APPEAL NO. 94155

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A contested case hearing was held on January 14, 1994, in (city), Texas, before (hearing officer) as hearing officer. The issues were: what is claimant's correct impairment rating[1], and is the carrier entitled to reduce impairment income benefits (IIBS) due to the prior compensable injury of (date of injury). The appellant, hereinafter carrier, appeals the hearing officer's determinations that the claimant's impairment rating (for an injury of (date of injury)) is 19%, as found by the designated doctor appointed by the Texas Workers' Compensation Commission (Commission), and that the carrier is entitled to reduce the claimant's IIBS for this injury by 58% due to claimant's prior compensable injury. The carrier argues that there is no evidence that the designated doctor lowered the claimant's previous impairment rating of 19% to 11% based upon the claimant's prior injury, but rather that the designated doctor lowered his rating to comply with the American Medical Association's Guides to the Evaluation of Permanent Impairment (AMA Guides). The claimant responds that the hearing officer's decision is correct and should be affirmed.

DECISION

We affirm the hearing officer's decision and order.

The claimant, who was employed by (employer), testified through an interpreter that on (date of injury), while unloading merchandise, he injured his back when he put a box down and then could not straighten up. He sought medical attention, had x-rays and physical therapy, and returned to the same job two weeks later. Medical records of his treatment for this injury were not in evidence.

Claimant stated that on (date of injury), after someone asked him to take a box down, he backed into an elevator door and, when the door opened, he fell about five feet down the elevator shaft. (Employer's manager and president disputed claimant's rendition of this incident, stating that no one was present when claimant fell.) Claimant said he hurt his head and his lower back as a result of the fall, and had bruises on his body. Claimant was taken to an emergency room and the next day began treating with (Dr. H), whom he was still seeing at the time of the hearing. He stated that Dr. H has given him a 22% impairment rating, although neither Dr. H's report nor any other of his records were introduced into evidence.

At the carrier's request the claimant was examined by (Dr. C) on December 4, 1992. (Dr. C's Report of Medical Evaluation, TWCC-69, gave the date of injury as "(date)," although his attached narrative discussed both injuries.) Dr. C noted "little change" between an MRI performed in April 1992 and one performed the following July, both of which

[1]While the issue of claimant's impairment rating for an earlier, separately docketed injury was before the hearing officer in a consolidated hearing, the instant decision and appeal only involve claimant's later injury of (date of injury).

showed bulging discs at L4-5 and L5-S1. Dr. C also certified that claimant had reached maximum medical improvement (MMI) on December 2, 1992, with a four percent whole body impairment rating for the lumbar spine, although his narrative assigned a nine percent impairment rating (four percent due to loss of lumbar motion and five percent due to "changes of the disc spaces").

The claimant was also examined by (Dr. E) at carrier's request; Dr. E certified MMI as of August 26, 1992, with a two percent impairment rating. In his narrative Dr. E stated that:

> Had I been judging the original injury of (month year) where there was MRI evidence of two degenerate [sic] discs and a small disc herniation at L5-S1 on the left, I would have rated the patient as having an impairment rating of the whole body permanently of 8%. I believe the ruptured disc at L4-5 and at L5-S1 occurred at the time of the fall in the elevator shaft, and would give the patient another 1% per disc rupture based upon the injury of (date of injury). Therefore, the patient at this time has a 10% whole body permanent impairment, but the final 2% occurred at the injury of May 1992, the injury in question for which I performed this present [examination].

On February 8, 1993, the Commission-appointed designated doctor, (Dr. A), examined claimant and completed separate TWCC-69s for each injury. With regard to the first injury Dr. A summarized studies done subsequent to that injury, including a lumbar spine MRI dated April 29, 1992, which showed degenerative changes at L4-5 and L5-S1, mild posterior annular bulging at L4-5, small left posterior lateral disc herniation at L5-S1, and mild spinal stenosis at L3-4 and 5. Dr. A gave claimant an impairment of seven percent due to the specific injury, but also wrote that "approximately 50% of the lumbar range of motion is attributable to (date) injury and 50% is attributable to (date of injury) injury, therefore lumbar range of motion impairment is 8% divided by 2 or 4 percent." Claimant's whole body impairment rating for the first injury was thus 11%.

