

APPEAL NO. 93272

This appeal arises under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8303-1.01 *et seq.* (Vernon Supp. 1993) (1989 Act). On March 9, 1993, a contested case hearing was held in (city), Texas, with (hearing officer) presiding. The issues brought before us on appeal concern impairment rating and contribution.

The hearing officer found that the appellee (claimant) had a whole body impairment rating of 16% based upon the opinion of the designated doctor. The hearing officer also found that contribution was not an issue before her in this case.

The appellant (carrier) contends in its request for review that the hearing officer erred in ruling that the claimant's impairment rating was 16%. Appellant contends that after it provided the designated doctor with information concerning the claimant's previous injury, he amended his rating to 6½%, and the carrier asserts that this rating properly reflects claimant's impairment based upon his compensable injury alone, taking into account contribution. The carrier argues that the hearing officer failed to reach this conclusion because she incorrectly ruled that contribution was not properly an issue at the contested case hearing.

The claimant filed no response to the carrier's request for review.

DECISION

After reviewing the record, we affirm the determinations of the hearing officer.

The critical facts of this case are basically undisputed. The claimant suffered an injury to his back on (date), while working for (employer). The parties stipulated that this injury was compensable. The claimant had suffered prior injuries in 1986 and 1989. The 1989 injury was a compensable back injury for which the claimant filed a workers' compensation claim and settled for \$12,500.

The employer originally sent the claimant to see Dr. C, the company doctor, for his (date) injury. After one visit with Dr. C, the claimant treated with Dr. W, whose office also treated him for his 1989 injury. Dr. W has recommended surgery to treat claimant's injury.

The carrier requested a medical examination by Dr. C. Dr. C certified that on April 27, 1992, the claimant reached maximum medical improvement (MMI) with 0% impairment. The Texas Workers' Compensation Commission (Commission) appointed Dr. K as the designated doctor and after examining the claimant on October 19, 1992, he found that the claimant had reached MMI on the date of the examination, and rated his impairment as 16%.

Dr. K's rating had two components. He assigned a 7% permanent physical

impairment based upon specific disorders of the spine, and 9% from loss of lumbar motion. Dr. K stated that he could not be "absolutely sure" that his range of motion measurements were "absolutely accurate." However, Dr. K stated that he "looked for range of motions that were also present within the old records and feel that a nine percent impairment rating is valid."

After Dr. K issued his report and certified his opinions as to MMI and impairment on a Report of Medical Evaluation form (TWCC-69), and in fact after a Benefit Review Conference was held in this case on January 13, 1992, the carrier sent correspondence to Dr. K in an effort to get him to reduce his rating based upon the 1989 injury sustained by the claimant. The carrier wrote to Dr. K on January 22, 1993, and on February 15, 1993. The February 15, 1993, correspondence was admitted into evidence, but the January 22, 1993, letter was never offered into evidence. In response to the carrier's correspondence, on February 25, 1993, Dr. K issued a report reducing the claimant's impairment to 6½%. Dr. K reached this result by determining that, based upon the correspondence sent to him by the carrier, claimant's 1989 injury had resulted in a 5% impairment due to specific disorders of the spine, thus reducing to 2% the claimant's impairment from the present injury due to specific disorders of the spine. Then Dr. K stated that if one assumed that the range of motion tests taken at the October 19, 1992, examination were at least fifty percent inaccurate, this would reduce the claimant's range of motion rating to 4½%. Combining these values would result in a whole body impairment of 6½%.

On March 8, 1993, Dr. W issued a report stating that in his opinion, taking into account the claimant's reduced range of motion and using the American Medical Association Guidelines to Physical Impairment, a "16% partial disability should be sustained." He also expressed the opinion that claimant still needed surgery.

The carrier argues that the hearing officer erred by determining that claimant's permanent physical impairment was 16%. Carrier contends that a proper rating must take into account the claimant's preexisting limitations. The carrier argues that once it had provided information concerning this to the designated doctor, he issued an opinion stating the claimant's impairment from his present injury and excluding the effects of his prior injury. The carrier contends that it is this rating that the hearing officer should have used in making her determination of permanent physical impairment.

Article 8308-6.34(e) provides that the contested hearing officer, as the fact finder, is the sole judge of the relevance and materiality of the evidence, as well as the weight and credibility that is to be given the evidence. Texas Workers' Compensation Commission Appeal No. 92255, decided August 3, 1992; Texas Workers' Compensation Commission Appeal No. 92641, decided January 4, 1993. As finder of fact, the hearing officer resolves conflicts in the testimony and in the evidence. Burelsmith v. Liberty Mutual Insurance Company, 568 S.W.2d 695 (Tex. Civ. App.-Amarillo 1978, no writ). This is equally true of medical evidence. Texas Employers' Insurance Association v. Campos, 666 S.W.2d 286

(Tex. App.-Houston [14th Dist.] 1984, no writ). When reviewing a hearing officer's decision for factual sufficiency of the evidence we should reverse such decision only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Texas Workers' Compensation Commission Appeal No. 92641, decided January 4, 1993; Cain v. Bain, 709 S.W.2d 175 (Tex. 1986).

