APPEAL NO. 950104
FILED MARCH 3, 1995

This appeal is brought pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on October 20 and December 15, 1994. The issue at the hearing that has been appealed is the respondent's (claimant herein) correct impairment rating (IR). The hearing officer determined that the claimant's correct IR was 21% as determined by a designated doctor selected by the Texas Workers' Compensation Commission (Commission). The appellant (carrier herein) appeals arguing that this determination is incorrect as a matter of law because it is based solely on mental condition and not on objective clinical and laboratory findings and because there was no evidence to indicate the claimant's condition is permanent. No response to this appeal has been received from the claimant.

DECISION

We affirm.

The claimant did not testify at the hearing or submit any other statements concerning the circumstances of his injury. However, because the issue presented on appeal is essentially a question of law, we need not provide an extensive recitation of facts. The claimant was an oil field worker who, on _____, inhaled some quantity of hydrogen sulfide gas while working on a rig. He is described in medical reports as leaving the rig to wash his face and waking up two days later in a hospital. Other reports say that he was conscious while being transported to the hospital by a coworker, but, at times, was hallucinating. He remained in the hospital until March 12, 1992, and has been diagnosed by his treating doctor, (Dr. K), as having "acute panic disorder precipitated" by the incident of _____. Dr. K also describes his condition as "anxiety with panic reaction" and "post traumatic stress disorder, severe," and often accompanied by generalized musculoskeletal pain, headaches, fatigue, tremulousness, shortness of breath, anorexia, hypertension, irritability and visual blurring. On July 7, 1992, Dr. K wondered "if he doesn't have some predisposing abnormality because of such prolonged and dramatic symptoms." Extensive physiologically based testing was either reported as normal or no connection between the test results and claimant's symptoms were made. Also, on July 7, 1992, (Dr. G), a neurosurgeon, examined the claimant at the carrier's request and found no evidence of neurological abnormality, but considered this diagnosis nonetheless consistent with a post-traumatic stress disorder with generalized anxiety and panic attacks. A year later, on July 9, 1993, Dr. G again was not able to demonstrate any physical abnormality in the claimant and considered his condition "strictly a psychiatric problem." The claimant was again hospitalized from April 9, 1993, through April 25, 1993, and from August 4, 1993, to August 5, 1993, for major depression and post-traumatic stress disorder.

On April 8, 1994, Dr. K completed a Report of Medical Evaluation (TWCC-69) in which he projected a date of MMI of October 1, 1994, and assigned a 100% IR. No explanation for this rating was given. Attached to the TWCC-69 were copies of Dr. K's progress notes. The carrier disputed this IR and on May 13, 1994, the Commission appointed (Dr. BR), Ph.D., a neuropsychologist, designated doctor to certify IR only because the claimant was considered to have reached statutory MMI pursuant to Section 401.011(30)(B). Dr. BR evaluated the claimant and administered numerous psychological tests. According to Dr. BR, certain of these tests were "reflective of an individual who is experiencing very severe levels of affective distress, who is having a severely difficult time coping, and who feels essentially out of control of his pain and dysfunction." He also concluded:

> From the standpoint of differential diagnosis, the key question is the degree of persisting central nervous system impairment potentially due to hydrogen sulfide exposure. While it is difficult to definitively rule out any cerebral dysfunction as a result of exposure to H2S, there does not appear to be compelling evidence of brain dysfunction at this time. There is, however, strong evidence of the degree to which the patient's affective ability interferes with the ability to understand, conceptualize, organize and store information.

Dr. BR declined to certify a whole body IR on a TWCC-69 because he is not a medical doctor. He, nonetheless, in narrative form assigned a 20% IR based on Chapter 14, Mental and Behavioral Disorders, of the Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association (AMA Guides). He further stated that in his evaluation "specific assessment procedures geared to assess malingering were implemented, and there was no evidence of malingering."

