APPEAL NO. 050062-s
FILED FEBRUARY 24, 2005

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 December 6, 2004. The hearing officer determined that the appellant (claimant) proper impairment rating (IR) is 10%.

The claimant appeals, contending that the third, and last, amended report of the designated doctor assessing a 28% IR should have been adopted and that the respondent (carrier) had failed to rebut the presumptive weight afforded to the designated doctor's amended report. The carrier responded, contending that the designated doctor's second amended report assessing a 28% IR "is invalid as a matter of law" because it is not based on objective clinical or laboratory findings (Section 408.122(a)), and that the designated doctor erred in including a separate 20% impairment for chronic pain. The carrier urges affirmance of the hearing officer's decision.

DECISION

Affirmed.

The parties stipulated that the claimant sustained a compensable (low back) injury on _____, that the claimant reached maximum medical improvement (MMI) on March 2, 2003 (the undisputed statutory date per Section 401.011(30)(B)), and that (Dr. A) is the Texas Workers' Compensation Commission (Commission)-selected designated doctor. A lumbar magnetic resonance imaging (MRI) performed on September 12, 2000, showed a disc herniation at L5-S1 and disc bulges and possible herniations at other levels. On January 2, 2001, the claimant had spinal surgery in the form of a lumbar laminectomy at L4-5, L3-4, and L2-3. Subsequently, the claimant had a spinal cord stimulator surgically implanted and had several procedures adjusting the stimulator. Pursuant to Section 408.104 and Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 126.11 (Rule 126.11) the date of statutory MMI was extended (for surgery involving the spinal stimulator) to March 2, 2003, and the parties stipulated that the claimant reached statutory MMI on that date. It is undisputed that the proper version of the Guides to be used is 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 first IR was given on March 31, 2003, by a referral doctor from the treating doctor who assessed a 20% IR based on Diagnosis-Related Estimate (DRE) Lumbosacral Category IV: Loss of Motion Segment Integrity. The carrier disputed that rating and Dr. A was appointed as the designated doctor. Dr. A in a report dated May 1, 2003, certified MMI on the statutory date of March 2, 2003, with a 5% IR based on "LS Category II: minor impairment." The report further commented that range of motion

(ROM) was not measured because the claimant had been told not to bend more than absolutely necessary. Dr. A noted that there was "no evidence objectively of radiculopathy."

The Commission by letter dated July 31, 2003, sent Dr. A additional progress notes asking if they would change the doctor's opinion. Dr. A replied by letter dated "July 7 [sic?], 2003," that it was doubtful the submitted information would change his opinion but that he would like to reexamine the claimant. Dr. A reexamined the claimant on October 2, 2003, and in a Report of Medical Evaluation (TWCC-69) and narrative of that date certified the statutory MMI date and assessed a 10% IR based on "DRE LS category III: Radiculopathy." Although previously having found no objective evidence of radiculopathy, Dr. A noted that other medical records found visible evidence of radiculopathy at L5, had an impression of chronic pain syndrome and "strongly" suggested a functional capacity evaluation (FCE) which "would provide objection evidence for rating any permanent impairment due to chronic pain" which "should then be combined with the spine impairment of 10% whole person for a more accurate whole person [IR]." The FCE was performed on April 1 and April 9, 2004, with an addendum of April 20, 2004. Various psychometric tests were performed and the claimant was found to be functioning at a less than sedentary physical demand level. Dr. A in a subsequent undated TWCC-69 and narrative (which referenced his October 2, 2003, examination and the April 2004 FCE) noted that he had not reexamined the claimant and amended his report to include chronic pain syndrome "undoubtedly arising from the site of his injury and resulting surgery." Dr. A referenced portions of Chapter 15 of the AMA Guides as justification for combining an additional 20% impairment to the 10% DRE Lumbosacral Category Category III: Radiculopathy, to arrive at a combined 28% IR. Dr. A also did a comparison ROM rating to justify his 28% IR. Dr. A in answers to a deposition on written questions provided additional justification for combining a separate chronic pain rating with the DRE III: Radiculopathy rating.

