APPEAL NO. 990018

This appeal is considered in accordance with the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). The decision is one on remand from the earlier Appeals Panel decision in Texas Workers' Compensation Commission Appeal No. 972300, decided December 29, 1997.

No second contested case hearing (CCH) was held. The hearing officer, closed the record in this matter on November 30, 1998, and issued a decision based upon additional documentary evidence, including a revised report from the designated doctor. The hearing officer found that the respondent (claimant), in accordance with this report, had a 25% impairment rating (IR), having reached maximum medical improvement on August 1, 1996; that the great weight of other medical evidence was not contrary to this report, but made no comment on the fact that the IR includes a purported psychological impairment that was not asserted at the prior CCH; and that the appellant (carrier) was entitled to contribution for the effects of a prior impairment to the extent of 28% of impairment income benefits (IIBS) and supplemental income benefits due to claimant.

Carrier has appealed and argues that the hearing officer erred in incorporating an IR that includes an injury not heretofore raised by claimant without a benefit review conference (BRC) or CCH. Carrier further argues that there is no evidence that the injury includes a psychological disorder; that the designated doctor's IR for the back is incorrect; and that the designated doctor's first IR is entitled to presumptive weight. Although the fact of this injury (and subsequent surgery) is undisputed, carrier nevertheless argues that it is entitled to 100% contribution for the effects of a prior injury. Claimant responds that the decision should be affirmed, citing generally the position that the factual determinations of the hearing officer should be given deference by the Appeals Panel. There is no response to the specific points raised by carrier, most especially the matter concerning the apparent change in the nature of the compensable injury after the remand.

DECISION

Affirmed that the IR of the designated doctor is entitled to presumptive weight, but only as to impairment for the compensable injury. We therefore reverse the decision of the hearing officer to the extent that it includes an IR for any mental impairment and render a decision that claimant's IR for his back injury, based upon the report of the designated doctor, is 17%. The hearing officer's determination that carrier is entitled to 28%, contingent upon the IR, is likewise reversed and a new decision rendered that the contribution is 41%.

The facts set forth in our earlier decision are hereby incorporated. We should first start out by emphasizing that the concern in remanding the case the first time was that the designated doctor had stated that he did not believe claimant had an objective basis for many of his complaints. We pointed out that the subsequent surgery, which had been approved through the second opinion process, called into question the designated doctor's

opinion, as an objective injury was indicated by the necessity for surgery. The hearing officer had not addressed this matter at all, although the surgery had occurred even prior to the BRC. The Appeals Panel made no decision on the matter of contribution pending resolution of the IR issue.

In the absence of ancillary correspondence in the record, we are left to surmise that the hearing officer simply sent claimant back to the designated doctor for a reexamination. Although the Appeals Panel specifically commented upon the sparseness of the record on many material points, incredibly, the only documents admitted on remand were the amended report of the designated doctor, Dr. F, correspondence from the hearing officer forwarding this report and seeking comment, and the responses of the parties thereto (in carrier's case, a request to hold the record open for 30 more days, with no further response submitted prior to the extended deadline).

As the record clearly indicates, the undisputed nature and scope of the injury at the time the decision was remanded was a back injury. However, in his amended report, the designated doctor added 10% to his evaluation for a psychological injury. Dr. F noted claimant was a surgical failure and had related depression. Dr. F further stated:

> I have combined the psychologists [IR] into my assessment and I defer to [Dr. MT] expertise in this area. However, I am a little confused as to why his impairment essentially doubles between September 15, 1997, and June 25,1998. In the status report of 06/19/98, [Dr. MT] defines areas of improvement and better mental coping abilities to those outlined in his 09/15/97 impairment assessment. His final assessment is made after the patient has been in constant therapy with reported continual and progressive improvement in pain management and coping skills with less depression. A second opinion may be in order here, as there is no clear provision as to rational [sic] behind the assessment of this impairment, aside from reference to chapters 4 and 14 of the Guides [Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association (AMA Guides)].

At the conclusion of his report, Dr. F describes Dr. MT as "Ph.D." The quoted passage and this description are the sole references in the record to the existence of reports of Dr. MT, none of those reports having been tendered or admitted. The first CCH was held September 18, 1997, and it appears from Dr. F's summary outlined above that Dr. MT began his treatment shortly before that date. Dr. MT's involvement in the claim, however, was apparently revealed to the hearing officer for the first time in this report; whether he was subjectively aware that this was contained in the report, however, is not known; the decision does not comment on this and carrier did not file a response pointing this out within the extended time it requested.

Controversy over the extent or scope of a compensable injury must be raised before, or along with, an issue on impairment or it may be waived; the party that does not believe that the designated doctor's report accurately reflects the nature of the compensable injury

must raise this either before or along with an adjudication of the IR. Texas Workers' Compensation Commission Appeal No. 961067, decided July 10, 1996. The point at which to do this in this case was at the time of the first CCH, not when a case is remanded, as new matters cannot be raised on remand. Texas Workers' Compensation Commission Appeal No. 92637, decided January 11, 1993. There being no indication whatsoever, prior to the generation of Dr. F's second report, that a psychological aspect to claimant's injury was asserted, that condition cannot now be incorporated into the compensable injury by reference an amended designated doctor's report. Consequently, we reverse the hearing officer's determination that the IR is 25% because that includes a percentage for a condition that is not part of the compensable injury.

We cannot agree that this renders Dr. F's report not entitled to presumptive weight on the impairment for the compensable injury (lumbar spinal impairment) and believe that the great weight of the other medical evidence is not against his report to this extent. Carrier's points on this matter are rejected. We cannot remand for recomputation of the IR, being allowed only one remand under the 1989 Act, so, using the Combined Values Table of the AMA Guides and applying them to Dr. F's component IR figures for specific condition, range of motion deficits, and sensory loss (10, five and two percent), we render a decision that, according to the designated doctor's amended report, claimant's IR is 17%.

The contribution percentage, contingent upon the final IR, must be adjusted as well. Although not expressly found, it appears that the hearing officer accepted seven percent as the appropriate IR for claimant's preexisting back impairment, found a cumulative effect therefrom, and applied this arithmetically to 25% in deriving a 28% contribution. We will accept the fact finder's seven percent and will follow the same method of computing contribution; the extent of carrier's allowable contribution is thereby 7/17, or 41%.

Affirmed and reversed and rendered that carrier must pay IIBS in accordance with this decision.

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Susan M. Kelley
Appeals Judge

CONCUR:

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Alan C. Ernst
Appeals Judge

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Tommy W. Lueders
Appeals Judge