Because Dr. BR is not a medical doctor, the Commission on August 29, 1994, designated (Dr. BU) to determine the claimant's IR. On September 12, 1994, Dr. BU certified the claimant's IR at 21% based on his examination of the claimant, a review of his records, including Dr. BR's evaluation, and Chapter 14 of the AMA Guides. He agreed with a diagnosis of post-traumatic stress disorder "as documented by psychiatric and psychological records and clearly an additional diagnosis of depression." In applying Table 1, of Chapter 14, Dr. BU found a mild impairment in the activities of daily living for a two percent rating; a moderate impairment of social functioning for a five percent rating; a moderate impairment of concentration for a 10% rating; and a moderate impairment of adaptation for a five percent rating.

The hearing officer determined that Dr. BU's certification of a 21% IR was entitled to presumptive weight under Section 408.125(e) and that the great weight of the other medical evidence was not to the contrary. In its appeal, the carrier argues that this conclusion is erroneous as a matter of law because an IR, and impairment income benefits

(IIBS) premised on that IR, cannot be given for purely psychological conditions which are not based on objective clinical and laboratory findings. In support of its position, carrier points out, and the contrary cannot be argued from the evidence in this case, that neither Dr. BR nor Dr. BU based his IR on any physical injuries. It then argues that the "legislature did not intend the new workers' compensation statute to include the recovery of [IIBS] for mental and behavioral disorders" because Section 408.122(a) precludes the payment of IIBS "unless evidence of impairment based on an objective clinical or laboratory finding exists." It further notes that section 401.011(32) defines "objective" to mean "independently verifiable or confirmable results that are based on recognized laboratory or diagnostic tests, or signs confirmable by physical examination" and Section 401.011(33) specifies that competent objective medical evidence must be "independently confirmable by a doctor . . . without reliance on the subjective symptoms perceived by the [claimant.]" The carrier does not consider either Dr. BR's or Dr. BU's reports to be based on objective clinical findings, and more importantly, that the guidelines of Chapter 14 are "purely subjective" and should be disregarded in assigning an IR despite the decision of the Appeals Panel in Texas Workers' Compensation Commission Appeal No. 941167, decided October 13, 1994, which recognized the validity of an IR based on Chapter 14.

We are unpersuaded by carrier's argument primarily for two reasons. First, we cannot assent to carrier's premise that the legislature did not intend that benefits under the 1989 Act be extended to those suffering mental and behavioral disorders. Indeed, Section 408.006 provides:

Sec. 408.006. MENTAL TRAUMA INJURIES.

(a)It is the express intent of the legislature that nothing in this subtitle shall be construed to limit or expand recovery in cases of mental trauma injuries.

(b)A mental or emotional injury that arises principally from a legitimate personnel action, including a transfer, promotion, demotion, or termination, is not a compensable injury under this subtitle.

To accept the carrier's position would virtually read this section out of the 1989 Act. As the Appeals Panel said most recently in Texas Workers' Compensation Commission Appeal No. 950011, decided February 15, 1995:

> It has long been held in Texas that mental trauma can produce a compensable injury, <u>even without an underlying physical injury</u>, if it arises in the course and scope of employment and is traceable to a definite time, place, and cause. [Citations omitted.] Further, the Texas Supreme Court has held that damage or harm caused by repetitious mental traumatic activity does not constitute an occupational disease for purposes of compensability

> under the workers' compensation statutes. [Citations omitted.] [Emphasis added.]

The hearing officer found that the claimant's mental condition is the direct result of the gas exposure which is traceable to a definite time, place, and cause.