The hearing officer in the Background Information section of his decision references the definitions of impairment (Section 401.011(23)), injury (Section 401.011(26)), IR (Section 401.011(24), and a definition of objective clinical and laboratory findings (Section 401.011(33)). The hearing officer also cites case and Appeals Panel decision authority for the proposition that pain, in and of itself, does not constitute an injury. The claimant in his appeal recites various portions of the medical evidence and contends that the carrier presented no evidence to rebut the designated doctors opinion. While we might agree that there is scant medical evidence contrary to Dr. A's opinion, it appears to us that this case turns on the correct application and interpretation of the AMA Guides. We do agree with the claimant that references to (Dr. Y) reports or opinions must be disregarded because the hearing officer sustained the objection that Dr. Y's report and name were not timely exchanged and there was no good cause for failing to do so. (*See* Rule 142.13(c)). That ruling was not appealed and we will disregard so much of the carrier's response that deals with Dr. Y's report and opinion. The key point that has been presented to us for resolution is whether pain or chronic pain syndrome can be rated as a separate element of the compensable injury and then combined with a rating for the compensable injury to the musculoskeletal

system. The AMA Guides, Rules for Evaluation dealing with pain (page 2/9) state that generally impairment percents shown in the chapters "make allowance for the pain that may accompany the impairing conditions." That paragraph goes on to note that chronic pain and chronic pain syndrome is evaluated in Chapter 15. We do not read that paragraph to say that the evaluation of chronic pain can then be combined with another impairing condition which presumably also made an allowance for pain. The hearing officer notes that Chapter 15 of the AMA Guides cautions that pain is subjective and its presence cannot be validated or measured objectively (page 15/303). Part 15.1 page 15/304 repeats the admonition that in general impairment percents given in the tables and figures applicable to permanent impairments of the various organ systems "include allowances for the pain that may occur with those impairments." In discussing pain and impairment, Part 15.3, page 15/304 states that " . . . pain may be viewed as an impairment that should be assessed according to the individuals residual functional capacity. Chronic pain and pain-related behaviors are not, per se, impairments, but they should trigger assessments with regard to ability to function and carry out daily activities." The paragraph goes on to state that workers' compensation programs vary from state to state. We agree with Dr. A that Part 15.8 does set out a procedure (which he used) for estimating impairment for pain, but that section does not provide for combining that estimate with a DRE category but rather applies to provide a estimate for pain standing alone. For instance unlike some other charts and tables which instruct that the impairment may be combined or added to another component that is not done in this case. Most instructive is Example 1 on page 15/312. In that case a 34 year old man sustained an L4-5 disc herniation causing radiculopathy, had surgery and eventually was diagnosed with "archnoiditis; neuritis; disk herniation at L4 to L5." That patient was rated at "10% whole-person impairment from a herniated disk, DRE lumbosacral category III (p. 110); pain impairment due to frequent pain of moderate intensity." The commentary said that "[t]he man's pain, which followed the primary insult and a surgical procedure, and his inability to perform some daily living activities established the presence of chronic pain syndrome." Those circumstances are similar to the instant case where the established chronic pain syndrome was included in the 10% DRE III rating. The next sentence of the comment states that "[a]ny peripheral nerve impairment other than that due to the L4 to L5 lesion [presumably the arachnoiditis and neuritis] should be determined by referring to criteria in Section 3.1 or 3.2 of Chapter 3 (pp. 15 [evaluation of hand and upper extremity] and 75 [the lower extremity]), and the whole-person impairment percent should be *combined* with the spine impairment percent (combined Values Chart, p. 322)." In this example no separate impairment was given for the chronic pain syndrome and then combined with the DRE III IR, rather the other peripheral nerve impairments where combined with the spine impairment percent.

We hold that Dr. A improperly assessed a separate impairment for the claimant's chronic pain syndrome and then attempted to combine that rating with the DRE Lumbosacral Category III; Radiculopathy rating. We affirm the hearing officer's determination that the claimant's proper rating is 10% under DRE Lumbosacral Category III, Radiculopathy as assessed by Dr. A in his second, October 2, 2003, report.

The hearing officer's decision and order are affirmed.

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

CT CORPORATION SYSTEM
350 NORTH ST. PAUL
DALLAS, TEXAS 75201.

_____
Thomas A. Knapp
Appeals Judge

CONCUR:

_____
Robert W. Potts
Appeals Judge

_____
Margaret L. Turner
Appeals Judge