APPEAL NO. 990552

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 was held on January 22, 1999. The issues were the date that the appellant (claimant) reached maximum medical improvement (MMI) and the claimant's impairment rating (IR). The Texas Workers' Compensation Commission (Commission)-selected designated doctor, Dr. A, rendered reports certifying the date the claimant reached MMI and his IR. The hearing officer made the following findings of fact and conclusions of law:

FINDINGS OF FACT

4. The Claimant was first examined by [Dr. A] on July 13, 1996. He certified that the Claimant reached MMI on April 5, 1996 with a 12% IR, which consisted of 2% for his right shoulder and 10% for his lumbar spine.

5. In October 1996, the Claimant began obtaining treatment from [Dr. G] for both his shoulder and back. The focus of [Dr. G's] concern regarding the Claimant was on the Claimant's low back, although he did perform two surgeries on the Claimant's right shoulder, one on May 27, 1997 and the other on April 7, 1998.

6. The Claimant has not had surgery upon his low back relative to the _____ injury, although it has been recommended without sufficient concurrence on more than one occasion. In 1995, [Dr. S] recommended spinal surgery for the Claimant, and beginning in October 1996, [Dr. G] recommended spinal surgery for him.

7. In early 1998, after the Claimant obtained counsel, BRC(s) [benefit review conference] were first requested to obtain clarification from [Dr. A] on the issues of MMI and IR because of the intervening shoulder surgeries the Claimant had obtained since [Dr. A's] July 1996 examination. Initially, in response to a letter from a Benefit Review Officer [BRO] and without further examination of the Claimant, [Dr. A] changed the date of MMI and amended his IR. The primary factor in [Dr. A's] amended IR was the condition of the Claimant's low back, and consisted of 0% for the Claimant's right shoulder and 17% for his lumbar spine.

8. Thereafter, the parties and the [BRO] were in agreement that [Dr. A's] amendment without an examination was likely improper. A second examination of the Claimant by [Dr. A] was scheduled on September 30, 1998.

9. On September 30, 1998, [Dr. A] re-examined the Claimant and certified that the Claimant reached MMI on April 7, 1998 with a 17% IR. His IR consisted of 1% for the Claimant's right shoulder and 16% for the Claimant's lumbar spine.

10. While intervening shoulder surgery that may have been anticipated on the date of [Dr. A's] first examination might be a proper reason to seek clarification from [Dr. A] relative to the shoulder impairment component of the Claimant's IR, it is not a proper reason to re-examine and significantly amend the Claimant's lumbar spine component of his IR.

11. It was reasonable for the Claimant to wait until after his May 27, 1997 surgery to seek clarification on the issues of MMI and IR.

12. On the date of [Dr. A's] first examination of Claimant, no further shoulder surgery was anticipated by [Dr. A], and spinal surgery had not been performed and was not anticipated, which apparently is why [Dr. A] concluded that the Claimant was at MMI.

13. The great weight of the medical evidence other than the [Dr. A's] first report dated July 19, 1996 is not contrary thereto.

CONCLUSIONS OF LAW

5. The Claimant reached MMI on April 5, 1996 per [Dr. A's] first report.

6. The Claimant's IR is 12% per [Dr. A's] first report.

The claimant appealed the last part of Finding of Fact No. 10, Finding of Fact No. 13 and Conclusions of Law Nos. 5 and 6. He urged that under the provisions of Section 401.011(24) and Section 408.123(a) Dr. A in his amended report dated October 2, 1998, properly rated both the shoulder and the low back, indicating appeal of only the latter portion of Finding of Fact No. 10; that that report of Dr. A is entitled to presumptive weight; that the great weight of the other medical evidence is not contrary to that report; and that his IR is 17%. The claimant requested that the Appeals Panel reverse the decision of the hearing officer and render a decision in his favor or, in the alternative, that the case be remanded to the hearing officer. The carrier filed a response that was timely filed to be a response but was not timely filed to be an appeal. The carrier contended that the designated doctor did not amend his first report for a valid reason or in a reasonable time and requested that the determinations of the hearing officer that the designated doctor did not properly amend his report, that the first report of the designated doctor is entitled to presumptive weight, that the great weight of the other medical evidence is not contrary to that report, and that the claimant's IR is 12% be affirmed.

DECISION

We reverse and render in part and reverse and remand in part.

The findings of fact set forth earlier in this decision reflect many of the facts concerning the disputed issue. In a letter to Dr. A dated May 11, 1998, a Commission BRO wrote:

> Please review the attached operative and test reports, for surgery and testing performed subsequent to your examination and determine if your opinion as to [MMI] and impairment remains the same.

