APPEAL NO. 980278
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 January 6, 1998, in (City), Texas, with (hearing officer) presiding as hearing officer. She determined that the respondent's (claimant) correct impairment rating (IR) was 16% as certified by Dr. A, a designated doctor selected by the Texas Workers' Compensation Commission (Commission) in an amended report. The appellant (carrier) appeals this determination, contending that Dr. A did not comply with the Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association (AMA Guides), and that he was improperly influenced to change his IR. The claimant replies that the decision is correct, is supported by sufficient evidence, and should be affirmed.

DECISION

We affirm.

The claimant sustained a compensable lumbar injury on _____. On September 19, 1994, Dr. C, a required medical examination doctor, completed a Report of Medical Evaluation (TWCC-69) in which he assigned a 12% IR. His diagnoses included lumbar strain, degenerative lumbar disc disease, and spondylolysis at L5. Of the 12% IR, eight percent was for a specific disorder of the spine (Table 49, Part IIIA of the AMA Guides) for spondylolysis and the remainder for lumbar range of motion (ROM). The claimant's treating doctor, Dr. P, completed a TWCC-69 on January 16, 1995, in which he assigned an IR of 18%, 12% of which was for loss of lumbar ROM and seven percent for L5 spondylolysis without spondylolisthesis, degenerative disc disease at L5-S1, and mild bulging of L5-S1 with no focal herniation.

On January 30, 1995, Dr. A completed a TWCC-69 in which he diagnosed lumbar sprain/strain and spondylolysis at L5 (first degree spondylolisthesis). He assigned a 14% IR, five percent of which was for a specific disorder of the spine under Table 49, Part IIB (unoperated disc lesions) and nine percent for lumbar ROM. He wrote in his report:

> Reviewing the x-rays of February 1st, 1994, there is clear evidence that the spondylolysis and spondylolisthesis is a pre-existing condition and was not caused by the incident that the patient reported as a work injury on _____.

On October 24, 1996, a dispute resolution officer (DRO) wrote Dr. A in reference to his TWCC-69 as follows:

> We are in receipt of a letter from the claimant's attorney claiming you did not consider the claimant's spondylolysis and spondylolisthesis when assessing her [IR]. The attorney has requested you review the attached letter form [sic] the claimant's treating doctor.
>
> Please review and clarify the issues in question and provide a copy of your response to all parties.

The letter referenced by the DRO was not in evidence. Therefore, it is impossible to determine with any precision what "issues" were identified. Similarly, there was no explanation for the delay from the time of Dr. A's report, date-stamped as received by the Commission on February 3, 1995, until the DRO's letter of October 24, 1996.

Dr. A responded on October 28, 1996, to the DRO. In this letter, he stated that he performed a thorough review of the medical records and, in particular, a sequence of x-rays that, in his opinion, did not show an acute fracture in connection with the compensable injury. If, however, a different opinion was received from a skeletal radiologist that the injury included the fracture, he would change the specific disorder IR to eight percent under Table 49, Part IIIB for spondylolysis and spondylolisthesis, which would result in a whole body IR of 16%.

On November 20, 1996, the same DRO again wrote Dr. A to advise him that she believed he changed his IR from 14% to 16% and asked him to complete a new TWCC-69 reflecting the 16% IR. Dr. A wrote back on December 9, 1996, to the DRO and explained that he still believed the spondylolysis and spondylolisthesis were preexisting conditions and not attributable to the injury. Thus, he declined to change the IR to 16% and said that this would be appropriate only if the Commission, and not he himself, determined that the spondylolysis and spondylolisthesis "should have been included" in the IR as part of the compensable injury. Absent such action by the Commission, he considered it "inappropriate" for him to change his IR.

On June 17, 1997, a Benefit Review Officer wrote Dr. A that "[i]n providing a whole person [IR], it is incorrect to exclude a pre-existing condition IF the condition was aggravated, exacerbated or accelerated by the compensable injury sustained on _____." (Emphasis in the original.) She enclosed Dr. C's report, which, for whatever reason, we presume Dr. A did not have up to that time, and pointed out that Dr. C assigned an IR for spondylolysis. The letter concluded: "As the designated doctor, it is your responsibility to determine whether the Claimant's pre-existing conditions were aggravated, exacerbated or accelerated by the compensable injury. An amended TWCC-69 should be completed only if appropriate." On June 27, 1997, Dr. A wrote that "it does appear that the claimants pre-existing condition was aggravated and exacerbated by the compensable injury." He therefore assigned an eight percent IR under Table 49, Part IIIB for spondylolysis which he combined with the nine percent IR for loss of lumbar ROM for a 16% whole body IR.

In her discussion of the evidence, the hearing officer listed the carrier's objections to the adoption of Dr. A's 16% IR as: (1) that Dr. A was improperly influenced by the three letters to change his IR; (2) that Dr. A's ROM measurements as attached to the TWCC-69 were incomplete in that did not reflect the necessary repeat measurements essential to determining whether the claimant met the consistency requirements of the AMA Guides; and (3) that the preexisting conditions of spondylolysis and spondylolisthesis should not have been rated. The hearing officer afforded statutory presumptive weight to Dr. A's 16% IR as contained in his amended report. Section 408.125(e). In doing so she found, contrary to the position of the carrier, that Dr. A "was not improperly influenced by the three letters." She otherwise did not address the carrier's other arguments about the validity of Dr. A's ROM measurements.

