

## APPEAL NO. 992744

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 November 12, 1999. The single issue at the CCH was what was the respondent's (claimant) impairment rating (IR). The hearing officer determined that the IR was 27% rejecting both the initial and amended reports of a designated doctor. The appellant (self-insured) appeals urging that the initial report of the designated doctor was entitled to presumptive weight and should have been adopted, that the amendment was not done in a reasonable period of time or for proper reason, and that the report of the doctor adopted by the hearing officer did not amount to the great weight of other medical evidence. Claimant responds that the evidence supports the findings and conclusions of the hearing officer and asks that the decision be affirmed.

### DECISION

Reversed and rendered.

On \_\_\_\_\_, the claimant, who worked as a prison guard, was exposed to ammonia inhalation for a period of a couple of hours which caused her to pass out and she awoke on a stairway. She was treated by her family doctor and a pulmonologist, Dr. D, who in a Report of Medical Evaluation (TWCC-69) dated October 19, 1993, found the claimant at maximum medical improvement (MMI) on June 22, 1993, and assessed an eight percent IR based on the Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association for "asthma/reactive airways disease." Dr. D states in his report the claimant has returned to work with restrictions. Because of a dispute, Dr. B was selected as a designated doctor and he examined the claimant and the medical records and issued a report dated February 4, 1994. His report details the claimant's history from the injury, his examination, and his review of pulmonary function studies, and concludes that one additional measurement (diffusing capacity for carbon monoxide) was needed to fully evaluate the claimant. In the February 4, 1994, report Dr. B also references earlier psychological symptoms and a diagnosis of post-traumatic stress disorder. The measurement information was obtained and in a March 9, 1994, report Dr. B states that he had received the final laboratory report regarding her work injury resulting from ammonia inhalation, including reports from Dr. D and from Dr. P, who was claimant's psychologist. He sets forth his analysis of the medical information, evaluation of her reactive airways disease and stress anxiety disorder, and his examination and determined that the claimant reached statutory MMI as of June 1993, and had a zero percent IR.

This was apparently disputed by the claimant and at a subsequent benefit review conference in May 1994, the benefit review officer (BRO) determined to write to Dr. B (the letter in evidence appears to have an address correction) enclosing a report of a psychologist, JL, who apparently did not find support for organic brain impairment but did diagnose clinical levels of anxiety, depression, and post-traumatic stress syndrome. It is

not clear what transpired following this for the next several years; however, a January 26, 1999, letter from another BRO to Dr. B states that "[t]his dispute has been ongoing and unresolved for quite some time" and attaches a copy of the earlier BRO's letter of May 5, 1994, indicating that no response to the letter was found. The letter also indicates that additional medical records are enclosed, inquires if a further exam is warranted and instructs Dr. B to complete a TWCC-69 if able. Dr. B responded on February 5, 1999, stating that the question posed by the BRO's letter of May 5, 1994, had been answered in his report of March 9, 1994. He also indicated that the diagnosis regarding a lumbar problem and fibromyalgia were made well after his report in March 1994, and long after statutory MMI and that he did believe they were ratable as related to the inhalation injury. He stated that he had received records from Dr. D who diagnosed occupational asthma and that he would tend to agree with the eight percent IR assessed by Dr. D.

Subsequently, the claimant was examined by Dr. O on June 14, 1999, and he certified a 27% whole body impairment giving ratings for his assessment of low back pain, cervical spine pain due to disc disruption at C4-5, disturbance of complex integrated cerebral function due to combination of post-traumatic stress disorder and/or toxic encephalopathy, and reactive airway disease due to ammonia inhalation.

Although the claimant testified that she first mentioned back pain sometime in 1992 she did not relate it to her accident, and the first medical report in evidence that references low back pain is a November 4, 1996, report from a Dr. W. The first medical report in evidence indicating any cervical injury was the June 14, 1999, report of Dr. O, who gave a cervical rating but incidentally did not give any rating for fibromyalgia. The self-insured did not dispute a compensable injury from the inhalation and apparently did not dispute any of the diagnoses made over the course of claimant's ongoing treatment.

