APPEAL NO. 990530

A contested case hearing (CCH) was originally held on September 22, 1998, under the provisions of the Texas Workers' Compensation Act, TEX. LAB CODE ANN. § 401.001 *et seq.* (1989 Act). At the CCH, the appellant (carrier) contended that the report of Dr. F, the Texas Workers' Compensation Commission (Commission)-selected designated doctor, was not made in compliance with the Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association (AMA Guides), that the report of Dr. F was not entitled to presumptive weight, and that the Commission could not base the respondent's (claimant) impairment rating (IR) on the report of Dr. F. The hearing officer did not make findings of fact to resolve those questions raised by the carrier and the evidence and found that the great weight of the other medical evidence is not contrary to the report of the designated doctor. The carrier appealed. In Texas Workers' Compensation Commission Appeal No. 982414, decided November 30, 1998, the Appeals Panel cited early Appeals Panel decisions stating that a report of a designated doctor is not entitled to presumptive weight unless it is rendered in compliance with the provisions of the AMA Guides and Commission rules, that findings of fact on whether the report of a designated doctor was made in compliance with the provisions of the AMA Guides and Commission rules and whether the report is entitled to presumptive weight should be made in all cases involving a report of a designated doctor, and that such findings of fact are required when questions of whether the report of the designated doctor was made in compliance with the provisions of the AMA Guides and Commission rules was litigated at the CCH; reversed the decision of the hearing officer; and remanded for him to make findings of fact on whether the report of Dr. F is in compliance with the provisions of the AMA Guides, whether it is entitled to presumptive weight, whether the great weight of the other medical evidence is contrary to that report, and what the claimant's IR is. Although not required to do so, the hearing officer held another CCH on February 9, 1999, and rendered another decision on February 18, 1999. He made the following findings of fact and conclusion of law:

FINDINGS OF FACT

2. [Dr. F], the commission selected designated doctor, examined the Claimant on February 16, 1998, prepared a report of medical evaluation [Report of Medical Evaluation (TWCC-69)], and certified that the Claimant had a 15% [IR].

3. [Dr. F] exercised his clinical judgment when arriving at the Claimant's [IR]. (See APD No. 970313 [Texas Workers' Compensation Commission Appeal No. 970313, decided March 25, 1997]).

4. [Dr. F] prepared his Report of Medical Evaluation in accordance with the AMA Guides.

5. The Report of Medical Evaluation prepared by [Dr. F] is entitled to presumptive weight.

6. The other medical evidence is not sufficient to overcome the presumptive weight afforded to the findings of the designated doctor.

CONCLUSION OF LAW

1. The Claimant has a 15% [IR].

The carrier requested review; urged that there is no evidence to support and, alternatively, the great weight and preponderance of the evidence is against, Findings of Fact Nos. 3, 4, 5, and 6 and Conclusion of Law No. 1; specifically contended that the AMA Guides do not provide for assigning an impairment for the injury to the claimant's ribs and that Dr. F did not use his clinical judgment in trying to arrive at the claimant's IR; and requested that the Appeals Panel reverse the decision of the hearing officer and render a decision that the IR assigned by Dr. F was not done in compliance with the AMA Guides and is not entitled to presumptive weight. A response from the claimant has not been received.

DECISION

We reverse the determinations of the hearing officer concerning the IR assigned by Dr. F. Based on the IR assigned by Dr. T, we affirm the decision of the hearing officer that the claimant's IR is 15%.

At the CCH on remand, the hearing officer spent considerable time stating why he did not think he was required to make the findings of fact that he was directed to make and prematurely announced that he was going to render a decision that the claimant's IR is 15% before affording the carrier an opportunity to present its argument. He did permit the carrier to present argument, and the carrier stated why it did not think that the report of Dr. F was made in compliance with the provisions of the AMA Guides. *See* Appeal No. 982414, *supra,* for a summary of the evidence. In his Decision and Order, the hearing officer did not address the arguments of the carrier and made the finding of fact set forth earlier in this decision. In Appeal No. 970313, *supra*, cited by the hearing officer in Finding of Fact No. 3, the Appeals Panel stated that the AMA Guides do not provide rigid parameters which supercede the ability of the physician to exercise clinical judgment; cited an Appeals Panel decision which allowed a physician's rating to stand where ostensibly "valid" range of motion testing was determined to be invalid based upon other observations made by the doctor during his examination; stated that, where there is ambiguity to the nonmedical reader in reviewing different provisions of the AMA Guides, the actual application of such provisions to an examination performed is ultimately a medical judgment; noted that provisions in Table 83c on page 77 and on page 91 can be read to result in an ambiguity; and stated that the designated doctor could use clinical judgment in determining the tightest straight leg raise. In his Decision and Order, the hearing officer does not refer to any provisions in the AMA Guides, does not mention any ambiguity, and

simply states that Dr. F "utilized his clinical judgment in trying to arrive at an appropriate [IR]" and that Dr. F exercised the same type clinical judgment that is discussed in Appeal No. 970313, *supra*.

