APPEAL NO. 951097

This appeal is considered in accordance with the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held in _____, Texas on June 20, 1995, before (hearing officer). The respondent, who is the claimant, was injured on a date the parties stated was _____, while employed as a welder by (employer). The issue at the hearing was the correct impairment rating (IR) to be assigned to the claimant for his injury. The parties stipulated mid-way through the hearing that statutory maximum medical improvement (MMI) (104 weeks after the date income benefits accrued according to Section 401.011(30)(B)) was September 6, 1994. The hearing officer determined that claimant had reached MMI on the stipulated date, with a 51% IR, as determined by the designated doctor. The hearing officer determined that the carrier had not timely or properly raised an issue for consideration regarding extent of injury.

The hearing officer had not allowed the issue of extent of injury to be developed at the hearing, but nevertheless stated in his discussion that the results of his decision would "in all probability be different" if the extent of injury issue had been timely raised.

The carrier has appealed the determination of the hearing officer, arguing that the extent of injury issue was subsumed because the hearing officer had to determine that the IR given by the designated doctor was based upon a "compensable injury," and that an IR cannot be given for conditions that are not defined as part of the injury. Arguing many procedural facts that are, for the most part, not part of the record of the case, the carrier appears to assert that it has disputed the extent of injury all along. It argues that a remand is not necessary because the medical evidence already produced compels the conclusion that claimant's IR is not due to a compensable injury and it points to the hearing officer's dicta observation of what he might otherwise have ruled as an indication of error in the refusal to correctly apply the definition of "impairment." The carrier argues that the designated doctor has actually found that no IR relates to the compensable injury, defined by the carrier as the respiratory injury. It argues that the hearing officer erred by failing to consider the carrier's response to the benefit review conference (BRC) report in which carrier attempted to "clarify" its statement of position. The carrier states that it did not dispute that claimant's pulmonary or respiratory problems may have been related to exposure to welding fumes. The claimant responds by arguing that the opinion of a doctor for the carrier should not be considered because he did not examine claimant, and that (essentially) the strokes leading to his impairment were causally linked to the welding inhalation incident. Evidence attached to the appeal which was not part of the record from the hearing has not been considered.

DECISION

We affirm the findings and conclusions of the hearing officer. The dicta comments of the hearing officer regarding how he would have ruled on an issue not before him must be disregarded.

The record of what occurred on the date of the injury and shortly thereafter is not well developed, and must be inferred from historical background in the medical records in evidence. Although the date of injury was described at the hearing as _____ (the date used by the employer in its first report of injury), the record indicated that during the last week of August 1992, as claimant was welding on steel, he sustained a bout of what is described as "metal fume fever." Claimant stated that this happened on a Friday. By the next morning, he experienced some facial paralysis, tremors, and one-sided weakness. The record indicated that claimant went to a clinic and was diagnosed with Bell's palsy. Claimant returned to work but his symptoms persisted. His wife noticed that the pupil of one eye was enlarged. He became ill and was hospitalized on (day after date of injury), for tests. During his hospitalization, it was determined that claimant had a congenital defect in his heart, referred to as a foramen ovale. In March 1993, claimant was hospitalized again with further symptoms.

Claimant's treating doctor on November 23, 1992, was Dr. G, whose specialty was psychiatry and neurology. In a letter of that date, Dr. G indicated that he observed multiple cranial neuropathies of uncertain etiology, and recommended further testing. Although in that letter Dr. G said it was relatively unlikely that welding had contributed to this, he documented his intent to further investigate the toxic products of welding fumes.

On July 18, 1994, claimant was referred to Dr. C. Dr. C noted a previous medical history of hypertension. Dr. C unequivocally stated that claimant had a "profound neurological deficit" as a result of his exposure, "it is my opinion that he has sustained significant central and peripheral nervous system damage on the basis of his work-related occupational exposure to metals." Due in large part to central nervous system deficits and their effects on claimant's motor skills, Dr. C assessed a 51% IR. A response to this report from Dr. W, whose role is not identified in the record, disputed Dr. C's report because it did not also include impairment for claimant's left knee.

On July 27, 1994, Dr. GT, a doctor of internal medicine and pulmonary disease, wrote that he could not rule out the possibility that claimant's welding exposure contributed to the neurological event claimant suffered the prior year. Dr. GT said that all of claimant's impairment related to his neurological problems. An earlier consulting report dated April 19, 1993, diagnosed moderate asthma, occupational asthma, status post brain stem cerebrovascular accidents, and severe obstructive sleep apnea. He stated then that it was difficult to answer whether his current symptoms were "entirely" work related, but supported the hypothesis that some of claimant's current respiratory difficulties were related to his exposure to welding fumes.

