APPEAL NO. 92636

This appeal arises under the Texas Workers' Compensation Act of 1989 (1989 Act), TEX. REV. CIV. STAT. ANN. arts. 1.01 through 11.10 (Vernon Supp 1992). On October 27, 1992, a contested case hearing was held in (city), Texas, with (hearing officer) presiding. He determined that the impairment rating of 14%, assessed by the Commission selected designated doctor, controlled and that the great weight of other medical evidence was not contrary to that report. The appellant, claimant herein, asserts that the great weight of medical evidence was contrary to the designated doctor's report, that his injury was rare, and that his treating doctor's impairment rating of 20% is more accurate because that doctor did the surgeries to his knee.

DECISION

Finding that the record contains sufficient evidence in support of the hearing officer's decision, it is affirmed.

At the time of his injury on (date of injury), claimant taught children with emotional problems in the (county) County Medical Education and Research Foundation. Claimant hurt his right knee after school hours in a basketball game to benefit the Parent Teacher Association. He was taken to a hospital by an ambulance. The next day he went to his physician, who later referred him to Dr. D. Dr. D specializes in orthopedic surgery and operated twice on claimant's right knee as a result of a ruptured patella tendon. There is no dispute as to the compensability of this injury; the only issue at hearing was the appropriate impairment rating.

Dr. D in assigning an impairment rating of 20% whole body impairment based on 50% lower extremity impairment, emphasized that he believed an additional discretionary impairment should be assessed based on his belief that the measured anatomic impairment did not appropriately rate the severity of the claimant's condition. On behalf of the carrier, Dr. DA examined claimant and assessed impairment at 14% based on 36% lower extremity impairment. The Commission then selected a designated doctor. The order of the Commission designating the doctor is in the record (as an exhibit of the carrier). The order reads:

> Pursuant to Article 8308, Sec. 4.25 (b), the Commission directs the above named employee to be examined by Dr. (B) on April 22, 1992 at 4:00 p.m., for an impairment rating at the address listed below, (BE SURE TO TAKE ALL MEDICAL RECORDS AND X-RAYS WITH YOU).

Unfortunately, this order states that it is concerned about an impairment rating but cites the article of the 1989 Act that relates to maximum medical improvement. In this instance it appears that Article 8308-4.26(g) would have been appropriate to cite. In addition, the body of the order does not say whether the claimant is directed to see a doctor selected by the parties or is directed to see a doctor selected by the Commission. Article 8308-4.26(g)

states that the Commission shall differentiate between the two methods of selection in the manner it considers the rating or report of the designated doctor.

The designated doctor, Dr. B, found 14% whole body impairment based on 34% lower extremity impairment. He had the reports of Dr. D and Dr. DA, plus x-rays and arthroscopic films of the knee. He agreed that the surgery of the ruptured tendon would aggravate the degenerative process (chondromalasia) of the kneecap. Dr. B points out that claimant several years before had surgery to the same knee at which time he was told of his severe problem with his knee cap. (No reduction for contribution from the prior injury was requested under Article 8308-4.30 of the 1989 Act in this case.) Dr. B's report is adequate and is attacked by claimant only because Dr. B did not treat claimant and did not choose to add an extra amount for impairment as did Dr. D. There were no procedural failings in Dr. B's report.

The hearing officer had before him a designated doctor's report as to impairment plus reports of impairment by the treating doctor and the doctor who examined claimant for the carrier. Both the designated doctor and the carrier's doctor found 14% impairment. The treating doctor ascribed his higher level of impairment to "an additional impairment can be given at discretion." Dr. D cites page 52 of the "Guides to the Evaluation of Permanent Impairment" for this assertion. We note that in copies of the Third Edition provided to the Appeals Panel, page 52 addresses "toes" exclusively. *See* Article 8308-4.24 of the 1989 Act for the correct criteria to use in assessing impairment. In this case one other medical report basically agreed with the designated doctor, and one disagreed as to the amount of impairment but not with many observations made by the designated doctor. The hearing officer was supported by sufficient evidence in choosing not to find that the great weight of other medical evidence was contrary to the designated doctor's rating.

By the terms of the statutory provisions in Article 8308-4.25 and 4.26 of the 1989 Act, the presumption given to a designated doctor deflates claimant's argument that a treating doctor who did the surgery must be able to provide a more accurate impairment rating than a doctor who did not. The legislature, in instances in which the Commission chose the designated doctor to assess impairment, does allow a different outcome in that rare instance when the great weight of other medical evidence is against the designated doctor. In this instance the hearing officer looked at all the medical evidence under that criteria and found that the designated doctor's report was not overcome.

The decision and order of the hearing officer is supported by sufficient evidence of record and is affirmed.

Joe Sebesta
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Robert W. Potts
Appeals Judge