APPEAL NO. 980225
FILED MARCH 23, 1998

This appeal arises 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 October 23, 1997, with hearing officer. The record was closed on January 6, 1998, after additional information was received from the designated doctor. The issue at the CCH was the impairment rating (IR) to be assigned to the respondent, who is the claimant.

The hearing officer determined that the claimant's IR was 15% in accordance with the amended report of the designated doctor, which was not contrary to the great weight of other medical evidence.

The appellant (carrier) has appealed. The carrier does not argue that the great weight of other medical evidence is contrary to the IR. Rather, the appeal focuses on the fact that the designated doctor, prior to being directed by the hearing officer to consider a cervical injury, did not consider that claimant could have injured her neck in the accident and therefore did not consider it part of her injury for purposes of assessing impairment. The carrier argues that the report of the designated doctor is entitled to presumptive weight. The carrier argues that the sole communication a hearing officer can have with the designated doctor is to clarify his report and the hearing officer's direction in this case to include a cervical injury went beyond that. The carrier argues that extent of injury was not an issue before the hearing officer to decide. The carrier further challenges the appointment of the second designated doctor. The claimant responds that the decision is correct and the carrier may not now challenge the appointment, by the Texas Workers' Compensation Commission (Commission), of a second designated doctor due to the unavailability of the first designated doctor.

DECISION

Affirmed.

The claimant worked as a cook for (employer), when she slipped and fell in the kitchen on _____. She stated that she fell on her buttocks and then back, but was unable to recall whether her head and neck also hit the ground. In any case, she was treated right away for her injury at a medical clinic selected by the employer. It was an area of great contention at the CCH that her medical reports within the first three weeks after her injury concentrate primarily on her lumbar spine. The medical records indicated that the claimant's initial diagnosis was contusion of the tailbone and low back sprain. On April 27, 1994, the diagnosis was broadened to state muscle spasm and strain in the cervical spine. The notes on the Specific and Subsequent Medical Report (TWCC-64) states that the claimant had increased pain and spasm along the upper back and shoulders. Claimant said both that she reported pain radiating all along her spine and that she thought when she complained of back pain that this included the neck. In any case, from _____, which

was well within the 60-day period following the accident, claimant was treated for pain along her entire spine--cervical area as well as lumbar. On May 12, 1994, Dr. L.T. J (Dr. J) reported, in what was entitled a "second opinion," the history of the fall and diagnoses of "contusion of the lower back with secondary strain of the lumbar and cervical spines." On May 25, 1994, (Dr. W) reported that claimant now had a "pulling" in her neck. On that date, a physical therapist, (Ms. D), wrote up a patient care plan noting decreased flexibility in the neck and spine and inconsistent pain complaints with positive Waddell's signs. The claimant received nine treatments. Claimant had a cervical MRI on January 5, 1995, which showed very minimal bulges at C5-6 (with impingement on the thecal sac) and C6-7. Degenerative changes were indicated. We note that the claimant's medical records in evidence describe her at ages that range between 53 and 65 years of age.

There was no evidence in the record that the carrier disputed the compensability of the injury being treated at this time. The claimant filed an Employee's Notice of Injury or Occupational Disease and Claim for Compensation (TWCC-41) on April 28, 1994, which claimed a back injury. Claimant said this was mailed to her by the Commission as a result of her employer filing a notice with the Commission about the accident. Claimant was examined by a doctor for the carrier, (Dr. O), on November 2, 1994, and Dr. O's report indicated that he was instructed by the carrier not to consider a cervical injury because "you felt the neck was not involved with this work injury so I will assume only the low back is involved." Dr. O assessed only a seven percent IR for specific condition of the lumbar spine. Dr. O opined that there were indications of symptom magnification. Claimant's range of motion (ROM) measurements were invalidated.

The Commission appointed a designated doctor, (Dr. F), who examined the claimant on September 14, 1995, and assigned a 13% IR. Dr. F found exaggerated pain behaviors. The IR assigned related solely to ROM deficits of the lumbar area; Dr. F found no specific conditions ratable using Table 49 of the Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association (AMA Guides). Dr. F also assessed the thoracic spine and found ROM measurements invalid. Dr. F stated that as claimant began to complain of neck pain three weeks after her injury, she did not consider it part of the injury and therefore did not assess any IR for the neck. Dr. F did a second examination on August 8, 1996, at the request of the benefit review officer (BRO). The BRO had apparently expressed concern about the omission of the cervical area and Dr. F responded that she viewed it as the duty of the designated doctor to determine which body parts were to be considered as compensable injuries. Dr. F expressed concern that there were other symptoms of a systemic nature which should be evaluated by a qualified internist (swollen glands, night sweats, fatigue, and general malaise).

