

APPEAL NO. 001953

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 in [City], Texas, on July 28, 2000. The issues were the date the respondent (claimant) reached maximum medical improvement (MMI) and his impairment rating (IR). The hearing officer determined that the appellant (carrier) did not improperly contact Dr. KHu, the Texas Workers' Compensation Commission (Commission)-selected designated doctor; that on May 29, 2000, Dr. KHu amended his December 5, 1999, report for a proper reason and within a reasonable time; that Dr. KHu's report dated May 29, 2000, that the claimant reached MMI on March 24, 2000, with a seven percent IR has not been overcome by the great weight of contrary medical evidence; and that the claimant reached MMI on March 24, 2000, with a seven percent IR. The carrier appealed; urged that the hearing officer erred in determining that the designated doctor properly amended his report by changing the date the claimant reached MMI; contended that the hearing officer erred in amending the date the claimant reached MMI despite there being no change in the claimant's IR; and requested that the Appeals Panel reverse the decision of the hearing officer and render a decision that the claimant reached MMI on November 12, 1999, with a seven percent IR as certified by the designated doctor in his first report. A response from the claimant has not been received. The determination that the carrier did not improperly contact the designated doctor has not been appealed and has become final under the provisions of Section 410.169.

DECISION

We affirm.

The claimant sustained a compensable injury on _____. Dr. KHu was appointed as the Commission-selected designated doctor. He examined the claimant on November 12, 1999. In a Report of Medical Evaluation (TWCC-69) dated December 5, 1999, Dr. KHu certified that the claimant reached MMI on November 12, 1999, with a seven percent IR. He attached a nine-page Report of Consultative Exam to the TWCC-69. On the first page of that report, he stated "[I]limited records from the treating doctor only. No records from the insurance carrier." On the last page, the designated doctor wrote:

As stated in the preceding paragraph, I do not feel that a determination of M.M.I. can be made without all of the pertinent information. I will again request the reports of surgical opinions and E.M.G./N.C.V. testing that should have been made available. I will also request that the treating doctor order a F.C.E. to evaluate the level of activity that this patient can perform in. Active rehabilitation may be needed. Figures 83b, 83c, and 84 from the AMA GUIDES TO THE EVALUATION OF PERMANENT IMPAIRMENT, third edition are attached. If these figures exist from [Dr. B's] examination, I would like a copy for comparison. If they are not available, then the examination or lack of examination should not impact this case. The impairment

evaluation should not be considered valid in any form if the criteria that are required by the [Commission] have not been met.

This report is being submitted to meet the seven day requirement of the [Commission]. An addendum will be submitted when the information required to complete this report is obtained.

Attachments to the Report of Consultative Exam reveal that the seven percent IR was awarded for loss of lumbar range of motion (ROM). The Report of Consultative Exam is not dated and it appears that it may have been completed within seven days of the examination on November 12, 1999. An Addendum to Report, Report of Consultative Exam states:

* * * *Limited records from the treating doctor only. No records from the insurance carrier initially.* * *

* * *Records received from [Ms. B] , RN, BSN, CDMS on 12-04-99. [Ms. B] is a representative of the carrier and is employed with Argus according to the letterhead. 12 pages of notes related to the patient's care prior to [Dr. KBH's] management of the case. No reports of values associated with an [IR] performed by [Dr. R].* * *

I have waited to acquire all pertinent documentation before issuing the final opinion on this case. [Ms. B] indicated that there is not an E.M.G./N.C.V. on record and no surgical consultation took place or is presently scheduled. The patient has not had / or been scheduled for a F.C.E. as recommended. [Ms. B] stated "without the cooperation of [Dr. KBH's] office, I cannot obtain any report from a surgeon, or determine that he even had a consult." The records obtained since the appointment with the patient have not added or distracted from the findings of the examination.

This morning a representative of the [Commission] - [City] Field Office, Angie, requested the final report be faxed today, 12-05-99. I feel that I must comply because my reasons for waiting are well known to all parties and this request is still being made.

Based on the examination of 11-12-99, the patient is awarded 7% whole person impairment for the injuries sustained on _____. The date of M.M.I. will be the date of the examination 11-12-99.

In December 1999, the claimant was represented by an attorney. In a letter to the Commission dated December 30, 1999, the attorney stated:

The undersigned respectfully requests that the Commission either disqualify the DD [designated doctor] and appoint a new one or send the designated doctor a letter of clarification asking him the following question(s):

You state in your report that you spoke with [Ms. B], a representative of the carrier. [Commission] Rules prohibit *ex parte* [sic] communication with the designated doctor. Please clarify how this communication, which was clearly inflammatory and derogatory towards the treating doctor, should not invalidate your report?

