APPEAL NO. 111710
FILED JANUARY 19, 2012

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 October 5, 2011. The hearing officer resolved the disputed issues by deciding that the respondent (claimant) reached maximum medical improvement (MMI) on May 21, 2010, and the claimant has a 23% impairment rating (IR). The appellant (carrier) appealed the hearing officer's determination of the IR. The appeal file does not contain a response from the claimant. The hearing officer's determination that the claimant reached MMI on May 21, 2010, was not appealed and has become final pursuant to Section 410.169.

DECISION

Reversed and rendered.

It was undisputed that the claimant sustained a compensable injury on (date of injury). The claimant testified that he injured his right shoulder and neck when he fell off a ladder. The hearing officer found that (Dr. S) was appointed by the Texas Department of Insurance, Division of Workers' Compensation (Division) regarding the issues of MMI and IR. That finding was not appealed.

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)(3) (Rule 130.1(c)(3)) provides that the 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 record indicates that Dr. S, the designated doctor, examined the claimant on May 21, 2010. The initial certification from Dr. S assigned an IR of 20%. The range of motion (ROM) measurements for the claimant's right shoulder contained in the narrative were different than the ROM measurements contained in the worksheet attached to the narrative. We note that the worksheet measurements correspond to measurements taken in a functional capacity evaluation (FCE) in evidence on that date. Although the narrative from Dr. S indicates he intended to order an FCE, the claimant denied that he underwent an FCE at the direction of Dr. S on that date. In response to a letter of

clarification (LOC) dated July 21, 2010, Dr. S stated there was a typographical error with regards to the IR assigned and attached an amended narrative and Report of Medical Evaluation (DWC-69) without the previously attached worksheets which indicated an IR of 23%. In response to a LOC dated July 13, 2011, Dr. S noted that he reviewed his report and records and had no record of an FCE being performed. He affirmed that the 23% IR was based in part on loss of reflexes of the claimant, referring to a specific portion of his narrative report. Whether or not the FCE took place and the figures reported conflicted with the narrative from Dr. S was a question of fact for the hearing officer to resolve.

In his narrative report, Dr. S noted that his neurological examination of the claimant's right upper extremity (UE) revealed a hypoactive biceps reflex and a weakness of the biceps and shoulder flexors. The narrative report also noted that the ROM measurements were as follows: flexion 90°; extension 40°; abduction 90°; adduction 40°; external rotation 30°; and internal rotation 30°. Dr. S pointed out in his narrative the specific figures and page numbers of 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) that he used in assessing impairment for loss of ROM of the claimant's right shoulder. Dr. S stated that the measurements resulted in 15% UE impairment, which he then converted to whole person impairment using Table 3, page 3/20 of the AMA Guides. Dr. S then combined the 9% whole person impairment for the claimant's right shoulder with 15% impairment for the cervical spine, for a total of 23%. Dr. S assigned 15% for the cervical spine under Cervicothoracic Diagnosis-Related Estimate (DRE) Category III: Radiculopathy.

As previously noted, Dr. S stated that he placed the claimant in Cervicothoracic DRE Category III based on loss of reflexes. (Dr. O) performed a post-designated doctor required medical examination of the claimant. Dr. O testified at the CCH and stated that the hyporeflexes noted in the designated doctor's report means diminished reflexes but maintained that the AMA Guides require a total loss of reflexes to qualify for an IR of radiculopathy on that basis.

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).

The AMA Guides do not require a total loss of reflexes to qualify for an IR of radiculopathy. *See* Appeals Panel Decision (APD) 091039, decided September 14, 2009, and APD 040924, decided June 14, 2004.

Other certifications of impairment were in evidence; however, the hearing officer found that the preponderance of evidence contained in the record of the CCH is not contrary to the opinion of the designated doctor, Dr. S. With the exception of a mathematical error, that finding is supported by the evidence. We note that using the figures in the narrative from Dr. S, he incorrectly added the ROM for the UE. Using the figures contained in his narrative the ROM impairment for the right shoulder is 16% UE impairment rather than the 15% he stated.[1] Using Table 3 to convert 16% UE impairment would result in 10% whole person impairment and when combined with 15% impairment assessed for the cervical spine, the IR would be 24% rather than the 23% as assessed by Dr. S.

We have previously stated that, where the designated doctor's report provides the component parts of the rating that are to be combined and the act of combining those numbers is a mathematical correction which does not involve medical judgment or discretion. Thus, we have recalculated the correct IR from the figures provided in the designated doctor's report and rendered a new decision as to the correct IR. *See* APD 041413, decided July 30, 2004; APD 100111, decided March 22, 2010; and APD 101949, decided February 22, 2011. Under the guidance of those cases, we note that the ROM impairment for the right shoulder is 16% UE and using, Table 3 to convert 16% UE impairment would result in 10% whole person impairment and when combined with 15% impairment assessed for the cervical spine, the IR would be 24%. Therefore, we conclude that the correct IR in this instance is 24%.

We reverse the hearing officer's determination that the claimant's IR is 23% and render a new decision that the claimant's IR is 24%.

[1] The 90° for flexion results in 6% UE impairment; 40° extension results in 1% (using Figure 38); 90° abduction results in 4%; 40° adduction results in 0% (using Figure 41); 30° external rotation results in 1%; and 30° internal rotation results in 4% (using Figure 44).

The true corporate name of the insurance carrier is **AMERICAN ZURICH INSURANCE COMPANY** 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 78701-3218.

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Margaret L. Turner
Appeals Judge

CONCUR:

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Cynthia A. Brown
Appeals Judge

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Thomas A. Knapp
Appeals Judge