The hearing officer found that neither of Dr. B's reports included a rating for low back, cervical, or fibromyalgia injuries all of which have been accepted by the self-insured as compensable, and thus Dr. B's reports were not entitled to presumptive weight. He found Dr. O's report valid and that it addresses the entire compensable injury. He thus states that Dr. O's report must prevail in these circumstances and determines the IR to be 27%.

Statutory MMI was reached in June 1993. Section 401.011(30)(B). When MMI is reached, an IR is assigned. Section 408.123. Under the provision of Section 408.125, where there is a dispute of an IR, a designated doctor is either agreed upon or one is selected by the Texas Workers' Compensation Commission (Commission). Under subparagraph (e), the report of a designated doctor selected by the Commission is accorded presumptive weight and the IR is based on that report unless the great weight of the other medical evidence is to the contrary. Here the hearing officer does not engage in any weighing of the other medical evidence or make any findings in that regard; rather, he finds that neither report of Dr. B's is valid. Curiously, although finding that Dr. B's report was invalid because of not including ratings for low back, cervical, or fibromyalgia injuries, the hearing officer finds Dr. O's valid although it does not give any rating for fibromyalgia.

Why this would render Dr. B's report invalid but find Dr. O's valid is not apparent. As a general proposition, a faulty IR cannot be replaced by another faulty IR. Texas Workers' Compensation Commission Appeal No. 94917, decided August 24, 1994. Too, the first indication in the evidence of any possible cervical injury is in the report and IR of Dr. O dated June 24, 1999. And, as indicated above, the first indication of a possible low back injury was in November 1996, over two and one-half years after the report of Dr. B, who first examined claimant after statutory MMI, and which was based on the medical evidence known and available at the time.

Germane to this case, the Appeals Panel stated in Texas Workers' Compensation Commission Appeal No. 980503, decided April 27, 1998, that "resolution of an IR cannot be indefinitely deferred to await the results of a potential lifetime course of medical treatment." That case went on to state that "[e]ven though additional medical conditions or even surgery may arise later, an IR should be assigned with reference to the achievement of MMI." Appeal No. 980503 involved an IR by a designated doctor close to the time of MMI and the report of a treating doctor several years later. The Appeals Panel upheld the IR of the designated doctor. In the case under review, the only conditions diagnosed and under consideration at the time of Dr. B's March 1994 report was the inhalation injury and psychological/stress disorder conditions. These were fully considered by Dr. B in his comprehensive reports of both February and March 1994 in arriving at his IR. We conclude there is no sound basis shown for rejecting his initial report of IR and hold that the low back pain indicated in November 1996, some three and one-half years after statutory MMI and over two and one-half years after the designated doctor's report, did not invalidate Dr. B's report of IR.

Although Dr. B, after being contacted by the Commission in 1999, did amend his report to assess an eight percent IR by apparently agreeing with Dr. D's eight percent assessment in 1993 and his diagnosis of occupational asthma, we cannot conclude from the evidence presented that it has been shown that the amendment was accomplished within a reasonable period of time (almost five years later) or for a proper reason (the same inhalation condition). Texas Workers' Compensation Commission Appeal No. 970954, decided July 7, 1997; Texas Workers' Compensation Commission Appeal No. 980999, decided June 29, 1998. This case is unlike those few cases involving back injuries where there is failed back surgery or where there are multiple surgeries over a course of time resulting in an amendment of an initial IR and which have been upheld. Texas Workers' Compensation Commission Appeal No. 982380, decided November 18, 1998. Although there is nothing indicating surgery is or was contemplated for the low back in this case, even subsequent surgery after statutory MMI will not necessarily permit an amendment to a designated doctor's report. Texas Workers' Compensation Commission Appeal No. 962071, decided December 4, 1996; Texas Workers' Compensation Commission Appeal No. 962107, decided December 2, 1996. In sum, the evidence does not support a proper amendment within a reasonable period of time under the circumstances.

For the reason stated, we do not find a factual or legal basis for the rejection of Dr. B's initial certification of IR, nor can we conclude from the evidence presented that it was contrary to the great weight of other medical evidence. Accordingly, we reverse the decision and order of the hearing officer and render a new decision that the claimant's IR is zero percent as certified by Dr. B in his March 9, 1994, report.

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Stark O. Sanders, Jr.  
Chief Appeals Judge

CONCUR:

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Joe Sebesta  
Appeals Judge

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Alan C. Ernst  
Appeals Judge