APPEAL NO. 960528
FILED APRIL 24, 1996

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 (CCH) was held on February 20, 1996. Addressing the disputed issues, she (the hearing officer) determined that the respondent (claimant herein) reached maximum medical improvement (MMI) on April 23, 1995, with five percent impairment rating (IR). The appellant (carrier herein) appeals, asserting error of law by the hearing officer. The claimant replies that the decision and order of the hearing officer are correct and should be affirmed.

DECISION

Affirmed in part and reversed and rendered in part.

It was not disputed that the claimant sustained compensable injuries in the nature of a neck sprain and contusions to the face, head and knee in a fall on _____. Dr. T, the treating doctor at the time, completed a Report of Medical Evaluation (TWCC-69) in which he stated that all the symptoms had resolved, found the claimant reached MMI on March 13, 1995, and assigned a zero percent IR. In a TWCC-69 of March 31, 1995, Dr. TU, another treating doctor, certified the claimant reached MMI as of that date, but assigned no IR.

The parties stipulated that Dr. B was selected by the Texas Workers' Compensation Commission (Commission) to be the designated doctor in this case. Evidence in the record indicates that Dr. B was selected to determine both MMI and IR. Dr. B examined the claimant on October 2, 1995. In a TWCC-69 of October 9, 1995, he certified the claimant reached MMI on April 23, 1995, and assigned a zero percent IR. In the narrative attached to his report, he explained that he conducted range of motion (ROM) testing of the cervical spine which reflected a five percent impairment according to the Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association (AMA Guides). He, nonetheless, declined to assign this IR because, in his words, "I feel that based on the individual's age (50) and his very stocky build and heavy shoulders, this was certainly within the normal range and not the result of pathology or of the injury. I feel that he most probably sustained cervical strain at the time of his injury, from which I feel he has essentially fully recovered."

The hearing officer determined that the claimant reached MMI on April 23, 1995, as determined by Dr. B, but that the claimant's correct IR was five percent. In her discussion of the evidence, the hearing officer wrote:

> The designated doctor states in his narrative report that the claimant "most probably sustained cervical strain at the time of the injury, from which . . . he has essentially fully recovered . . . ." As a diagnosis is made and a loss of [ROM] associated with that diagnosis is reflected in the worksheet, the designated doctor may not attribute it to something other than the diagnosis.

In addition, that a condition had resolved does not invalidate a permanent impairment which is established when the examination is performed.

She also made the following pertinent Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

6. The designated doctor improperly attributed the 5% loss of [ROM] for the cervical strain to factors not associated with the diagnosis.

7. The 0% [IR] given by the designated doctor at box 18 [on the TWCC-69] is against the great weight of other medical evidence and is not entitled to presumptive weight.

8. The 5% [IR], for the cervical strain, documented in the designated doctor's narrative and worksheets is entitled to presumptive weight and not contrary to the great weight of other medical evidence.

CONCLUSIONS OF LAW

2. The claimant reached [MMI] on April 23, 1995, with a 5% [IR].

The carrier appeals these determinations, arguing that Dr. T's certification became final, or that Dr. B properly did not assign a five percent IR for reduced cervical ROM because he did not attribute the loss of ROM to the compensable injury, or alternatively that if for some reason the great weight of the other medical evidence is deemed contrary to Dr. B's report, the hearing officer should adopt Dr. T's rating of zero percent. We observe that the finality of Dr. T's certification pursuant to Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.5(e) (Rule 130.5(e)) was not reported as an issue by the benefit review officer and was not considered at the CCH. For this reason, it will not be addressed on appeal.

The claimant argued, and the hearing officer was apparently persuaded, that Texas Workers' Compensation Commission Appeal No. 951219, decided September 6, 1995, is controlling in this case. In that case, the sole issue was the correct IR. The designated doctor issued two reports. In the first report she assigned an 18% IR and in the second report a nine percent IR for a cervical injury. The 18% in the first report included 15% for loss of ROM which the designated doctor felt was valid and consistently demonstrated on testing. The designated doctor was then asked to "justify" her ROM rating. She then issued a second report in which she reduced the rating to nine percent. Her reasoning was that she agreed with the carrier that 15% far exceeded the rating normally given surgically treated lesions or significant discogenic changes. In her second report, she agreed to "minimize" the ROM rating because the claimant was only suffering from a soft tissue injury

and it was within her discretion to determine which impairments were "truly secondary" to the compensable injury. The designated doctor then "minimized" the ROM IR because she considered the claimant to have a "fairly minor soft tissue injury." The hearing officer in that case determined that the correct IR was the 18% first reported by the designated doctor and the carrier appealed. The Appeals Panel affirmed. In doing so, it noted that a primary purpose for mandating the use of the AMA Guides in arriving at an IR is to ensure some element of reproducibility and consistency among raters. This is achieved primarily by using objective data and following the protocols of the Guides. The Appeals Panel found that a reduction of two-thirds in the ROM component of an IR based on the "discretion" of the designated doctor was inconsistent with the objectivity required by the AMA Guides.

We do not believe that Appeal No. 951219, *supra*, should be controlling, and we distinguish it from the facts of the case we now consider. Section 401.011(24) defines an IR as "the percentage of permanent impairment of the whole body resulting from a compensable injury." (Emphasis added.) A designated doctor asked to determine an IR must provide a rating only for an "impairment" which is an abnormality or loss existing after MMI "that results from a compensable injury and is reasonably presumed to be permanent." Section 401.011(23). Dr. B concluded that the claimant sustained no permanent compensable injury and for this reason gave no IR. The addition of the comment in his narrative report that the claimant does not have normal cervical ROM because of his age and build, does not change his primary conclusion that none of the loss of ROM can be attributed to his compensable injury, the symptoms of which had resolved. To the extent that the hearing officer is asserting in her decision and order that once a diagnosis of a compensable injury is made, any loss of ROM "associated with" that diagnosis must be reflected in the IR, we agree. Dr. B, however, did not "associate" the reduced ROM with the compensable injury. The hearing officer's statement in Finding of Fact No. 6 that Dr. B "improperly attributed" the five percent "to factors not associated with the diagnosis" has no evidentiary basis in the record and is, we believe, a complete misreading of Dr. B's report. This situation is unlike Appeal No. 951219, *supra*, because, in that case, the designated doctor found that some impairment resulted from the compensable injury and improperly used "discretion" rather than objective medical evidence to arrive at a rating. In the case we now consider, the designated doctor found no impairment whatsoever to have resulted from the compensable injury. He, therefore, properly assigned a zero percent IR. The only other IR in evidence was also zero percent. For this reason, we reverse the decision of the hearing officer that the claimant's correct IR was five percent. We render a decision that the correct IR was zero percent as determined by the designated doctor and that the great weight of the other medical evidence did not contradict this determination. *See* Section 408.125.

The portion of the decision of the hearing officer that the claimant reached MMI on April 23, 1995, is affirmed. That portion of the decision of the hearing officer that the claimant's correct IR is five percent is reversed and a new decision rendered that the claimant's correct IR is zero percent.

Alan C. Ernst
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Lynda H. Nesenholtz
Appeals Judge