The second reason we reject carrier's argument is that it too narrowly defines "objective clinical or laboratory findings." As noted above, Dr. BR administered numerous psychological tests on which both he and Dr. BR relied, at least in part, in assigning an IR. The carrier produced no evidence that any of these tests were not "well-standardized," professionally recognized tests administered by or under the direction of mental health professionals, including psychologists and psychiatrists. *See* AMA Guides, Section 14.2. In addition, there was no evidence that the actual test scores were misinterpreted or that the tests themselves did not carry internal indicia of reliability such as control questions that would indicate "gaming" by the claimant. Both Dr. BR and Dr. BU considered the test results consistent with their clinical experience of the claimant. In previous cases, the Appeals Panel has sanctioned the use of Chapter 14 in assessing an IR despite "some difficulty in establishing a direct link between medical findings and percentage of mental impairment. . . ." Appeal No. 941167, *supra*. *See also* Texas Workers' Compensation Commission Appeal No. 94551, decided June 15, 1994; Texas Workers' Compensation Commission Appeal No. 94462, decided June 2, 1994, which specifically affirmed the uses of Table 1, of Chapter 14; and Texas Workers' Compensation Commission Appeal No. 931069, decided January 7, 1994, which affirmed a rating under Chapter 14 based on reports of psychological testing. The key to the use of Chapter 14 to assign an IR lies the in the exercise of best clinical judgment. In this regard, Chapter 14, although it lacks specific numerical rating guidance, is not totally unlike other chapters of the AMA Guides which rely ultimately on the professional judgment of the examining doctor and the interpretation of symptoms, primarily pain, which are inherently subjective, but which can be given some collateral verification from clinical observation of the patient. In the case now appealed, both Dr. BR and Dr. BU buttressed their conclusions about the claimant's correct IR under Chapter 14 on their personal observations of the claimant. These clinical observations together with the acceptance of the testing procedures by the medical community as valid indicia of mental and behavioral disorders constitute, in our opinion, the required objective clinical and laboratory findings on which this IR was based.

The carrier also argues that there was "no evidence" to support a permanent impairment of the claimant. In reviewing a no evidence point of error, the Appeals Panel considers only the evidence, and reasonable inferences therefrom, which viewed in their most favorable light support the finder of fact, and rejects all evidence and inferences to the contrary. Texas Workers' Compensation Commission Appeal No. 94132, decided March 22, 1994. Section 401.011(23) defines "impairment" in pertinent part as a functional abnormality or loss existing after MMI "that results from a compensable injury and is reasonably presumed to be permanent." Only a permanent impairment can be assigned

an IR. Section 401.011(24). The question of the permanence or not of an injury is resolved either at the date of MMI, or by the lack of objective clinical or laboratory data to support a finding of a permanent injury. Appeal No. 94551, *supra*. Inherent in the concept of MMI is the notion of reasonable, not absolute, stability of the medical condition. *See* Section 2.1 of the AMA Guides and accompanying sample Report of Medical Evaluation which considers a likely improvement of no more than three percent within the next year to be consistent with stability. Texas Workers' Compensation Commission Appeal No. 94368, decided May 6, 1994. *See also* Section 14.1, Chapter 14, of the AMA Guides for a discussion of the concepts of "chronic," "cure" and "remission" as applied to psychiatric impairment. Dr. BR concludes that the claimant's post-traumatic stress syndrome with anxiety and depression can be treated at least with regard to the claimant's ability to adapt to stressful situations "with a good rate of recovery to the point of adaptive functioning, I would not expect this area of impairment to be life long." Whether a compensable injury results in a permanent impairment is a question of fact for the hearing officer to decide. Given our standard of review of a no evidence point of error, we are unwilling to conclude, as the carrier urges, that this statement of Dr. BR compels the conclusion that the claimant's compensable mental trauma injury was not permanent at the time he reached MMI or that this statement was not probative evidence from which, together with the reports of Dr. BR and Dr. BU, the hearing officer could find that his injury was permanent. We thus find no merit in carrier's assertion that there was no evidence to support a finding that the claimant's condition is permanent.

The hearing officer afforded presumptive weight to Dr. BR's report certifying a 21% IR. Section 408.125(e). Finding the evidence sufficient to support the decision and order of the hearing officer on the appealed issue of the claimant's correct IR and no legal error, we affirm.

Alan C. Ernst
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Philip F. O'Neill
Appeals Judge