On December 11, 1996, the Commission appointed a second designated doctor, (Dr. M). The carrier at that time filed objection to this appointment. Dr. M examined the claimant on December 16, 1996, and certified that she had a nine percent IR. Dr. M, noting his impression that the claimant did not complain of neck pain for six weeks, stated that he did not believe claimant's cervical area was injured in the fall for this reason. He assigned

five percent from Table 49 of the AMA Guides for the lumbar spine, noted that lumbar flexion and extension ROM were invalidated, and assigned four percent for lumbar lateral ROM deficits. He noted that had he included the cervical ROM, this would have added an additional three percent. On January 15, 1997, Dr. M responded to an inquiry from the BRO stating that he disagreed with the statement posed to him that claimant injured her cervical area, shoulders, and knees in her fall. In this letter, he noted that a 32 week passage of time until cervical symptoms were reported was inconsistent with injury. The BRO apparently continued to regard these clarifications as insufficient and on February 18, 1997, posed yet still more questions to Dr. M. Pertinent to this appeal is that Dr. M stated that cervical and thoracic impairment are invalid. (His letter indicated invalidity to the cervical area was based on his opinion that the neck was not injured). Dr. M's opinions are developed in more detail in a deposition given on September 25, 1997. Claimant expressed extreme dissatisfaction with Dr. M because he examined her without a nurse present while she was disrobed. She agreed, however, that he did nothing inappropriate. Dr. M's position and methodology is described in more detail in his deposition. He said that he took three cervical ROM measurements that were invalid and three that were valid. It was his opinion that if claimant's bulging discs in her neck occurred from her fall, they would have caused pain right away. He also stated that he did not believe the cervical pain exhibited on his examination to be genuine.

Claimant's treating doctor, (Dr. G), assigned a 25% IR on July 9, 1995. Of this, nine percent was due to cervical specific condition and ROM deficits.

The hearing officer wrote to Dr. M on November 21, 1997, and asked that Dr. M consider the cervical spine as part of the compensable injury and rate it. Dr. M responded by adding an additional seven percent, consisting of three percent measured ROM deficits and four percent specific condition from Table 49 of the AMA Guides. The total IR was 15%.

An IR is based on a compensable injury. Section 401.011(24). A hearing officer may make necessary findings on the threshold issue of the compensable injury in order to adopt an IR that must be based by definition on a compensable injury. Texas Workers' Compensation Commission Appeal No. 961067, decided July 10, 1996.

We do not agree that any error with respect to Dr. M's appointment as designated doctor was preserved for purposes of appeal. Dr. F's replacement as designated doctor was explained by both counsel at the beginning of the CCH by the assertion by counsel for the claimant that Dr. F had moved out of state. There was no issue formulated that Dr. M was not a properly appointed designated doctor and, in fact, the carrier argued in support of Dr. M's first IR of nine percent and based its argument thereon. Carrier has only urged, for the first time on appeal, that Dr. M's IR should not be considered presumptive due to the invalidity of his appointment, that the sole reason for this apparently being the rise of the IR to 15%.

As to whether the hearing officer went beyond his authority by contacting the designated doctor, we cannot agree that he erred by doing what should have been done

years earlier in this case--giving unequivocal direction to the designated doctor to render an IR based on the injury as determined by the Commission, which included the cervical area. There is no explanation in the record for why the discourse between Commission representative and Drs. F and M took on the aspects of back-and-forth debate. Suffice to say that we have stated numerous times that the scope and extent of the compensable injury are ultimately determinations of the Commission and the designated doctor's opinion, while a factor to consider, is not given presumptive weight on matters other than MMI and IR. Texas Workers' Compensation Commission Appeal No. 93734, decided September 30, 1993; Texas Workers' Compensation Commission Appeal No. 941139, decided October 4, 1994;Texas Workers' Compensation Commission Appeal No. 950018, decided February 17, 1995; Texas Workers' Compensation Commission Appeal No. 962484, decided January 21, 1997. The carrier correctly notes that extent of injury was not in issue but is explained by the apparent failure of the carrier to formulate a timely dispute as to causation of a condition that was actively treated three weeks after the date of injury. When IR is in issue, the nature of the compensable injury is necessarily subsumed and the hearing officer cannot be faulted for making findings on this threshold issue. *See* Appeal No. 961067, *supra*. When it becomes clear that the designated doctor has failed to include the entire injury and has not provided figures in his report that enable the hearing officer to compile the correct IR, the hearing officer is not at fault for holding the record open in order to seek such information, although he would also have the option of finding the great weight of the contrary medical evidence was against the designated doctor's IR and adopting another IR that includes all of the injury.

The decision of the hearing officer will be set aside only if the evidence supporting the hearing officer's determination is so weak or against the overwhelming weight of the evidence as to be clearly wrong or manifestly unjust. Atlantic Mutual Insurance Company v. Middleman, 661 S.W.2d 182 (Tex. App.-San Antonio 1983, writ ref'd n.r.e.).

We do not agree that this is the case here, and affirm the hearing officer's decision and order.

Susan M. Kelley
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Elaine M. Chaney
Appeals Judge