The carrier disputed Dr. C's IR; Dr. R was appointed as the designated doctor. He examined the claimant on December 27, 1994. He stated that he did not examine or include the left knee because it was not related to claimant's presenting complaint. Dr. R found various nerve palsies present and motor deficits resulting in a 51% IR. Dr. R's

narrative report was dated February 10, 1995. On March 1, 1995, Dr. A, on behalf of the carrier, wrote a page and a half letter to the carrier stating that he had reviewed the case records "provided" for claimant. These are not enumerated in the letter, but hospitalization records or reports of Dr. G are not mentioned. Dr. A noted that claimant had a heart defect that had been repaired by the date of his letter. Dr. A concluded that claimant had most likely experienced embolic events to his brain related to the cardiac defect. Dr. A noted that the etiology of his strokes had no relationship to his welding. Dr. A agreed that high exposure to manganese could cause tremors but there were no metal levels indicated in the records he reviewed. He recommended that claimant's blood be tested for metal levels, and he agreed that exposure to welding fumes had been a factor in claimant's pulmonary problems.

The record indicated that on March 16, 1995, Ms. D, a benefit proceedings specialist for the Texas Workers' Compensation Commission, wrote to Dr. R asking four questions concerning whether separate IRs were assigned to claimant's asthma and his neurological conditions, and whether each rating was done in accordance with the Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the AMA Guides. No answer was included in the evidence, and no evidence was offered as to why this letter was generated. On March 23, 1995, Dr. R wrote to the benefit review officer (BRO) in apparent response to a letter of March 22nd. This letter recited seven questions and answered them. When asked if exposure to fumes could have created a coughing episode powerful enough to strain the heart condition, Dr. R said that such an event was speculative. He stated, however, that it was certainly true that forceful coughing aggravated by exposure to irritant fumes could produce a shunt of blood from one side of the heart to the other through the congenital opening, and that "emboli may be transferred from the right side of the heart into the arterial circulation on the left side of the heart by such a shunt, producing paradoxical embolization and resulting in a stroke." He further stated that he had not evaluated the knee "because it has no relationship to his current disorder." Dr. R indicated that he attributed 0% impairment to the respiratory system. Dr. R closed his letter by noting that claimant's major condition resulted from a series of strokes. Although he stated that contribution of the workplace exposure was speculative, Dr. R described in the next paragraph that claimant's chronic cough likely was a result of a combination of exposure to welding fumes, cigarette smoke, and underlying asthma, that this cough likely resulted in the shunting in the heart defect and consequent embolization resulting in the severe strokes he had suffered. Dr. R stated that claimant did not exhibit symptoms associated with neurotoxicity. Although it was argued that an inquiry to the designated doctor was made because the extent of injury was discussed at the BRC, no evidence was offered as to the reasons why the letter was written, nor was the BRO's letter to Dr. R put into evidence.

The only BRC report in evidence is dated May 1, 1995, reflecting that the BRC was held on April 24, 1995. It states that temporary income benefits (TIBS) were paid to claimant for 105 weeks. The issue is "what is claimant's impairment rating?" Carrier's

position is stated only as the "impairment rating assigned by the designated doctor is incorrect."

On May 25, 1995, carrier filed a response to the BRC report. The response did not argue that the BRO had misstated its position. Rather, the carrier asked that it be allowed to "amend" its position as:

> It is the [carrier]'s position that the designated doctor's March 23, 1995, letter to [the BRO] clearly sets forth that of the 51% impairment rating assigned to [claimant], no percentage is related to his compensable injury. Further, the evidence, to the extent that any exists, of a connection between the compensable injury and the neurological deficits, is speculative at best.

The letter than asserted that there was "good cause" for "clarification" of its position on the disputed issue, and that same was intended as an amendment to the BRC report. At the hearing, the attorney for the carrier again sought "clarification," and did not move to add a new issue; carrier's attorney stated that the objective of the response was to "redefine" the issue. The hearing officer stated that he would not allow the case to proceed on any issue of extent of injury, and that the sole issue was IR.

The claimant primarily represented himself during the CCH. He argued that carrier had paid for his income benefits and medical care with essentially no dispute. He attempted to introduce Payment of Compensation or Notice of Refused or Disputed Claim forms (TWCC-21s) which he appeared to assert would either prove that carrier had not disputed the condition within 60 days, or the first IR within 90 days (it was not clear). The hearing officer, *sua sponte*, challenged whether such evidence would be relevant to the sole issue of IR, and the claimant withdrew these exhibits. The carrier offered no documents or other evidence during its case in chief. At closing, when directly asked by the hearing officer why the issue on extent had not been joined before the passage of years in the case, the carrier's attorney responded that, as near as he could tell, the case had been adjusted based upon "assumptions" that had been called into question by later medical evidence.

