2000. The hearing officer should inform the designated doctor of the requirement that the 5% IR be explained in accordance with Rule 130.1(c)(3) and the AMA Guides 3rd edition or the designated doctor may assess a new IR based on the claimant's condition as of the date of MMI, June 30, 2000, considering the medical record, the certifying examination, and the rating criteria in the AMA Guides 3rd edition, and providing an explanation of the new rating in accordance with Rule 130.1(c)(3).

The hearing officer is to provide the designated doctor's response to the parties and allow the parties an opportunity to respond and then make a determination regarding the IR. If Dr. D is no longer qualified and available to serve as the designated doctor then another designated doctor is to be appointed pursuant to Rule 126.7(h) to determine the claimant's IR.

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 060721, decided June 12, 2006.

The true corporate name of the insurance carrier is **STATE OFFICE OF RISK MANAGEMENT (a self-insured governmental entity)** and the name and address of its registered agent for service of process is

For service in person the address is:

JONATHAN BOW, EXECUTIVE DIRECTOR
STATE OFFICE OF RISK MANAGEMENT
300 W. 15TH STREET
WILLIAM P. CLEMENTS, JR. STATE OFFICE BUILDING, 6TH FLOOR
AUSTIN, TEXAS 78701.

For service by mail the address is:

JONATHAN BOW, EXECUTIVE DIRECTOR
STATE OFFICE OF RISK MANAGEMENT
P.O. BOX 13777
AUSTIN, TEXAS 78711-3777.

_____
Cynthia A. Brown
Appeals Judge

CONCUR:

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Veronica L. Ruberto
Appeals Judge

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Margaret L. Turner
Appeals Judge