You state that there was no EMG/NCV, but that is inaccurate. If there was such testing, would it change your opinion about MMI/IR?

The claimant is scheduled [sic] for an orthopedic/surgical evaluation. Do you feel that you can make decisions about MMI without having the benefit of a surgical consult?

The record does not indicate what, if anything was done by the Commission as the result of the letter from the attorney.

On May 16, 2000, a Commission benefit review officer wrote a letter to the designated doctor that states:

The [Commission] appointed you as the commission selected doctor for [claimant] and an examination was performed on 11-12-99. You submitted a report in which you state that [claimant] reached [MMI] on 11-12-99 with a 7% impairment.

Some questions were raised at the Benefit Review Conference [BRC] by the interested parties. Will you please respond to the following: 1. In the course of completing your evaluation of the claimant, are you able to ascertain what percentage of claimant's current impairment, if any, is related to claimant's intervening injury in _____. If yes, please indicate a percentage of impairment attributable to the _____ injury. 2. If the [IR] or [MMI] date for this claimant has now changed from the [IR] and [MMI] date you assigned in the TWCC-69 filed by you on December 9, 1999, please state the reasons for such change.

If your response is a change, please file an amended form TWCC-69. Since you may be reviewing additional medical records and considering some prior records, you are not bound by an prior decisions.

In a TWCC-69 dated May 29, 2000, Dr. KHu certified that the claimant reached MMI on March 24, 2000, with a seven percent IR. The designated doctor attached a 12-page Report of Consultative Exam to the TWCC-69 that reveals that he had medical information

that he did not previously have, that some of the medical information was developed before his previous examination, and that some of it was developed after his previous examination. In the report Dr. KHu said that the claimant's ROM test results for lumbar flexion and extension were invalid; that he did not think that the claimant's _____ incident caused the ROM tests results to be invalid; and that under Table 49 of the Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association (AMA Guides) the claimant has impairment of "5-7%." He provided the following answers to the questions asked by the benefit review officer:

1. I do not believe that the patient suffered from any impairment attributable to the _____ injury. The patient indicated that he did not feel that the _____ incident caused any residual symptoms/permanent impairment when questioned about the incident.
2. The date of M.M.I. will change because the review of records indicates that the patient made progress with the work hardening program to the point of returning to gainful employment. Return to work is a criteria utilized in determining M.M.I. "improvement of employability." The amount of whole body impairment will not change from the original 7%. The results of this examination would indicate 5-7% based on table 49. No award can be made for [ROM] loss due to the S.L.R. validity. This is due to the loss of sacral flexibility. I feel that the patient deserves the 7% whole person impairment.

We first address the determination that the designated doctor amended his report for a proper reason. The designated doctor did not have all of the medical records at the time he issued the first TWCC-69. He stated that he did not have all of the records, that all of the records are needed to perform the functions of a designated doctor, and that he issued the first TWCC-69 because he was asked to do so by the Commission. In Texas Workers' Compensation Commission Appeal No. 971733, decided October 20, 1997, the Appeals Panel affirmed determinations that the first report of a designated doctor was not valid because the designated doctor did not have all of the medical records at the time that it was rendered and that the second report of the designated doctor was entitled to presumptive weight. In the case before us, the hearing officer did not err in determining that the designated doctor amended his report for a valid reason.

We next address the determination that the claimant's IR is seven percent. Even though the designated doctor assigned a seven percent IR in both his original and his amended report, he assigned seven percent for loss of ROM in the first report and seven percent for a specific disorder under Table 49 of the AMA Guides in his amended report. Dr. KHu rendered his first report less than six months after the date of the injury and rendered his second report more than six months after the date of the injury. Table 49 provides for impairment of the lumbar spine for intervertebral disc or other soft tissue lesions that are "[u]noperated with medically documented injury and a minimum of six months of medically documented pain, recurrent muscle spasm or rigidity." If the condition

is “associated with none-to-minimal degenerative changes on structural tests” a five percent impairment may be awarded and if the condition is “associated with moderate to severe degenerative changes on structural tests, including unoperated herniated nucleus pulposus, with or with radiculopathy” a seven percent impairment may be awarded. In his amended report, the designated doctor assigned an IR based on the claimant’s condition on the March 24, 2000, date of MMI and not on the claimant’s condition at the time of the rescinded November 12, 1999, date of MMI. The hearing officer did not err in determining that the amended report of the designated doctor is entitled to presumptive weight.

We affirm the decision and the order of the hearing officer.

Tommy W. Lueders
Appeals Judge

CONCUR:

Robert E. Lang
Appeals Panel
Section Manager

Kenneth A. Huchton
Appeals Judge