As to the (date of injury), injury which is the subject of this hearing, Dr. A noted his previous allocation of lumbar range of motion between the two injuries, and stated that repeat MRI studies failed to reveal any significant change or progression of the structural abnormalities shown on the first MRI "and therefore the patient was estimated to have an impairment of 7% in accordance with [Table 49, the specific disorder table of the AMA Guides]. He will not receive any additional impairment due to lumbar spine under Table 49 for the injury of (date of injury) as it appears that this injury primarily involved the cervical spine and secondarily involved an exacerbation of lumbar spine injuries." Dr. A also assigned impairment due to the specific disorder and range of motion of claimant's cervical spine, for a total "regional" impairment of 16%. Claimant's whole body impairment due to the second injury was 19%, based upon the combined values chart of the AMA Guides.

At carrier's request, (Dr. O), who did not examine claimant, wrote the carrier on March 9, 1993, critiquing the reports of Dr. A and the other doctors. He concluded that Dr. H's

22% impairment rating was inaccurate due to the fact that claimant's range of motion study showed minimal effort and should have been repeated or cross-validated, and the fact that Dr. H did not address claimant's "abnormal MRI which is the significant finding." With regard to Dr. C's report, Dr. O said that Dr. C apparently invalidated range of motion but did not state why it was invalid. He said Dr. C's five percent "should have been 7% due to the more extensive degenerative changes and bulges."

As to Dr. A, Dr. O said that he did not perform a straight leg raise for cross- validation, so that the numbers could not be cross-checked. Dr. O also found problematic Dr. A's apportionment of lumbar range of motion, stating that ". . . this is just opinion, but if there are no facts to show the present lumbar range of motion at 8% should be given 4% for the previous injury and 4% for this injury, this is strictly the doctor's opinion about how to apportion the 8% loss in range of motion." Dr. O agreed with Dr. A that claimant merited a seven percent rating for the specific disorder of the lumbar spine and that for the cervical spine, "I think everyone agrees with the 4% from specific disorders."

On June 4, 1993, Dr. A issued an amended TWCC-69 for the second injury in which he gave claimant an 11% impairment rating which was broken down as follows: lumbar spine (Table 49): seven percent; lumbar spine range of motion (50% attributable to "superseding intervening injury of (date of injury)"): eight percent divided by two = four percent. The amended TWCC-69 stated "see attached report" under the space for "a description of the most recent clinical evaluation;" attached was Dr. A's original TWCC-69 (assigning 19% impairment) and the accompanying report. An unsigned June 4, 1993, letter accompanying the amended TWCC-69 stated, "[a]ttached is a corrected copy of the TWCC 69 form on [claimant] please be advised this impairment rating is in accordance with the second printing of the AMA Guides."

The carrier contended at the hearing and on appeal that the designated doctor reduced his impairment rating to 11% because Dr. O's report "confronted" Dr. A with evidence that he had improperly applied the AMA Guides in arriving at the 19% impairment rating. The carrier contends there is no evidence that Dr. A lowered his previous assessment of 19% based on the claimant's prior injury of (date of injury), as found by the hearing officer, that the designated doctor's 11% is supported by the reports of Drs. C and O, and it urges this panel to reverse the hearing officer's decision and render a decision that claimant's impairment rating is 11%, based upon Dr. A's amended report and Dr. O's letter.

At the outset we caution against confusing the two issues in this case. The first issue concerned claimant's correct impairment rating for his injury of (date of injury), and Dr. A was appointed designated doctor to make such determination. The 1989 Act provides that where the Commission appoints a designated doctor to determine impairment, the report of that doctor shall have presumptive weight unless the great weight of the other medical evidence is to the contrary. Section 408.125. While this panel has held that a designated doctor may amend his report "under proper circumstances," Texas Workers' Compensation Commission Appeal No. 93062, decided March 1, 1993, we have also held that a hearing officer is not limited solely to consideration of a later TWCC-69 in his or her

determination of MMI and impairment rating. Texas Workers' Compensation Commission Appeal No. 92469, decided October 15, 1992.

