APPEAL NO. 991924

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 July 30, 1999. On the single issue before her, the hearing officer determined that the appellant's (claimant) impairment rating (IR) was 13% as certified by a doctor other than the designated doctor appointed by the Texas Workers' Compensation Commission (Commission). The claimant appeals, urging, in essence, that what is involved in this case is nothing more than a difference in medical opinion which should not serve to reject the report of a designated doctor, and complaining that it was improper for the identity of the peer review doctor not to be disclosed until the CCH. The respondent (carrier) argues that the hearing officer properly weighed the medical evidence and other evidence before her and that her determination to accept a report other than that of the designated doctor is supported by sufficient evidence.

DECISION

Affirmed.

The claimant, a massage therapist, sustained a repetitive trauma-type injury with a date of injury of _____, and reached maximum medical improvement on June 3, 1998. In response to a question, the claimant states the body parts injured were his wrists, neck, and shoulders, and that "my shoulders come and go pretty much but the wrists and neck stay fairly constant." The claimant continued to work following his injury; however, he works for another chiropractor at this time. At the time of injury, the claimant worked at a chiropractic clinic and his employer was his treating chiropractic doctor, Dr. H. Dr. H certified a 28% IR on June 3, 1998, for range of motion (ROM) deficits in the cervical and upper extremity area. Because of a dispute, a chiropractor, Dr. M, was selected as a designated doctor. Dr. M rendered an IR of 29% for ROM deficits on August 25, 1998. The carrier had a peer review accomplished by a chiropractor, Dr. D, who stated from his review of the various medical records that "it does not appear that [claimant] has a permanent loss of function" from the injury, noting that he lost no time from work, had an uncomplicated clinical course, and did not have significant reproducible clinical or objective findings. Dr. D also faulted the ROM measurements, noting that an earlier measurement showed greater motion and suggested maximal amount of motion was not shown. Dr. D also disagrees with the 15% cervical ROM impairment in light of comparing it to a complete fusion of all seven cervical vertebrae which would only be 14% impairment. In summary, Dr. D states that:

> the 29% [IR] assigned by Dr. M is based on the significant reduction of cervical and bilateral wrist and shoulder [ROM]. While it appears that the [ROM] calculations are correct, the values provided do not appear to represent maximal effort when compared to previous measurements and are

by definition not permanent and reproducible. As a result, the [ROM] values should not be considered objective clinical data and should not be used for rating permanent impairment.

The Commission, pursuant to request, sent Dr. D's report to Dr. M for clarification, review, and comment regarding his rating. The report sent to Dr. M blocked out any information as to whom conducted the peer review and this was commented on by Dr. M. The claimant again raises this on appeal. While we do not find prejudicial error in this inappropriate procedure, we agree that it was not proper to refuse to disclose the identity of the peer review doctor to the designated doctor who is being asked to defend his report. In any event, Dr. M responded, rejecting the observations and opinions of the peer review doctor and questioning the relevance and how he came up with his comparisons of IRs in the cervical area. Dr. M also faulted, noting no examination, the opinion that there was no permanent impairment and stated that the peer review was a waste of time and proved nothing. Dr. M adhered to his 29% IR.

At the request of the carrier for an independent medical evaluation, the claimant was examined by an orthopaedic surgeon, Dr. G, on March 30, 1999. The diagnosis was for wrist, shoulder, and neck pain, and left carpal tunnel syndrome (CTS). Dr G notes that he reviewed the records from Dr. H and Dr. M, reviewed diagnostic reports, examined and measured the claimant, and determined the claimant's IR was13%. Using the Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association (AMA Guides), he found the shoulder ROMs symmetrical and within normal limits for a zero percent IR, the cervical ROMs to be seven percent, a specific condition from Table 49 to warrant a four percent IR, and a two percent rating for left CTS from Table 14. Combining the rating he certified a 13% whole person impairment.

In an expanded discussion, the hearing officer set out her reasoning for rejecting Dr. M's report as contrary to the great weight of other medical evidence and adopting the report of Dr. G in finding the IR to be 13%. The Appeals Panel has noted the unique position occupied by a designated doctor under the 1989 Act and has stated it is not just a balancing of medical evidence that will overcome the presumptive weight to be accorded the report of a designated doctor. Texas Workers' Compensation Commission Appeal No. 92412, decided September 28, 1992. However, whether the designated doctor's report is contrary to the great weight of the medical evidence is generally a factual matter for the determination of the hearing officer. Texas Workers' Compensation Commission Appeal No. 941323, decided November 16, 1994. Where a designated doctor's report is rejected by the hearing officer, there needs to be a detailing of the relevant evidence and reasons for why and how the report is outweighed by other medical evidence. Texas Workers' Compensation Commission Appeal No. 94210, decided March 31, 1994; Texas Workers' Compensation Commission Appeal No. 94914, decided August 19, 1994. If the designated doctor's report is contrary to the great weight of other medical evidence, it may be rejected and the report of one of the other doctors adopted. Section 408.125(e).

In her decision, the hearing officer clearly sets out the medical evidence before her and discusses both the reports of Dr. D and Dr. G which reject the ROM determinations of Dr. M. She indicates that the discrepancy, particularly in the cervical area, between the rating of Dr. M on August 25, 1998, and Dr. G on March 30, 1999, is troubling and that Dr. M's rating is not convincing. She indicated that the impairment evaluations should be performed when the condition has become static, which did not appear to be the case here, and that she gave considerable weight to the observations and opinions of Dr. D and Dr. G in assessing the extent and degree of the claimant's permanent impairment. Although the medical evidence forms the basis for determining the great weight of medical evidence as being contrary to the designated doctor's report, she could reasonably consider the circumstances surrounding the injuries asserted, the treatment for the injuries, the claimant's work capability, the time of a particular evaluation, and the overall guidance of the AMA Guides as they relate to a medical report or evaluation. Based on the evidence before her, she was not convinced that Dr. M's report complied with the general provisions of the AMA Guides. We conclude that she is supported in this determination by her observation of the provisions of the AMA Guides but, more significantly, by the reports of Dr. D and Dr. G. As the sole judge of the relevance and materiality of the evidence and the weight and credibility to be given the evidence (Section 410.165(a)), the hearing officer could give the weight she deemed appropriate to the reports of Dr. D and Dr. G. From our review of the record and the Decision and Order of the hearing officer, we conclude that she has set forth the evidence and reasons to find the report of Dr. M contrary to the great weight of other medical evidence and to adopt the report of Dr. G as assessing the correct IR in this case, and that her determination is not so against the great weight and preponderance of the evidence as to be clearly wrong or unjust. Employers Casualty Company v. Hutchinson, 814 S.W.2d 539 (Tex. App.-Austin 1991, no writ). Texas Workers' Compensation Commission Appeal No. 961872, decided November 6, 1996; Texas Workers' Compensation Commission Appeal No. 962240, decided December 12, 1996.

Accordingly, under the particular circumstances of this case, the decision and order are affirmed.

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Stark O. Sanders, Jr.
Chief Appeals Judge

CONCUR:

_____
Alan C. Ernst
Appeals Judge

_____
Tommy W. Lueders
Appeals Judge