The record does not indicate what medical records were sent to the designated doctor. In a letter to the BRO dated May 13, 1998, Dr. A stated that the range of motion (ROM) of the shoulder had improved with the surgery and that the impairment for the shoulder was zero percent. He also wrote:

> The whole person [IR] contributed by the lumbar area needs to be increased. Using Table 49, Page 73, Section II C [Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association (AMA Guides)], this patient is entitled to an additional 7%. Together with the previous percentage given of 10%, this patient has a 17% Whole Person [IR].

In a letter dated September 17, 1998, another BRO stated that arrangements had been made for another examination of the claimant and that medical records were enclosed for review without specifying which records. The BRO also made requests for information and asked specific questions including requesting the basis for increasing the impairment for the lumbar spine, whether the records reflected that the claimant received any significant treatment to the lumbar area since the initial examination, whether the claimant made full maximal effort in ROM testing, and whether he continued to believe that the claimant reached MMI on April 5, 1996, with a 12% IR. In his response dated October 2, 1998, Dr. A stated that the impairment for the lumbar spine was "increased due to the claimant continuing to receive medical care and upon further examination from the month of July 1996, to the present" and that an additional seven percent impairment was assigned under Table 49 of the AMA Guides. The record does not indicate that Dr. A was requested to consider only the shoulder in making an amended report, and there is no indication that he exceeded his authority in also assigning an impairment for the lumbar injury.

Section 408.123(a) provides, "[a]fter an employee has been certified by a doctor as having reached [MMI], the certifying doctor shall evaluate the condition of the employee and assign an [IR] using the [AMA Guides]." Section 401.011(24) defines IR as "the percentage of permanent impairment of the whole body resulting from a compensable injury." Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.1(c)(6) (Rule 130.1(c)(6)) provides that a Report of Medical Evaluation (TWCC-69) shall contain a description of the

most recent clinical evaluation of the employee. Rule 130.1(e) states, "[i]f a doctor certifies that an employee has an impairment, the doctor shall assign a whole body [IR] based on the injury." Rule 130.1(f) provides that a doctor required to submit a TWCC-69 shall submit supplementary and explanatory reports and information as requested by the Commission or the carrier. Rule 130.6(j) states:

> The designated doctor shall address the issue(s) in dispute and confine the report . . . to only those issues.... This means the designated doctor must evaluate the complete clinical and non-clinical history of the medical condition(s), perform an examination of the employee, analyze the medical history with the clinical and laboratory findings and assess and certify an [IR] according to the AMA Guides.

In Texas Workers' Compensation Commission Appeal No. 94492, decided June 8, 1994, the claimant had a back injury, had surgery, and the designated doctor found it impossible to do a ROM study due to the recent surgery. The Appeals Panel rejected the carrier's argument that the claimant's IR should be a snapshot of the claimant's impairment on the date of MMI, reversed and remanded the case, and stated, "[e]xpeditious arrangements should be made to have the claimant evaluated at the earliest time possible, physical conditions considered, and a complete IR report accomplished." Neither party has cited a case in which the claimant had two injuries and a designated doctor amended the report based on one injury and a question arose because the designated doctor did or did not change the impairment for the other injury. Our research has not revealed such a case. The carrier did not file a timely appeal. Review of the provisions of the 1989 Act and Commission rules indicates that under the circumstances of this case, Dr. A was correct in assigning an IR for the complete injury of the claimant at the time of his reexamination of the claimant on September 30, 1998. Dr. A's report dated October 10, 1998, was made in compliance with the AMA Guides.

The hearing officer did not make a finding of fact that Dr. A's first report dated July 19, 1996, is entitled to presumptive weight, but such a finding of fact may be implied or inferred. We reverse that implied or inferred finding of fact and the conclusions of law and the decision of the hearing officer that the claimant reached MMI on April 5, 1996, with a 12% IR. Some comments in the statement of the evidence and the findings of fact may not be consistent. Appeals Panel decisions have considered whether surgery was contemplated or considered at the time of MMI, not whether it was anticipated by the designated doctor. Based on the evidence, the statement of the hearing officer in the Decision and Order that the shoulder surgery is the reason the issues of MMI and IR were reopened and is not a valid reason to amend the IR relative to the lumbar spine, and the unappealed findings of fact, we render findings of fact that the report of Dr. A dated October 2, 1998, was rendered in compliance with the AMA Guides, Commission rules, and the 1989 Act and that that report is entitled to presumptive weight. We remand for the hearing officer to determine whether the great weight of the other medical evidence is contrary to that report and to determine the date the claimant reached MMI and his IR. Because of the unusual wording of Finding of Fact No. 13, we note that the Appeals Panel has held that

the great weight of the other medical evidence contrary to the finding of the designated doctor can include the actual content of the report of the designated doctor. Texas Workers' Compensation Commission Appeal No. 92621, decided December 23, 1992.

Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Commission's Division of Hearings, pursuant to Section 410.202. *See* Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

_____
Tommy W. Lueders
Appeals Judge

CONCUR:

_____
Joe Sebesta
Appeals Judge

_____
Dorian E. Ramirez
Appeals Judge