In the present case, the finding of 16% impairment is supported by the original report of the designated doctor as well as the report of the treating doctor. It is in conflict with the opinion of Dr. C and the second report from the designated doctor. Looking at the evidence as a whole, we cannot find that the hearing officer's determination of impairment was so contrary to the evidence as to be clearly wrong and unjust.

In examining carrier's contention that only the designated doctor's second report properly determined the claimant's impairment by excluding the effects of claimant's prior injury, let us say first that we are troubled by the carrier's communication with the designated doctor in this case. We believe that such communication could undermine the perception of impartiality of the designated doctor. As we stated in Texas Workers' Compensation Commission Appeal No. 92595, decided December 21, 1992:

The use of a designated doctor is clearly intended under the Act to assign an impartial doctor to finally resolve disputes over MMI and impairment rating. As we noted recently in Texas Workers' Compensation Commission Appeal No. 92570, decided December 14, 1992, it is important to realize that the designated doctor, unlike a treating doctor or a doctor for whom a carrier seeks a medical examination order under Article 8038-4.16, serves at the request of the Commission. We believe that it is the responsibility of the Commission, and not of either of the parties, to ensure that the designated doctor completes the TWCC-69 form or otherwise supplies the information required under Texas Workers' Compensation Rules, 28 TEX. ADMIN. CODE § 130.1 (Rule 130.1). If information is nevertheless missing or unclear by the time that the contested case hearing officer is asked to evaluate the designated doctor's report, it is appropriate for the hearing officer, in carrying out his or her responsibilities to fully develop the facts required, in accordance with Article 8308-6.34(b), to seek that additional information. Moreover, direct contact between the Commission and its appointed designated doctor will serve to discourage unilateral contacts from either side following the examination that could serve to undermine the perception that the designated doctor is impartial. See Texas Workers' Compensation Commission Appeal No. 92511, decided November 12, 1992.

In the present case the carrier's letter of February 15, 1993, to the designated doctor is in evidence. The carrier stated in part in this letter:

Mr. J was treated for the 9/9/89 injury at least until 6/1/90, even after he returned to work on 3/2/90, which indicates more than 6 months of medically documented pain and rigidity, substantiated by the physical therapy notes of 1/24/90 and by Dr. B's report of 6/1/90, copies of which are enclosed. Therefore, if such documentation indicates that he had, in 1989, a whole body impairment of 7%, based on the same objective findings which still exist now, then could you not then definitely say that the 7% impairment which he has now is the same one which preexisted the 4/22/91 claim? Since these whole body impairments are permanent impairments, and not something that disappear with time, and *since the TWCC requires that the present injury only be evaluated*, could not you reduce his whole body rating by at least the 7% which preexisted the present injury. In addition, there are indications in the medical reports from the 9/9/89 injury that Mr. J had the same difficulty bending forward as he does now. (emphasis added)

We perceive a number of problems with the above letter which could undermine the perception that the designated doctor is impartial. The carrier appears not only to be telling the designated doctor what to decide but how to decide it. The carrier is providing the doctor with alleged medical information ostensibly from an injury other than his present one and telling the doctor how to judge the relevance of this information. These problems are not solved, as carrier implies, by the sending of a copy of carrier's correspondence to the claimant's attorney.

The carrier asserts that the hearing officer also erred in concluding that contribution was not an issue in the case. Contribution was not an issue listed in the report of the benefit review officer, and since the issue was not otherwise added by express agreement of the parties, the hearing officer decided, rightly, that the issue was not before her. We are not persuaded to the contrary by the carrier's assertion, without the benefit of authority, that the issues of the impairment rating and contribution are so "entwined that they cannot be separated." The 1989 Act makes clear, however, that it is the Commission, not the designated doctor, that determines the extent of any contribution "at the request of the insurance carrier." Such request, we believe, must be express, not implied.

It is apparently the belief of the carrier that in determining an impairment rating of a claimant who had a prior compensable injury, a doctor must exclude the effect of the prior compensable injury on the claimant's present impairment. This is not what the 1989 Act says. Should the carrier wish to seek contribution to the cumulative injury for the effect of prior compensable injuries, it must do so under Article 8308-4.30. See Carey v. American General Fire & Casualty Co., 827 S.W.2d 631 (Tex. App.- Beaumont 1992, writ denied).

Consequently, we affirm the decision of the hearing officer.

Gary L. Kilgore
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Philip F. O'Neill
Appeals Judge