The second issue in this case involved contribution from a prior compensable injury. The 1989 Act provides that at the request of an insurance carrier the Commission may order that IIBS and supplemental income benefits be reduced in a proportion equal to the proportion of a documented impairment that resulted from earlier compensable injuries. Section 408.084(a). This panel has ruled that the statute requires that it is the benefit and not the impairment rating that is reduced. *See* Texas Workers' Compensation Commission Appeal No. 92610, decided December 30, 1992. Further, it is the Commission, and not a doctor, which determines the extent of contribution; the Act does not provide that the doctor is to exclude the effect of a prior compensable injury in the calculation of present impairment. Texas Workers' Compensation Commission Appeal No. 93272, decided May 24, 1993.

The hearing officer found that Dr. A subsequently lowered his original impairment rating of 19% to 11% based on claimant's prior injury of (date of injury), and that the method used by Dr. A in reducing claimant's impairment rating was not the proper method of reducing benefits based on prior injuries. In a factually similar case, we held that the evidence was sufficient for a hearing officer to resolve the conflict between two reports of a designated doctor, and to accept the doctor's original report which, unlike the second report, did not reduce impairment based upon a prior injury. Appeal No. 93272, *supra*. The carrier argues, however, that the hearing officer erroneously found that Dr. A's amended report improperly reduced claimant's impairment rating based upon his prior injuries, and contends that Dr. A instead was correcting deficiencies pointed out by Dr. O. It also claims Dr. A's 11% finds support in the assessments of Drs. O and C and thus the hearing officer should have adopted that impairment rating.

Our review of Dr. A's amended TWCC-69, however, leads us to the conclusion that it is so inherently conflicting that the hearing officer did not err in rejecting it. On its face it purports to assess the identical impairment rating assigned for the lumbar spine injury in (month) (using, presumably, the same methodology the carrier contends was in violation of the AMA Guides). It is unclear whether Dr. A intended to add the 11% to the 19% previously assigned to the May injury (which was an injury to claimant's cervical spine, in addition to his lumbar spine) or to subtract it therefrom. It does not appear that Dr. A was, in hindsight, assigning no impairment rating to the cervical spine, as the TWCC-69 and narrative for the second injury were attached to, and referenced in, the amended report. Further, our review of the evidence does not indicate that Dr. A's amended 11% impairment rating (if, indeed, it was 11%) was supported by the reports of Drs. O and C. In actuality, Dr. O stated claimant was entitled to seven percent and four percent for the specific disorders due to the lumbar spine and the cervical spine, respectively--in addition to any range of motion limitation. Dr. C's nine percent whole body impairment, while numerically close to 11%, clearly was based upon claimant's lumbar spine injury alone and did not evaluate any impairment to the cervical spine arising from the second injury. (Further, there is an inconsistency within Dr. C's report, which gives whole body impairments of both nine percent and four percent; despite carrier's argument to the contrary, the report does not

specifically assign four percent to the first injury and five percent to the second.) To the extent the hearing officer has impliedly found that Dr. A's original report for the (date of injury) injury was not overcome by the weight of the other medical evidence (including the reports of Drs. O, E and C), that is supportable under prior decisions of this panel. *See, e.g.*, Texas Workers' Compensation Commission Appeal No. 92412, decided September 28, 1992, which provides that overcoming the presumptive weight accorded the designated doctor requires more than "a mere balancing of the evidence." In sum, we believe that the hearing officer's rejection of Dr. A's amended report--which resulted in her determination that claimant's impairment rating for the (date of injury), injury was 19%--was not contrary to the overwhelming weight of the evidence. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).[2]

After determining that claimant's proper impairment rating for this injury was 19%, the hearing officer proceeded to make a determination that the carrier was entitled to reduce the claimant's IIBS by 58%, based upon the 11% impairment rating for the earlier injury. While Dr. A could not have been appointed as a designated doctor to render an opinion regarding the degree to which the earlier injury contributed to the claimant's present impairment, nevertheless the hearing officer was entitled to consider all relevant medical evidence concerning the earlier injury and to choose to rely upon Dr. A's opinion in determining the extent of the previous impairment. Neither party appealed the methodology used by the hearing officer to assess the reduction for contribution of the first injury, which is hereby affirmed.

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

Lynda H. Nesenholtz
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Philip F. O'Neill
Appeals Judge

[2]Neither party complained at the hearing or on appeal about Dr. A's apportioning lumbar range of motion between the two injuries; therefore, we will not address it.