APPEALS PANEL NO. 94024
FILED FEBRUARY 14, 1994

This appeal is considered in accordance with the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act) (formerly V.A.C.S., Article 8308 1.01 *et seq*.). On November 18, 1993, a contested case hearing was held in (City), Texas, with _____ presiding. The issues to be determined at the contested case hearing were the correct impairment rating of the claimant, (Claimant), who is the respondent, and whether the carrier was entitled to obtain a medical examination of claimant with a doctor located more than 75 miles away. Claimant sustained an undisputed compensable injury on (date of injury), while employed by (employer).

The hearing officer determined, based upon the report of the designated doctor, that claimant had a 16% whole body impairment rating, and that the great weight of other medical evidence did not overcome this. The hearing officer also ruled that the carrier was not entitled to a medical examination order granting examination with a doctor located more than 75 miles from a claimant's residence.

The carrier appeals, arguing that the great weight of other medical evidence is against the designated doctor's opinion, specifically the assessment of an additional three percent for nerve damage related to claimant's headaches. The carrier also argues that it has a right to a doctor of its choice, even beyond 75 miles, especially when the claimant elected to go beyond that limit voluntarily for treatment. The claimant responds that the decision is correct, and that he agrees with it.

DECISION

We affirm the hearing officer's decision.

The claimant was driving an 18-wheeler truck across a railroad track when the truck was struck by a train. As a result, claimant sustained injury to his cervical spine, resulting in herniation, conservative treatment, and an eventual laminectomy on September 15, 1992, which involved the C4-5 and C5-6 levels. A review of claimant's medical records clearly indicates that he has also, since the date of the accident, been bothered by persistent headaches (as many as four a week) and ringing in the ears. His high frequency hearing was also affected. Doctors for the claimant have attributed the ringing in the ears to the accident, although the hearing loss was opined by one doctor as having been noise induced. MRI and CT scan tests on claimant's brain were normal. Claimant was treated by a headache clinic in (City), by (Dr. M), for his persistent headaches. Dr. M opined that the headaches, characterized as post traumatic, could be vascular in origin, but noted that standard medication for this had been ineffective. On March 11, 1993, Dr. M opined that claimant had a 30% impairment rating for the headaches, but noted in this same report that there were no objective signs.

Claimant had earlier (June 15, 1992) consulted with (Dr. H), who stated that the headaches and ringing in the ears could be related to acoustic nerve injury (prior to the MRI, but after the CT scan).

Claimant's neurosurgeon, (Dr. K), certified that he reached maximum medical improvement (MMI) on January 14, 1993, with a 13% impairment rating. Dr. K expressly stated that this was for the neck only, and not for claimant's other conditions, for which impairment would have to be judged by other doctors treating him for these conditions. The 13% was attributed both to specific disorders and some loss of range of motion. According to claimant's testimony, it was the carrier that disputed the 13% rating and contended that claimant should have eight percent instead. A designated doctor, (Dr. V), a neurological surgeon, was appointed by the Texas Workers' Compensation Commission (Commission). He concurred in the 13% rating for the neck, and assessed another three percent rating for claimant's headaches, which he attributed to some nerve damage. Dr. V indicated that for the additional three percent he used Table 5, page 105, of the Guides to the Evaluation of Permanent Impairment, third edition, second printing, published by the American Medical Association (AMA Guides).

The carrier asked three doctors, (Dr. B), (Dr. O), and (Dr. F), to review claimant's records and medical opinions. None of the three examined claimant. Dr. B states he believed the 30% was grossly inaccurate and that the 13% rating was more accurate. He did not comment on Dr. V's 16% rating. He stated generally that claimant's headaches "sound" like tension headaches.

Dr. O, expressing skepticism about the seriousness of claimant's headaches, noted that he disputed that claimant's headaches were caused by the nerves referenced by Dr. V, because claimant's headaches were suborbital in location rather than occipital.

Dr. F, expressed doubt that even the spinal injury was related to the trauma. He noted that there was no objective evidence of nerve damage noted by Dr. V, and stated that the 13% assigned by Dr. K related to a condition that was not the injury. Dr. F opined that the only injuries relating to the collision between the train and the truck were contusions and lacerations around the left eyelid and left arm, with no permanent impairment.

On January 13, 1993, the carrier sought to have claimant examined by (Dr. A) of (City), Texas. This request was denied by the Commission on February 1, 1993, for the reason that the doctor was located outside of 75 miles from claimant's residence. The carrier has nothing in the record indicating why this doctor was chosen, and merely argues that because claimant voluntarily consulted with the pain clinic in (City), it should obtain an order in its favor. There is no indication that the carrier sought, in the nearly 10 months after its request was denied, prior to the hearing, an examination by a doctor of its choice within 75 miles.

MEDICAL EXAMINATION ORDER DOCTOR ISSUE

As the hearing officer pointed out, Texas Workers' Compensation Commission Appeal No. 91073, decided December 20, 1991, determined that the Commission, through promulgating Rule 126.6(h), intended to limit the distance travelled to a medical examination order to 75 miles. The hearing officer properly decided the issue in accordance with the rule and Appeals Panel decision. This rule make no exception for situations in which a carrier can show that a claimant has voluntarily travelled outside this limit to seek some medical attention. In response to the carrier's argument that the result is somehow unfair to the carrier, we would note that the argument would have more force if the claimant resided in an area of the state where doctors were few and far between, as opposed to a two-city metropolitan area. The carrier has not even asserted, much less offered evidence, that a choice of health care provider within the 75 miles could not be found. Regarding the carrier's argument that it has some right or entitlement to a particular doctor, we would note that Section 408.004 provides that the Commission "may" order a medical examination upon request by the carrier. The carrier is entitled to an examination, not a doctor, and it is within the discretion of the Commission to grant an order, if needed.

DESIGNATED DOCTOR ISSUE

The report of a Commission-appointed designated doctor is given presumptive weight. Sections 408.122(b), 408.125(e). The amount of evidence needed to overcome the presumption, a "great weight," is more than a preponderance, which would be only greater than 50%. *See* Texas Workers' Compensation Commission Appeal No. 92412, decided September 28, 1992. Medical evidence, not nonmedical testimony, is the evidence required to overcome the designated doctor's report. Texas Workers' Compensation Commission Appeal No. 92164, decided June 5, 1992.

"Impairment" is defined in the 1989 Act as "any anatomic or functional abnormality or loss existing after maximum medical improvement that results from a compensable injury and is reasonably presumed to be permanent." Section 401.011(23). Further, impairment must be based upon "objective clinical or laboratory finding" and, where assigned by a doctor chosen by the claimant, must be confirmable by a designated doctor. Section 408.122(a).

We cannot agree that the hearing officer was wrong in not finding that the great weight of other medical evidence was against Dr. V's report. She could consider that medical opinions against Dr. V were rendered by doctors who had not examined claimant, and all were not even of like mind as to the efficacy of the 13% rendered by the treating doctor. She had information before her to assess whether an opinion as to nerve damage was thoroughly against any objective indication, and determine that the great weight of other medical evidence did not demonstrate this.

The determination of the hearing officer is not against the great weight and preponderance of the evidence, Atlantic Mutual Insurance Co. v. Middleman, 661 S.W.2d 182 (Tex. App.-San Antonio 1983, writ ref'd n.r.e.), and we affirm her decision and order.

Susan M. Kelley
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Alan C. Ernst
Appeals Judge