The carrier is in a situation of its own making. It offered no exhibits, nor did it tender as its own exhibits the TWCC-21s which the claimant withdrew after the hearing officer expressed concern about the relevance of those documents. From the record here, the carrier admittedly did not clearly, and early on, seek to add an issue on extent of injury, but obliquely sought to inject the issue by amending its position as stated in the BRC report asserting that it had "good cause". Notwithstanding the contentions made on appeal that the BRO had not correctly characterized its position, the posture of the carrier at the CCH was that it sought to "redefine" the issue. We observe that a clear articulation of an issue on the extent of injury would afford claimant the opportunity to investigate, and assert, any arguments it might have under Section 409.021. Frankly, the record developed in the CCH

supports, rather than refutes, the hearing officer's observation that an issue on the extent of injury was not timely or properly raised.

We have indicated before that raising questions about the extent of an injury for the first time when an IR controversy arises may result in waiver of the argument that certain conditions should (or should not) be rated. Texas Workers' Compensation Commission Appeal No. 941333, decided November 21, 1994, involved an IR dispute in which the carrier had not challenged the extent of injury at the BRC, and stated that it was not seeking to add that issue at the CCH, but stated that it reserved the right to dispute a knee injury which had been included in the IR of the designated doctor. The Appeals Panel stated extent of injury was necessarily reached by the hearing officer, because the impairment had to be based upon the compensable injury, and that it was incumbent upon the carrier to "activate" any dispute over the extent of injury "well before" a dispute was made to an IR that included that injury. In Texas Workers' Compensation Commission Appeal No. 950330, decided April 17, 1995, which quoted Appeal No. 941333, the Appeals Panel held that where the parties stipulated merely that the claimant had a compensable injury, and the claimant argued at the CCH that the full extent of her injury had not been rated by the designated doctor, the issue of extent of injury should have been more clearly articulated and presented as a distinct issue.

In Texas Workers' Compensation Commission Appeal No. 950335, decided April 17, 1995, the carrier argued that the hearing officer erred by finding that a lumbar condition as well as a cervical condition was part of the compensable injury since there was no separate issue on extent of injury. The Appeals Panel agreed that the carrier indeed had not brought forward an extent of injury issue, but nevertheless noted that the hearing officer should resolve necessary collateral issues where it was apparent that the designated doctor had failed to include the entire injury, and the hearing officer did not err by finding that the lumbar injury was part of the compensable injury as a threshold finding on IR.

The cases indicate that while the an extent of injury issue is not "subsumed" in IR disputes in the sense that a full-blown trial on extent of injury is required, a hearing officer should adopt a rating for the "compensable injury" and can appropriately make findings on this threshold issue. When, however, there is conflict and controversy on the extent of the ratable compensable injury, and this is at the heart of a party's opposition to the IR, it is incumbent upon the party challenging the designated doctor's rating to activate a full hearing on this issue. Where, as here, benefits were apparently paid for a long time and there is no evidence of an earlier dispute and where it is not obvious from the face of his report or responses to questions that the designated doctor rated more than those injuries which are compensable, we believe that it was up to a carrier to activate a dispute by clearly and early on joining an issue on the matter and moving it through the hearing process so that both sides would have the opportunity to fully, and fairly, develop medical evidence on the matter and raise all related issues (including the matters set forth in Section 409.021).

To the extent that a threshold question of compensable injury is a collateral issue to the IR issue, we would note that the medical evidence here does not, as carrier asserts, clearly preclude inclusion of the stroke-related impairments as part of the compensable injury for purposes of impairment. Moreover, the designated doctor, who expressly declined to rate a knee condition he deemed unrelated, described how the respiratory problems, coupled with the pre-existing heart defect, "likely" caused the strokes. Even Dr. A agrees that the strokes most likely were "related" to the cardiac defect, but does not opine, one way or the other, about the interplay of the occupational asthma with the heart condition. Carrier conceded that the compensable injury definitely included claimant's pulmonary and respiratory conditions. The fact that the respiratory conditions did not cause permanent impairment does not mean that they were not a factor at all in the ratable "compensable injury." Based upon the record, we can affirm the hearing officer's determination that the claimant sustained a compensable injury, and that the correct IR, based upon the neurological problems, is 51%. (This is not to say, however, that the designated doctor's opinion has presumptive weight on the issue of extent of injury, as we have held that it does not. Texas Workers' Compensation Commission Appeal No. 94392, decided May 13, 1994.)

We expressly disapprove, and strike, the hearing officer's gratuitous observations on how he would have decided an extent of injury issue. Without a full trial on an issue of extent, and given that TWCC-21s which would be pertinent to the issue were withdrawn when the hearing officer questioned their relevance to impairment, it is inexplicable how an outcome could be known when all relevant evidence was not offered or developed.

Based upon the record, for the reasons stated, we affirm the hearing officer's decision to adopt the impairment rating as determined by the designated doctor, noting that the medical evidence in this case further supports assessment of impairment for the effects of claimant's strokes. The order for payment of impairment income benefits (IIBS) and medical benefits is also affirmed.

Susan M. Kelley
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Elaine M. Chaney
Appeals Judge