

APPEAL NO. 030288-s
FILED MARCH 18, 2003

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 10, 2003. The hearing officer determined that the respondent's (claimant) impairment rating (IR) is 15% as certified by the designated doctor.

The appellant (carrier) appealed, contending that the designated doctor incorrectly applied 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 responded, urging affirmance.

DECISION

The hearing officer's decision is reversed and the case is remanded to the hearing officer.

It is undisputed that the claimant, a nurse, sustained a compensable low back injury on _____, assisting a patient and had spinal surgery in May 2001. It is also undisputed that the fourth edition of the AMA Guides should be used. The only issue at the CCH was the IR and more specifically which rating model of the AMA Guides should be used. The benefit review conference report and the hearing officer comment that the parties did not dispute that maximum medical improvement (MMI) was reached on March 3, 2002. There was no stipulation of MMI at the CCH.

The designated doctor, in a report dated June 21, 2002, certified MMI on June 21, 2002, and assessed a 15% IR based on various loss of range of motion (ROM) from Table 75, Section (II)(E), page 3-113 and Tables 81 and 82 on pages 3-128 and 3-130 of the AMA Guides, combining the ratings to get the 15% IR. The carrier's peer review doctor, Dr. B, in a report dated July 16, 2002, stated that the designated doctor had used the Functional ROM Model of the AMA Guides when he should have used the Injury Diagnosis Related Estimates (DRE) Model. Dr. B went on to comment that based on the information provided to him the claimant's IR "should be a DRE II as there is no verifiable radiculopathy."

Dr. B's report was sent to the designated doctor who commented that the AMA Guides "clearly leaves" the decision of which model to use to the evaluating physician and that he "thought it most appropriate to use the Functional Model to obtain the most appropriate [IR]." The designated doctor points out that the AMA Guides only say the DRE Model "should" be used. The hearing officer adopted this argument commenting:

However, [Dr. B's] interpretation of the word "should" as being mandatory, rather than precatory, language, is unfounded; as opposed to the words

“shall” or “must,” the word “should” does not require a particularly [sic] course of action, but merely indicates a preference for such course of action, while allowing discretion to adopt a different approach when such alternate approach is warranted by the particular substances of the case. Clearly, the designated doctor did not feel that Claimant’s medical condition fit the DRE model sufficiently well as to render it appropriate to assess an [IR] according to the DRE model, and he therefore assessed Claimant’s [IR] according to the [ROM] model, discretion which is specifically allowed under the [AMA] Guides.

We disagree that an evaluating physician has “the leniency to use the Model that he or she feels is most appropriate.” Page 3-94 of the AMA Guides provides that the evaluator “should use the Injury [DRE] Model, if the patient’s condition is one of those listed in Table 70 (p. 3-108).” That paragraph goes on to give an example of a herniated lumbar disk (which is what the claimant had). The paragraph concludes, “if none of the eight categories is applicable, then the evaluator should use the [ROM] Model.” Further, the AMA Guides in Section 3.3j, page 3-112, discussing the ROM Model, states that the ROM Model “should be used only if the Injury Model is not applicable, or if more clinical data on the spine are needed to categorize the individual’s spine impairment.” (Emphasis added.)

The ROM Model may also be used as a differentiator as explained in Texas Workers’ Compensation Commission Appeal No. 022509-s, decided November 21, 2002. That case stated:

If the physician cannot decide into which DRE category the patient belongs, the physician may refer to and use the ROM Model, which is described in Section 3.3j (p. 112). (p. 99). Using the procedures of that model, the physician combines an impairment percent based on the patient’s diagnosis with a percent based on the patient’s spine motion impairment and a percent based on neurologic impairment, if it is present. (p. 99). The physician uses the estimate determined with the ROM Model to decide placement within one of the DRE categories. (p. 99). The proper DRE category is the one having the impairment percent that is closest to the impairment percent determined with the ROM Model. (p. 99).

In summary, although there are instances when the ROM Model may be used, such as if none of the categories of the DRE Model are applicable, or as a differentiator, the use of the DRE Model is not optional and is to be used unless there is a specific explanation why it cannot be used. A comment that the evaluator merely prefers “to use the Model that he or she feels is most appropriate” is insufficient justification for not using the DRE Model.

We reverse the hearing officer’s decision and remand the case to the hearing officer for the hearing officer to request the designated doctor to provide an IR report

that is in compliance with the AMA Guides, fourth edition. The hearing officer should ask the designated doctor if a reexamination of the claimant is necessary to complete his report. The hearing officer should provide the parties with a copy of any amended report of the designated doctor and allow the parties an opportunity to respond to any such report.

In view of the designated doctor's MMI date as differing from what appears to be an agreed MMI date, on remand the hearing officer should ask the parties if they will stipulate to an MMI date. It appears that the agreed MMI date may be the statutory MMI date (Section 401.011(30)(B)). In any event before an IR can be assessed the hearing officer must determine an MMI date, either by stipulation or as supported by the evidence.

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 Commission's Division of Hearings, 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 Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

The true corporate name of the insurance carrier is **CONNECTICUT INDEMNITY COMPANY** and the name and address of its registered agent for service of process is

**CORPORATION SERVICE COMPANY
800 BRAZOS, COMMODORE 1, SUITE 750
AUSTIN, TEXAS 78701.**

Thomas A. Knapp
Appeals Judge

CONCUR:

Elaine M. Chaney
Appeals Judge

Michael B. McShane
Appeals Panel
Manager/Judge