

APPEAL NO. 041903-s  
FILED SEPTEMBER 22, 2004

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 July 9, 2004. The hearing officer determined that: (1) the certification of maximum medical improvement (MMI) and impairment rating (IR) assigned by Dr. H, dated January 6, 2004, has become final under Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.12 (Rule 130.12); and (2) the respondent (claimant) has a 15% IR. The appellant (carrier) appeals these determinations, asserting that it timely disputed Dr. H's certification and, in the alternative, that Dr. H misapplied 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 claimant did not file a response.

DECISION

Affirmed.

It is undisputed that the claimant sustained a compensable injury on May 4, 2002, to the cervical spine. The treatment records, in evidence, show that the claimant was diagnosed with a large left paracentral disc herniation with strong evidence of left C7 radiculopathy. The claimant received conservative treatment for her injury. On November 14, 2003, the claimant's treating doctor certified that the claimant had a 15% IR under Diagnosis-Related Estimate (DRE) Cervicothoracic Category III of the AMA Guides, for radiculopathy, noting "diminished triceps reflexes."

On January 6, 2004, the claimant was examined by Dr. H, a designated doctor appointed by the Texas Workers' Compensation Commission (Commission). Dr. H certified that the claimant reached MMI on January 6, 2004, with a 15% IR under DRE Cervicothoracic Category III of the AMA Guides, for radiculopathy. Dr. H's report indicates weakness in the neck and shoulders, "diminished left triceps exam with decreased strength of the left triceps of 4/5 and left hand grip 4/5," "Spurling's and max cervical compression tests were positive for radicular pain from the neck into the left shoulder and upper extremity," "atrophy of the forearm and wrist," and "decreased sensory perception to sharp and dull stimuli of the entire left lateral upper extremity, including the thumb, index and long fingers." The designated doctor's examination also revealed deep tendon reflexes of 2+ in the upper extremities and circumferential measurements of the upper extremities, as follows: Above the elbow, right=29.5cm, left=28.5 cm; Below the elbow, right=29cm, left=28cm; Wrist, right=17cm, left 16.5cm. The parties stipulated that Dr. H's certification, dated January 6, 2004, was the first valid certification.

The carrier conceded that it received Dr. H's certification on January 16, 2004. The carrier filed a Required Medical Examination Notice or Request for Order (TWCC-

22) on January 26, 2004. In its TWCC-22, the carrier requested, “[Required Medical Examination] after [Designated Doctor]. Please approve.” The request was approved, and the claimant was examined by a required medical examination (RME) doctor on March 3, 2004. The carrier’s RME certified the claimant with a 5% IR under DRE Cervicothoracic Category II of the AMA Guides, stating that the claimant “showed no strength deficit and her sensory exam showed stocking-glove anesthesia, no specific radicular abnormality” and “does not have any muscle atrophy or any absence of reflex....” An EMG report indicated “no electrophysiologic evidence to suggest cervical radiculopathy.” The claimant testified, however, that the RME doctor did not consider her actual injury but appeared to examine her for carpal tunnel syndrome. The carrier conceded that it filed a Request for Benefit Review Conference (TWCC-45) on April 28, 2004, more than 90 days after receipt of Dr. H’s certification.

The carrier contends that it timely disputed Dr. H’s certification on January 26, 2004, by filing a TWCC-22 in accordance with Rule 130.5(f)(1), regarding requests for examination by an RME doctor if the carrier is not satisfied with the designated doctor’s report. We disagree. Rule 130.12 (90-day Rule), effective March 14, 2004, governs the finality of the first certification of MMI and IR. The rule expressly provides:

(b)(1) Only an insurance carrier, an injured employee, or an injured employee’s attorney or employee representative under 150.3(a) may dispute a first certification of MMI or assigned IR under § 141.1 (related to Requesting and Setting a Benefit Review Conference) or by requesting the appointment of a designated doctor, if one has not been appointed. [Emphasis Added.]<sup>1</sup>

The rule provides no further means of dispute. We note that had the Commission intended to provide for disputes by filing a TWCC-22, it could have readily incorporated the earlier provisions of Rule 130.5(f) into new Rule 130.12. In the absence of such language, the carrier’s TWCC-22 was insufficient to dispute Dr. H’s certification. As stated above, the carrier admits that it failed to file its TWCC-45 within 90 days after receipt of Dr. H’s report. Accordingly, the hearing officer properly determined that the carrier did not timely dispute Dr. H’s report.

The carrier next asserts that Dr. H’s certification did not become final because the designated doctor failed to properly apply the AMA Guides. The carrier cites Section 408.123(e) and Rule 130.12(b)(4) in support of its position. Section 408.123(e) essentially provides that the first certification of MMI/IR may be disputed after the 90-day period if there is compelling medical evidence establishing a significant error on the part of the certifying doctor in applying the appropriate AMA Guides and/or calculating the impairment rating. It is the carrier’s position that Dr. H made a significant error in his application of the AMA Guides by providing a rating for radiculopathy when none was

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<sup>1</sup> Rule 141.1(b) provides that a benefit review conference (BRC) shall be made on a Form TWCC-45, except as provided in subsection (c) which allows an unrepresented claimant to request a BRC by contacting the Commission in any manner.

warranted.<sup>2</sup> The hearing officer found that the carrier failed to produce compelling medical evidence that Dr. H made a significant error in applying the AMA Guides. In view of the evidence presented, we cannot conclude that the hearing officer's determinations are so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

The decision and order of the hearing officer is affirmed.

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

**DOROTHY LANGLEY  
10000 NORTH CENTRAL EXPRESSWAY  
DALLAS, TEXAS 75230.**

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Edward Vilano  
Appeals Judge

CONCUR:

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Judy L. S. Barnes  
Appeals Judge

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Chris Cowan  
Appeals Judge

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<sup>2</sup> The AMA Guides provides that a rating under DRE Cervicothoracic Category III is warranted where the patient has significant signs of radiculopathy, such as (1) loss of relevant reflexes; or (2) unilateral atrophy with greater than 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.).