APPEAL NO. 950097
FILED MARCH 6, 1995

On December 13, 1994, a contested case hearing was held. The hearing was held under the provisions of the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). The issues at the hearing were maximum medical improvement (MMI) and impairment rating (IR). The hearing officer decided that the respondent (claimant) reached MMI on August 27, 1993, with a 24% IR as reported by the designated doctor. The appellant (carrier) disagrees with the hearing officer's determination that the claimant has a 24% IR and contends that he has an 11% IR. No response was received from the claimant.

DECISION

Affirmed.

The claimant testified that on _____, he and other coworkers were taking blood samples from cows and that his job was to use a hook to hold the cows by the nose while the samples were drawn. When he attempted to use the hook on one cow, the cow raised its head and hit him under the chin. He said he was knocked backwards into a wall. He said he hurt his jaw, left shoulder, and neck. He said he started having bad headaches and that he developed a hearing loss in his left ear about a week after the accident. He also said he developed a hearing loss in his right ear over the last one and one-half years to two years prior to the hearing. When the claimant was asked whether the hearing loss in his right ear had "nothing to do with the cow hitting you in your face or your mouth," he responded "I am not going to say it had nothing to do with the cow hitting me in the mouth because also on the left ear when I was struck I did not become deaf right then, right away, it was after awhile." However, the claimant also testified that his treating doctor (Dr. W), told him that the hearing loss in his left ear was caused by the accident, and that no doctor has told him that the hearing loss in his right ear was due to the accident. He said he started missing work because of his injuries on or about January 22, 1992. The claimant testified that he did not agree with Dr. W's report that he reached MMI on June 4, 1993, with an 18% IR. The carrier offered that report into evidence, but it was not admitted because of the carrier's failure to exchange it. No appeal has been made of that ruling.

By letter dated December 27, 1993, the Texas Workers' Compensation Commission (Commission) selected (Dr. B) as the designated doctor to determine IR only. The Commission erroneously advised Dr. B that the claimant had reached statutory MMI, which is at the expiration of 104 weeks after income benefits begin to accrue. *See* Section 401.011(30)(B). In a Report of Medical Evaluation (TWCC-69) dated January 19, 1994, Dr. B certified that the claimant reached MMI on August 27, 1993, with a 24% IR. The IR was composed of 18% impairment for hearing loss, three percent impairment for cranial

nerve loss, and five percent impairment for vestibular dysfunction, which resulted in a 24% IR under the Combined Values Chart of the Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association (the Guides). Dr. B stated in his narrative report that he used the Guides in assessing impairment. He also noted that following the accident on _____, the claimant developed decreased hearing in his left ear, that the claimant was diagnosed with perilymph fistula of the left ear, that Dr. W performed surgery on the left ear in January 1992, and that the claimant was fitted with a hearing aid for the left ear. Dr. B further noted that the claimant had decreased hearing in both ears, worse on the left side. He did not indicate when the right ear hearing loss developed.

Apparently some questions were raised about Dr. B's report because on April 5, 1994, a disability determination officer (DDO) wrote to Dr. B asking him to respond to the following questions: "1. Does the impairment rating include the hearing loss for both ears? As you are aware [claimant] has a pre-existing noncompensable hearing loss to the right ear. 2. Was there a worksheet used to calculate the hearing loss? If so, please provide me with a copy." On April 13, 1994, Dr. B responded to the DDO as follows:

> I am in receipt of your letter dated April 5, 1994. The [IR] does in fact include loss of hearing for both ears. As the Guides require, one has to take the hearing loss in the worst ear in the X-axis and then cross-reference that with the hearing loss in the better ear on the Y-axis of the chart. The audiogram dated June 4, 1993 was used for that. In this case, the graph was used to determine the values. The only other option I see is to use the hearing loss only for the left ear and use a zero percent hearing loss in the right ear. One could then use Table 2 from page 167, for monaural hearing impairment. This being the case, there is a 250 DSHL [decibel sum of the hearing threshold levels at 500, 1,000, 2,000, and 3,000 hertz] loss would be a 56.2 percent monaural hearing loss. Or applying Table 3, 250 by the best possible 100 would be a 9.4 percent hearing loss and a 9.5 binaural hearing loss would be 3 percent of the whole person. Therefore, the difference comes from the preexisting injury, but the hearing loss calculation requires the use of both ears. I am sorry for any confusion this might cause. I was simply following the Guides as outlined in Section 9.1a on page 166.
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> There was not a work-sheet used; however, I can provide to you the data that was used for this.

LEFTRIGHT

55 500 50
65 1000 55
65 2000 65

65 3000 65
250 235

> From the above Table, this was the data that was used to calculate the hearing loss aspect. I hope that the TWCC-69 that was submitted in August [sic], documented the loss of cranial nerve from Section 4.1 on page 102, and the objectified vestibular dysfunction from Section 9.1c on page 20.

On September 6, 1994, the Commission sent Dr. W, the treating doctor, a copy of Dr. B's TWCC-69 and asked Dr. W to file an amended TWCC-69 "to include the whole body [IR] resulting from the injury of _____." In an undated TWCC-69 which was received by the Commission in October 1994, Dr. W certified that the claimant reached MMI on August 27, 1993, with a 23% IR. The IR was composed of 18% impairment for hearing loss and five percent impairment for vertigo. Dr. W apparently did not use the Combined Values Chart of the Guides because according to that chart, the 18% impairment combined with the five percent impairment would result in a combined value of 22%. Dr. W did not state in the TWCC-69 which was received by the Commission in October 1994 whether the impairment assigned for hearing loss related to just the left ear or whether it was calculated using both ears.

