

APPEAL NO. 000242

Following a contested case hearing (CCH) held on January 6, 2000, pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act), the hearing officer, resolved the disputed issue by determining that the great weight of the other medical evidence was contrary to the report of the designated doctor because the designated doctor "misapplied" the Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association (AMA Guides). He further found that appellant's (claimant) impairment rating (IR) is 17% as assigned by the treating doctor. The claimant appeals, contending that the 30% IR assessed by the designated doctor is correct and requests that the Appeals Panel reverse the hearing officer's decision and order and render a decision in her favor. The respondent (carrier) replies that the decision is supported by sufficient evidence and should be affirmed.

DECISION

Reversed and remanded.

The claimant did not testify at the CCH. Both parties relied solely on documentary evidence. This evidence reflects that the claimant was hit in the back by a bus in (City 1), (State 1), while engaged in furtherance of the employer's business. Her medical records reflect complaints of back and bilateral shoulder pain. In an undated Report of Medical Evaluation (TWCC-69) of an office visit on May 7, 1998, Dr. T, the treating doctor, certified the claimant reached maximum medical improvement (MMI) on August 10, 1998,<sup>1</sup> with a 17% IR. The diagnostic codes listed on the TWCC-69 were for spinal stenosis (723.0) and arthralgia (719.41). Attached to his report was an IR calculation worksheet completed on August 25, 1998, and signed only by the technician. This worksheet reflects an IR of 17% consisting of four percent for a specific disorder of the cervical spine together with five percent for a specific disorder of the lumbar spine and nine percent for loss of lumbar range of motion (ROM). We assume that Dr. T adopted the test results contained in this worksheet. There is no indication that he considered the shoulders to be part of the compensable injury.

Dr. T's certification of IR was timely disputed and Dr. W was selected by the Texas Workers' Compensation Commission (Commission) to be designated doctor in this case. On December 18, 1998, he examined the claimant and on December 28, 1998, completed a TWCC-69 in which he certified a date of MMI of August 10, 1999, and assigned a 30% IR. His five diagnoses were four-quadrant myofascial pain syndrome, myofascial trigger points, neck pain, back pain, and left and right elbow pain. In his report of the examination, he wrote:

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<sup>1</sup>The parties agreed at the CCH that this was the correct date of MMI.

She has trigger points in all four quadrants and all four limbs, but most pronounced in the back and in the right and left upper arms, therefore, measurements were made of the lumbar, thoracic and cervical spine along with both shoulders and both elbows.

The 30% IR consisted of 10% for loss of ROM of the cervical spine; seven percent for loss of ROM of the lumbar spine; five percent for loss of ROM of the thoracic spine; five percent whole person IR for the right shoulder and elbow; and seven percent whole person for the left shoulder and elbow.

Dr. TO reviewed Dr. W's TWCC-69 at the request of the carrier. In a report of January 19, 1999, he commented that the source of the right elbow injury was physical therapy for the compensable injury, but otherwise said that Dr. W "does not explain why he included both shoulders and the left elbow in his [IR]." He suggested that a review of the claimant's records would be a more reliable source for the extent of her compensable injuries rather than subjective complaints of pain "way down the line to the designated doctor." With regard to the spinal area ratings, Dr. TO observed that Dr. W gave no ratings for specific disorders in any area of the spine. He felt this required an explanation in view of the "significant impairments for reduced [ROMs] at these three levels." He further believed that the seven percent lateral flexion lumbar ROM rating was "technically correct" even though Dr. W used a goniometer to measure the left and right lateral flexion. With regard to Dr. W's five percent thoracic loss of ROM measurements, he found them incorrect because of the use of unexplained negative numbers and lack of consecutive measurements meeting the consistency requirements of the AMA Guides. He also found the cervical extension measurements did not meet the consistency requirements resulting in a cervical IR of 7%, not 10%. Finally, he challenged the correctness of the upper extremity ratings even though he did not believe the compensable injury included the upper extremities.

Dr. W responded to Dr. TO's critique on March 27, 1999. After challenging Dr. TO's credentials to make these judgments, Dr. W said that he believed the compensable injury affected the ROM upper extremity measurements. Specifically, with regard to the left elbow, he said that it was assigned an IR "because [claimant] had pain in the area and it made sense from an understanding of myofascial pain, that it could be involved." He acknowledged he used a goniometer for cervical and lumbar ROM measurements and said he was willing to retest, if asked, with dual inclinometers. He also said that the negative numbers were the result of the claimant "pushing against her knees, which made a reverse curve, which made a negative angle." He considered the non-negative numbers valid because they were within five degrees of the middle number, even though the extremes were not within five degrees of each other.

