APPEAL NO. 931130

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (formerly V.A.C.S., Article 8308-1.01 *et seq*.) (1989 Act). A contested case hearing was held on October 20, 1993, (city) in, Texas to determine the single issue of what is the claimant's impairment rating. The appellant, hereinafter carrier, raises points of error regarding hearing officer (hearing officer) determination that the respondent, hereinafter claimant, had an impairment rating of 14% as determined in the initial opinion issued by the designated doctor chosen by the Texas Workers' Compensation Commission (Commission). The carrier contends that the hearing officer committed reversible error in according presumptive weight to the designated doctor's first impairment rating and in refusing to consider the same doctor's amended impairment rating. The claimant filed no response.

DECISION

Finding no error, we affirm the hearing officer's decision and order.

The claimant, who had been employed since 1988 by (employer), testified that she suffered an injury to her left shoulder and arm on (date of injury), while lifting a 50-pound container of ball bearings in order to empty them into a machine. She also testified that in 1975 she broke her left wrist when she slipped on some ice near her home; she stated that at the time she had a surgical bone graft and that her wrist was in a cast for several months. However, it was her testimony that her wrist had completely healed and that she had been able to perform her job, which required heavy lifting, with no problems until the incident of (date of injury). The claimant was left handed.

Following her injury, claimant was originally seen by (Dr. H), who she said took her off work and told her she had pulled a muscle in her shoulder. She was next seen by (Dr. P), who ordered tests and diagnosed carpal tunnel syndrome (CTS). In an October 21, 1991 letter Dr. P wrote that claimant had informed him of the earlier wrist fracture which he stated was "probably a fracture of her scaphoid, judging from the surgical scar . . . ."

Claimant was next referred to (Dr. N), who performed surgery on the claimant on May 8, 1992. He also certified that she reached maximum medical improvement (MMI) as of January 18, 1993, with a 25% impairment rating. In an accompanying narrative dated February 26, Dr. N stated in pertinent part: "The other severe degenerative changes associated with the avascular necrosis are accorded a ten percent impairment with regards to her wrist . . . . Here again, it should be noted that the patient had a previous injury to her wrist which may be responsible for the avascular necrosis."

On March 8th, the carrier sent a note to Dr. N, acknowledging his statement about the prior injury and the avascular necrosis, and asking Dr. N to separate this from the impairment for the (date of injury) injury: "According to the Workers' Comp. Act, the carrier is entitled to contribution. In other words we should not be held responsible for pre-existing

impairments associated with past injuries."

The same day, Dr. N replied to the carrier that it would "seem likely" that claimant's earlier injury predisposed her to avascular necrosis of the scaphoid. He went on to state:

> At which point the avascular necrosis developed is difficult to say. The avascular necrosis appeared to be present at 3 months following her injury when we first evaluated the patient in October, 1991. It would be reasonable to assume that the avascular necrosis was present and how much collapse occurred during her work related injury in (month year), and between that interim of 1975 to 1991 would be almost impossible to assess. I think it would be reasonable to deduct the 10 percent impairment for avascular necrosis from the impairment. This would give an impairment rating more on the order of some 18 percent. Certainly, this is a complex problem but because of pre-existing conditioned (sic) and separation of injuries in the same area are often difficult to really delineate.

Due to the carrier's dispute of Dr. N's impairment rating, the Commission appointed (Dr. S) as designated doctor. On April 14, 1993, Dr. S signed a Report of Medical Evaluation (Form TWCC-69) finding MMI as of that date and giving a 14% whole body impairment. In the accompanying narrative, Dr. S wrote that claimant:

> has some degenerative changes of the wrist which most likely are secondary to the trauma she sustained in which she fractured the scaphoid resulting, at one time, (sic) avascular necrosis but it seems like the circulation to the bone appears to be adequate. The degenerative changes are secondary, most likely, to the pathology that took place at the time. She has developed secondary changes involving the scaphoid lunate articulations and this is giving her the discomfort with her hand. In my opinion this patient does not have avascular necrosis. I think she does have the degenerative arthritis of the proximal row of the wrist. I think the changes in there were aggravated by the trauma that she sustained.
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> After explaining his whole body impairment rating of 14%, Dr. S stated:
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> If there is a question that she was compensated for the first injury in her wrist in which the resulting degenerative changes and the changes in the scaphoid lunate, a rate of articulations are questioned, then you would have to take 12% impairment away from the upper extremity giving this lady an 11% permanent impairment to the upper extremity as the result of the current injury which would give her a 7% impairment to the body as a whole.