Apparently, another hearing officer was initially assigned to conduct the CCH in this case. On November 21, 1997, the carrier submitted a request to the original hearing officer to take the oral deposition of Dr. A "to explore the reasons for the increase in the [IR]." There is no indication that the original hearing officer took any action on this request, which the carrier renewed at the CCH, with the added justification that Dr. A never provided his ROM worksheets. The hearing officer never responded to this renewed motion at the CCH but stated at the end of the CCH that she would leave the record open and that she "may or may not grant the request." She did not leave the record open or grant the request. Rather, she proceeded to issue a decision and order as discussed above. The carrier appeals the determination to give presumptive weight to Dr. A's amended TWCC-69 for the reasons stated at the CCH and it asks again for the opportunity to take an oral deposition of Dr. A. The claimant replies that she agrees that Dr. A was not improperly influenced and that the decision to award a 16% IR "should stand."

We observe first that, generally, it is inappropriate not to answer a request by a party for the development of further information from the designated doctor. This is especially true given the restrictions on unilateral contact with the designated doctor. *See* Section 408.125(f). Secondly, if a hearing officer announces that the record will be left open until she decides whether to grant the request for the oral deposition and that she will notify the parties of her decision on this request, the parties are entitled to know whether the request was granted and not find out only by implication in the decision and order. Thus, orderly and efficient procedure would have required a timely answer to claimant's request to take the oral deposition of Dr. A.

With regard to the merits of this case, the decision of the hearing officer to give presumptive weight to Dr. A's amended report was made only in terms of the alleged improper influence. The carrier argues that Dr. A finally capitulated to the third letter against his own medical judgment. Unfortunately, the third letter states incorrectly that the designated doctor is to determine whether the claimant's preexisting condition was compensably aggravated. The designated doctor is to assign an IR to the permanent effects of the compensable injury. The Commission determines what the compensable injury is. In his last response, Dr. A agreed that spondylolysis was aggravated by the injury and assigned it an IR. If there was an extent of injury question to be decided as a threshold issue to the IR issue, the carrier should have raised this question since it was receiving information copies of the correspondence between Dr. A and the Commission. It apparently did not do so. Under these circumstances, the hearing officer should have expressly determined whether the spondylolysis was part of the compensable injury. We conclude that she impliedly did so and that this determination is sufficiently supported by the evidence. We also find no merit in the carrier's assertion that even if the spondylolysis was part of the compensable injury, it should have been explained to Dr. A that it should receive an IR only if it was deemed more or less permanent. Dr. A's report gives no indication that he was unaware of this fundamental principle of assigning an IR and we make no such inference.

More problematic, we believe, is the carrier's contention that it cannot determine if the claimant met the validity criteria for ROM measurements because Dr. A did not provide his worksheets. The hearing officer did not address this contention in her decision and order although the carrier made a significant point of it during the CCH. *See* Texas Workers' Compensation Commission Appeal No. 970826, decided June 27, 1997. The carrier argues that it sought this information by means of the request for an oral deposition, discussed above, which was never answered. The text of the request stated that the carrier "would like to have the opportunity to depose [Dr. A] to explore the reasons for the increase in the [IR]." The increase was due solely to Dr. A's change of an IR for a specific disorder. Dr. A never changed the portion of the IR assigned for loss of ROM. We, therefore, have serious reservations that the carrier was pursuing information about the missing ROM measurement numbers in its request for a deposition.[1] In Texas Workers' Compensation Commission Appeal No. 941314, decided November 16, 1994, a case dealing in part with the absence of worksheets from the report of a designated doctor which included a substantial IR for loss of ROM, the Appeals Panel wrote: "Carrier cites us no authority requiring a designated doctor's report to have attached [ROM] measurement charts." This comment was cited in Texas Workers' Compensation Commission Appeal No. 951105, decided August 22, 1995. It is unclear what steps, if any, the parties to these cases took to obtain the

[1]One might further question why a deposition was sought when a Commission official could have more simply asked Dr. A, as an "agent" of the Commission for the worksheets. *See* Texas Workers' Compensation Commission Appeal No. 94327, decided March 31, 1994.

ROM worksheets in advance of the CCH. For this reason, we do not consider them dispositive of this issue. Furthermore, we do not consider these cases authority for the proposition that a party is not entitled to the worksheets provided a timely request for them is made. In the case we now consider, we find no evidence that the carrier actually sought the ROM worksheets before the CCH and do not construe its request for a deposition to have encompassed a request for the worksheets. Under these circumstances, we find no error in the decision of the hearing officer to afford presumptive weight to Dr. A's amended TWCC-69.

For the foregoing reasons, we affirm the decision and order of the hearing officer.

Alan C. Ernst
Appeals Judge

CONCUR:

Elaine M. Chaney
Appeals Judge

Judy L. Stephens
Appeals Judge