Section 408.124(a), then in effect, provides that an award of an impairment income benefit is to be made on an IR "determined using the" AMA Guides. An IR assigned by a designated doctor selected by the Commission is entitled to presumptive weight and the

"commission shall base the [IR] on this report unless the great weight of the other medical evidence is to the contrary." Section 408.125(e). Whether the great weight of the other medical evidence is contrary to the report of the designated doctor is a question of fact for the hearing officer to decide, Texas Workers' Compensation Commission Appeal No. 93459, decided July 15, 1993, and this determination is in turn subject to reversal on appeal only if it is so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Company, 715 S.W.2d 629, 635 (Tex. 1986). A hearing officer who finds the great weight contrary to the report of the designated doctor must identify the evidence and state why it is believed to constitute the great weight. Texas Workers' Compensation Commission Appeal No. 92522, decided November 9, 1992. Fundamental to the correct certification of IR by any doctor is a determination of what constitutes the compensable injury. Texas Workers' Compensation Commission Appeal No. 980996, decided June 22, 1998. No presumptive weight is given to the designated doctor's opinion of the extent of the compensable injury. Texas Workers' Compensation Commission Appeal No. 950789, decided June 30, 1995.

At the CCH, the carrier contended that Dr. W's certification of a 30% IR was fatally flawed for three reasons: (1) Dr. W improperly included in the compensable injury a bilateral shoulder and elbow injury;<sup>2</sup> (2) the use of a goniometer was contrary to the AMA Guides and resulted in erroneous measurements; and (3) proper validity testing of the lumbar and thoracic ROM measurements was not done before assigning the IR. The hearing officer commented in his statement of the evidence that "[b]ased on the matters raised by Carrier supported by peer review commentary, the great weight of credible medical evidence is contrary to the findings of the designated doctor." He further commented that Dr. T's findings were "a valid certification that claimant has a 17% [IR]." This was reflected in the following findings of fact and conclusion of law:

### **FINDINGS OF FACT**

2. The great weight of credible medical evidence is contrary to the findings of the designated doctor because [Dr. W] misapplied the AMA Guides.
3. The findings of [Dr. T], treating doctor, are valid certification that Claimant had a 17% [IR].

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<sup>2</sup>The carrier appears to complain only of the inclusion of the right shoulder and left elbow in the compensable injury. This would seem to concede, at least, a compensable right elbow injury. It also suggests that the carrier mistakenly believed either that Dr. W did not rate a left shoulder injury, which he did, or that the left shoulder is part of the compensable injury. This should be clarified on remand.

## CONCLUSION OF LAW

3. Claimant has a 17% [IR].

The claimant appeals these determinations, contending that Dr. TO's criticisms of Dr. W's report were wrong. Unfortunately, she cited as authority a later edition of the AMA Guides, which the 1989 Act, as presently in effect, precludes from using to determine an IR. We consider her appeal in terms of the applicable portions of the correct edition of the AMA Guides.

A substantial part of the difference between Dr. W's and Dr. T's ratings derives from what each considered to be the extent of the compensable injury. The dispute at the CCH was also in large measure about what was or was not part of the compensable injury. The hearing officer made no findings on the extent of injury. On appeal, the claimant again asserts that Dr. T did not consider the entire injury and in response the carrier argues that Dr. W included too much in the compensable injury. Because this threshold issue of extent of injury was critical to a fair resolution of the issue of the claimant's correct IR and because extent of injury was actually litigated at the CCH, we reverse the determination of the hearing officer that the great weight of the medical evidence was contrary to Dr. W's report and remand this determination for further consideration and express findings by the hearing officer of what constituted the compensable injury. Texas Workers' Compensation Commission Appeal No. 970187, decided March 24, 1997. Specifically, findings are required on whether the compensable injury includes the elbows or shoulders. Such findings should be made in light of the definition of an injury contained in the 1989 Act as "damage or harm to the physical structure of the body." Section 401.011(26).

Once the determination of the extent of injury is made, the question of a correct IR should be returned to Dr. W or, in the discretion of the hearing officer, a second designated doctor should be appointed. In any case, the claimant should be reexamined for purposes of determining her correct IR. Even though we have held that the AMA Guides do not as a matter of law require that an inclinometer must be used to measure spine ROM, see Texas Workers' Compensation Commission Appeal No. 950845, decided July 6, 1995, and cases cited therein, that the designated doctor in this case should reexamine the claimant using an inclinometer.<sup>3</sup> With regard to the validation requirements for ROM testing, we note that the deviation in measurements can be computed from the median number or the maximum number. Texas Workers' Compensation Commission Appeal No. 980985, decided June 26, 1998. See also Texas Workers' Compensation Commission Appeal No. 990678, decided May 17, 1999 (Unpublished). Finally, negative numbers are to be avoided or explained. Texas Workers' Compensation Commission Appeal No. 950692, decided June 15, 1995.

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<sup>3</sup>In his response to Dr. TO's critique, Dr. T said he measured "the same patient" with both a goniometer and dual inclinometer and arrived at the same measurement for the cervical spine. It is unclear whether the "same patient" was the claimant.

For the foregoing reasons, we reverse the determinations that the great weight of the other medical evidence was contrary to the report of the designated doctor and that the claimant's correct IR is 17%, and remand this issue for further consideration and findings on the threshold issue of extent of injury and for a reexamination by the current designated doctor or a second designated doctor, which addresses the matter raised in this opinion.

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.

Alan C. Ernst  
Appeals Judge

CONCUR:

Tommy W. Lueders  
Appeals Judge

Judy L. Stephens  
Appeals Judge