On April 14th, the same day claimant was seen by Dr. S, carrier's claims representative wrote Dr. S asking him to consider separating the impairment for avascular necrosis "as not related to the (date of injury) incident. It was pre-existing to the injury." And

on June 25th the same claims representative wrote Dr. S as follows, referencing his April 14 report:

> In the last paragraph of your letter, you state the permanent impairment to the upper extremity as the result of the current injury would give her a 7% impairment to the body as a whole. [Carrier] is only responsible for impairment related to the date of injury (date of injury). Therefore, the TWCC-69, space 16, should indicate the impairment of the (date of injury) injury only. Would you please resubmit an amended TWCC-69 indicating the impairment for the (date of injury) date of injury only?

On July 7, 1993, Dr. S submitted what was denominated a "Corrected" TWCC-69 giving an MMI date of April 14, 1993, but a whole body impairment of 7%.

The report from the benefit review conference states that it was convened on August 17 but concluded on September 1, 1993. The record contains an August 23rd letter from the benefit review officer (BRO) to Dr. S, noting Dr. S's original TWCC-69 and his subsequent amendment. The BRO asked Dr. S to review certain medical reports (the exhibit did not identify the reports) and information regarding the status of claimant's prior injury, and asked whether he still concluded that her impairment rating was seven percent. On August 25th, Dr. S replied that claimant's impairment rating was seven percent based on the (date of injury) injury; that she "does have some more impairment of the wrist but those were due to problems in the wrist that pre-existed the trauma she sustained in 1991."

The findings of fact and conclusions of law challenged by the carrier include the following:

FINDINGS OF FACT

10. In response to the carrier's request, [Dr. S] reduced the impairment rating to 7% on July 7, 1993.

11. [Dr. S's] revised impairment rating was based on inaccurate and inappropriate communication from the carrier.

12. [Dr. S's] assessment of a 14% impairment rating is not contrary to the great weight of the other medical evidence.

CONCLUSIONS OF LAW

2. The initial determination of the designated doctor dated April 14, 1993, is entitled to presumptive weight.

3. Claimant reached maximum medical improvement on April 14, 1993, with an impairment rating of 14%.

In his discussion, the hearing officer stated that the evaluations of the doctors, especially the designated doctor, "are difficult to assess because of the inappropriate and misleading communication" by the carrier. The hearing officer noted that the designated doctor initially found an impairment rating of 14%, but that the carrier wrote the doctor advising him not to rate the wrist problems and stating that the carrier was only responsible for the upper extremity problems. The hearing officer also stated, "[t]he carrier then directed the designated doctor to resubmit an amended TWCC-69 indicating the 7% impairment. This letter was directed to the doctor only and not sent to the Commission or the claimant . . . . I find the carrier's actions in this case to be most inappropriate. Its actions were clearly aimed at undermining the neutral and impartial role of the designated doctor."

In its appeal the carrier states that the Appeals Panel has ruled that a designated doctor can amend his or her report, and that the 1989 Act requires a designated doctor's report to be accepted by a hearing officer unless it is overcome by the great weight of the other medical evidence. In this case, it argues, the hearing officer erred as a matter of law by refusing to consider Dr. S's amended report merely on the basis of carrier's communication with the doctor, rather than making the finding required by the act. Further, it argues, carrier's communication was not inaccurate but merely stated the law as regards contribution. With regard to the inappropriateness of the communication, the carrier argues that the remedy is to seek further clarification rather than to reject the designated doctor's report.

Despite the fact that the hearing officer denied carrier's motion to add the issue of contribution, underlying this case is the question of whether and to what degree a designated or other doctor should have considered the effects of claimant's prior injury when assigning her impairment rating. The 1989 Act provides in pertinent part as follows:

Sec. 408.084. Contributing Injury.

(a)At the request of the insurance carrier, the commission may order that impairment income benefits and supplemental income benefits be reduced in a proportion equal to the proportion of a documented impairment that resulted from earlier compensable injuries . . . .