In December 1994 the DDO asked Dr. B, the designated doctor, whether he considered the claimant's temporomandibular condition in the IR, and Dr. B responded that he had and that the claimant had no impairment related to that condition.

The carrier does not challenge the hearing officer's determination that the claimant reached MMI on August 27, 1993, as was found by Drs. B and W. The carrier contends that the hearing officer erred in determining that the claimant has a 24% IR as was assigned by Dr. B, the designated doctor. The hearing officer found that the determination of the designated doctor is not contrary to the great weight of the other medical evidence and that it is entitled to presumptive weight. The carrier asserts that the hearing officer erred in determining the IR based on the report of Dr. B because it contends, as it did at that hearing, that the impairment Dr. B assigned for hearing loss was based, in part, on injury to the right ear which it asserts is not part of the compensable injury, and because Dr. B did not correctly calculate impairment in compliance with the Guides. It contends that the claimant's IR is 11% composed of three percent impairment for left ear hearing loss, five percent impairment for cranial nerve loss, and three percent impairment for vestibular dysfunction. The hearing officer made no finding regarding the extent of the claimant's injury; however, in the Statement of the Evidence portion of his decision he stated:

> Carrier contends that the designated doctor was incorrect in rating both ears. It takes the position that Claimant only injured the left ear during the incident at work. [Dr. B], the Commission selected designated doctor, explained that

> the AMA Guides rate hearing loss and not individual hearing components. The Carrier disagrees with [Dr. B's] rating.

Section 408.125(e) provides that, if the designated doctor is chosen by the Commission, the report of the designated doctor shall have presumptive weight, and the Commission shall base the IR on that report unless the great weight of the other medical evidence is to the contrary, and that, if the great weight of the other medical evidence contradicts the IR contained in the report of the designated doctor chosen by the Commission, then the Commission shall adopt the IR of one of the other doctors. "Impairment" means any anatomic or functional abnormality or loss existing after MMI that results from a compensable injury and is reasonably presumed to be permanent. Section 401.011(23). "IR" means the percentage of permanent impairment of the whole body resulting from a compensable injury. Section 401.011(24). Section 408.124(b) provides that the Commission shall use the Guides for determining the existence and degree of an employee's impairment. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.1(e) (Rule 130.1(e)) provides that, if a doctor certifies that an employee has an impairment, the doctor shall assign a whole body IR based on the injury, and that all certifications of impairment shall be made in compliance with the rating criteria contained in the Guides. Rule 130.1(g) provides, in part, that the medical evaluation report form shall contain an instruction to the doctor that the IR shall be based on the compensable injury alone. In Texas Workers' Compensation Commission Appeal No. 92570, decided December 14, 1992, we stated the following in regard to the use of a designated doctor:

> At the outset, we would note that the use of a designated doctor is clearly intended under the 1989 Act to assign an impartial doctor to finally resolve disputes over MMI and [IR]. To achieve this end, the report of a Commission appointed designated doctor is given presumptive weight. Articles 8308-4.25(b) and 4.26(g). Only the great weight of other medical evidence can counter this presumptive status. As the Appeals Panel has stated before, this requires more than a mere balancing of the evidence. Texas Workers' Compensation Commission Appeal No. 92412, decided September 28, 1992. Lay testimony or evidence does not provide sufficient basis to overcome this presumption. Texas Workers' Compensation Commission Appeal No. 92164, decided June 5, 1992.

Chapter 9 of the Guides pertains to the ear, nose, throat and related structures. Section 9.1a of that chapter concerns hearing impairment and the following are excerpts from that section:

> For the purpose of this chapter, impairment of the whole person is determined from the calculation of permanent binaural hearing impairment.

* * * * *

> The evaluation of binaural hearing impairment of adults is derived from the pure tone audiogram and is always based upon the functional state of both ears.
>
> * * * * *
>
> A purely monaural hearing impairment should be converted to binaural hearing impairment using the formula above, with 0% hearing impairment for the better ear.

Dr. B, the designated doctor, assigned the claimant a 24% IR, 18% of which was for binaural hearing impairment. The Guides specifically provide that impairment of the whole person is determined from the calculation of permanent binaural hearing impairment. While Dr. B states that "[t]he only other option I see is to use the hearing loss only for the left ear and use a zero percent hearing loss in the right ear," he specifically states that "the hearing loss calculation requires the use of both ears" and indicates that he was following the Guides in determining the 18% impairment for hearing loss. It is evident that the claimant has hearing loss in both ears (although the right ear hearing loss may not be related to the work-related injury), thus it appears that he does not have a "purely monaural hearing impairment" which can be converted to binaural hearing impairment with 0% hearing impairment for the better ear (the right ear is the better ear and the DSHL for that ear was 235). Although we adhere to the principle that an IR must be based on the compensable injury alone, we are also cognizant that the 1989 Act requires that the Guides be used in determining the existence and degree of impairment. Here, the Guides state that impairment of the whole person is determined from the calculation of permanent binaural hearing impairment, and Dr. B, the designated doctor, states that the hearing loss calculation requires the use of both ears. Considering the lack of medical evidence to contradict the opinion of Dr. B on the use of the Guides to rate hearing impairment, we are unwilling to hold, under the particular circumstances of this case, that the hearing officer erred in determining that Dr. B's opinion is not contrary to the great weight of the other medical evidence and that his IR determination is entitled to presumptive weight. We conclude that the hearing officer's decision is supported by sufficient evidence and is not so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175 (Tex. 1986).

The hearing officer's decision and order are affirmed.

Robert W. Potts
Appeals Judge

CONCUR:

Gary L. Kilgore
Appeals Judge

Alan C. Ernst
Appeals Judge