APPEAL NO. 110382
FILED MAY 5, 2011

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 March 2, 2011.

The hearing officer resolved the sole issue before him by determining that the respondent's (claimant) impairment rating (IR) is 15%.

The appellant (carrier) appealed the hearing officer's IR determination, contending that the 15% IR was improperly assessed. The claimant responded, urging affirmance.

DECISION

Reversed and rendered.

The parties stipulated that the claimant sustained a compensable injury on _____, and that she reached maximum medical improvement (MMI) on August 18, 2010. The claimant testified that she injured her neck at work while lifting a heavy brake drum. The operative report in evidence reflects that the claimant had cervical spinal surgery (C4-6 anterior cervical diskectomy and fusion) on November 30, 2009.

(Dr. W) was appointed by the Texas Department of Insurance, Division of Workers' Compensation (Division) to determine MMI/IR. Dr. W examined the claimant on August 18, 2010, and certified that the claimant had reached MMI on August 18, 2010, the stipulated date of MMI, with 15% IR, 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). Dr. W assessed 15% IR, placing the claimant in Diagnosis-Related Estimate (DRE) Cervicothoracic Category III: Radiculopathy.

Page 3/104 DRE Cervicothoracic Category III: Radiculopathy has the following description and verification:

> *Description and Verification:* The patient has significant signs of radiculopathy, such as (1) loss of relevant 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).

Dr. W, in citing evidence of radiculopathy, notes only the October 12, 2009, EMG as electrodiagnostic evidence consistent with chronic cervical radiculopathy to support his

DRE III rating. There is no mention of testing or measurements of loss of relevant reflexes or unilateral atrophy. The description/verification criteria only mentions that the impairment "may be verified by electrodiagnostic testing." In Appeals Panel Decision 030091-s, decided March 5, 2003, the Appeals Panel held that "the AMA Guides indicate that to find radiculopathy, 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 with the unaffected side" to find radiculopathy. The Appeals Panel went on to state that the findings of neurologic impairment may be verified by electrodiagnostic studies but the AMA Guides do not state that electrodiagnostic studies showing nerve root irritation, without loss of reflexes or atrophy, constitutes undeniable evidence of radiculopathy.

In reviewing a "great weight" challenge, we must examine the entire record to determine if: (1) there is only "slight" evidence to support the finding; (2) the finding is so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust; or (3) the great weight and preponderance of the evidence supports its nonexistence. *See* Cain v. Bain, 709 S.W.2d 175 (Tex. 1986).

In the instant case, Dr. W, the designated doctor, points to no clinical basis for his opinion regarding radiculopathy other than the cited EMG. Because there is no evidence of radiculopathy ratable under the AMA Guides, the hearing officer's determination that the claimant's IR is 15% is so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust.

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.

In evidence is a Report of Medical Evaluation (DWC-69) from (Dr. M), a treating doctor, who examined the claimant on May 18, 2010. Dr. M certified that the claimant reached MMI on May 18, 2010, which is not the date of MMI stipulated to by the parties. Dr. M's certification of MMI/IR cannot be adopted.

There is one other certification of MMI/IR in evidence from (Dr. S), a carrier-selected post-designated doctor required medical examination doctor. Dr. S examined the claimant on October 29, 2010. Dr. S certified that the claimant reached MMI on August 18, 2010, the stipulated date of MMI, with a 5% IR. The 5% IR is based on DRE Cervicothoracic Category II: Minor Impairment. Dr. S's physical examination revealed no evidence of radiculopathy. Dr. S documented in his narrative report that there was "no evidence of muscle wasting or atrophy. Reflexes were normal." Dr. S's certification of MMI/IR is supported by the evidence and can be adopted.

Accordingly, we reverse the hearing officer's determination that the claimant's IR is 15% and render a new decision that the claimant's IR is 5%.

The true corporate name of the insurance carrier is **HARTFORD INSURANCE COMPANY OF THE MIDWEST** and the name and address of its registered agent for service of process is

CORPORATION SERVICE COMPANY
211 EAST 7TH STREET, SUITE 620
AUSTIN, TEXAS 78701-3232.

_____
Cynthia A. Brown
Appeals Judge

CONCUR:

_____
Carisa Space-Beam
Appeals Judge

_____
Margaret L. Turner
Appeals Judge