The stated issue in this case was, what was claimant's impairment rating. "Impairment rating" is defined by the 1989 Act as the percentage of permanent impairment of the whole body resulting from a compensable injury. Section 401.011(24). In rendering an impairment rating, a doctor is responsible for rating only the compensable injury involved in the particular case; as we have previously stated, where the compensable injury in question is to the same area of the body the lines may become somewhat blurred. Texas Workers' Compensation Commission Appeal No. 931098, decided January 18, 1993. Nevertheless, we have held that the effects of a prior injury should not be discounted in the assessment of an impairment rating for the current compensable injury. Texas Workers' Compensation Commission Appeal No. 93695, decided September 22, 1993. We have also specifically rejected the argument that the issues of impairment rating and contribution

are so intertwined that they cannot be separated. Texas Workers' Compensation Commission Appeal No. 93272, decided May 24, 1993. The statute makes it clear that it is the Commission, and not a doctor assessing impairment, who is to determine the extent to which any contributing compensable injury is one for which the claimant "has already been compensated." Texas Workers' Compensation Commission Appeal No. 93889, decided November 17, 1993. To hold otherwise would make Section 408.084 seem superfluous. Appeal No. 931098, *supra*. Furthermore, it has been held that a carrier is not entitled to any contribution due to a noncompensable injury. Texas Workers' Compensation Commission Appeal No. 93861, decided November 15, 1993. The claimant's unrefuted testimony in this case was that her wrist fracture occurred at her home, during a time in which she was not working. Based on the foregoing, the hearing officer's determination that the carrier's direction to the designated doctor was inaccurate is supported by the law and the evidence.

We also agree that carrier's communication was inappropriate, given the stature and function of the designated doctor, and this panel has many times warned litigants of possible consequences of unilateral communication with the designated doctor. *See*, e.g., Texas Workers' Compensation Commission Appeal 92595, decided December 21, 1992, and Texas Workers' Compensation Commission Appeal No. 93455, decided July 22, 1993, wherein we stated that such communication with a designated doctor could tend to compromise the perception, if not the reality, of impartiality on the part of the designated doctor. As we stated in Texas Workers' Compensation Commission Appeal No. 93613, decided August 24, 1993, there could be a situation where a unilateral communication "so compromises the appearance of impartiality of the designated doctor as to require us as a matter of law to hold that his opinion must be disregarded."

In response to the carrier's argument that the hearing officer is bound to accept the designated doctor's amended report or, in the alternative, to seek further clarification from that doctor, we note that Dr. S's original TWCC-69 certified MMI on April 14, 1993, with a 14% impairment rating; his attached report substantiated this rating, but contained a paragraph, clearly in response to carrier's communication, which gave an alternative impairment rating "[i]f there is a question that she was compensated for the first injury in her wrist . . . ." Dr. S's amended TWCC-69, also prepared at carrier's direction, contained the same MMI date with a seven percent impairment rating. Given the circumstances surrounding Dr. S's later report, and the fact that his earlier report thoroughly substantiated his original 14% impairment rating, we cannot say that the hearing officer erred in finding the first report was the report of the designated doctor and according it presumptive weight. The hearing officer certainly was not bound to accept the later of Dr. S's reports, especially under the facts of this case. An earlier case directly on point is Appeal No. 93272, *supra*, wherein the Appeals Panel affirmed a hearing officer's finding of MMI and impairment in accordance with a designated doctor's original report rather than his second report, amended after a unilateral communication by the carrier. *And see* Texas Workers' Compensation Commission Appeal No. 92469, decided October 15, 1992, where the hearing officer accepted the designated doctor's initial rating of 22% rather than his subsequent rating of seven percent; in affirming, the Appeals Panel wrote that the parties

did not raise an issue concerning the reduction of the claimant's impairment income benefits on account of an earlier compensable injury, and that "under these circumstances, we do not find that the hearing officer was limited solely to the later TWCC-69 in his determination of the MMI date and the impairment rating."

Based on the foregoing, we find no error in the hearing officer's decision. We accordingly affirm his decision and order.

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Lynda H. Nesenholtz
Appeals Judge

CONCUR:

_____
Robert W. Potts
Appeals Judge

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Gary L. Kilgore
Appeals Judge