In Texas Workers' Compensation Commission Appeal No. 951691, decided November 21, 1995, the Appeals Panel wrote:

> The AMA Guides do not appear to us to preclude the assessment of a ROM [range of motion] deficit without also assessing a specific disorder under Table 49, even though it might seem that the two would be expected to go together. We have stated that it is basically nothing more than a medical difference of opinion in a case where a designated doctor did not assess a specific disorder but did assess a ROM deficit. Texas Workers' Compensation Commission Appeal No. 950727, decided June 22, 1995.

In Texas Workers' Compensation Commission Appeal No. 960811, decided June 6, 1996, the Appeals Panel stated that an IR may include impairment for loss of ROM in an area of the spine without an impairment for a specific disorder to that same area of the spine under Table 49 of the AMA Guides. In Appeal No. 951691, *supra*, and Appeal No. 960811, *supra*, there was an injury to the spine. In the case before us, there is evidence of broken ribs in the thoracic area, but no evidence of an injury to the thoracic spine. In Texas Workers' Compensation Commission Appeal No. 982080, decided October 14, 1998, the claimant had open heart surgery prior to his compensable injury; sustained an injury lifting an overhead door; and had cartilage and part of a rib removed. The designated doctor stated that the injury did not compromise the claimant from a respiratory, pulmonary, or cardiovascular standpoint; indicated that the resection of part of the second rib affects the claimant's ability to move his chest; stated that the musculature across the chest wall affects the shoulder; and assigned zero percent for a specific disorder under Table 49 of the AMA Guides, six percent for loss of ROM of the thoracic spine, 11% for loss of ROM of the left shoulder, and 10% for loss of ROM of the right shoulder. The record did not indicate that the carrier requested that the Commission ask questions of the designated doctor, but does indicate that the carrier argued the designated doctor did not properly apply the provisions of the AMA Guides because he did not compare the uninvolved shoulder to the involved shoulder. The Appeals Panel pointed out that both shoulders were involved and stated that there was no uninvolved shoulder to be used for comparison. Although the question of medical judgment was not raised at the hearing and was raised for the first time on appeal, the Appeals Panel stated that the designated doctor used his medical judgment in assigning an impairment for loss of ROM of the shoulders even though that loss of ROM of the shoulders resulted from injury to the chest wall.

In the case before us, it would have been advisable for the hearing officer to have, either in a discussion section or in finding or findings of fact in his Decision and Order, indicated how he determined that Dr. F exercised clinical judgment in arriving at the claimant's IR; that Dr. F's report was prepared in accordance with the provisions of the AMA Guides; and that Dr. F's report is entitled to presumptive weight. The Appeals Panel

may reverse and remand a case only one time (Section 410.203) and may affirm the decision of a hearing officer on any theory reasonably supported by the evidence (Texas Workers' Compensation Commission Appeal No. 93796, decided October 22, 1993). Under that authority, we can affirm a determination that includes three percent for loss of thoracic ROM. But the two percent assigned for a specific disorder of the thoracic spine under Table 49 of the AMA Guides presents a different problem. Table 49 is entitled Impairments Due to Specific Disorders of the Spine. DORLAND'S ILLUSTRATED MEDICAL DICTIONARY, on page 1558, defines spine as "the spinal column" and spinal as "pertaining to a spine or the vertebral column." Dr. G testified that the claimant had rib fractures; that there is no evidence of an injury to the thoracic spine; and that an impairment for a specific injury to the thoracic spine under Table 49 of the AMA Guides could not be assigned when the injury was not to the spine, but was to an area adjacent to the spine. In a narrative attached to a TWCC-69 dated February 16, 1998, Dr. F stated that the claimant had persistent pain emanating from the crushed ribs which would relate directly to the thoracic spine and assigned three percent for loss of ROM and two percent for a specific injury to the thoracic spine under Table 49. A Commission employee wrote to Dr. F and, in a letter dated March 25, 1998, Dr. F restated his position concerning the rib fractures and the thoracic area and said that he could use some other part of the AMA Guides to come up with a higher impairment for pain. Dr. F did not properly apply the provisions of the AMA Guides in assigning a two percent impairment under Table 49. The report of Dr. F is not entitled to presumptive weight concerning the two percent impairment under Table 49.

In a TWCC-69 dated December 31, 1997, Dr. T assigned a 15% IR. He assigned zero percent for the rib injuries, eight percent for a shoulder injury, eight percent for an ankle injury, and used the combined values chart to arrive at the 15% IR. The claimant's treating doctor agreed with the report of Dr. T. Section 408.125 provides that if the great weight of the other medical evidence is contrary to the report of the designated doctor, the Commission shall adopt the IR of one of the other doctors. The carrier argued that the TWCC-69 of Dr. T is invalid because it does not contain the Commission's file number. We reject that argument. Based on the report of Dr. T, we affirm the determination that the claimant's IR is 15%.

We reverse the determinations of the hearing officer concerning the report of Dr. F. However, based on the report of Dr. T, we affirm the determination that the claimant's IR is 15%.

Tommy W. Lueders
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Alan C. Ernst
Appeals Judge