

## APPEAL NO. 002007

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on June 20, 2000. The record closed on July 13, 2000. With respect to the issues before him, the hearing officer determined that the issue of the appellant's (claimant) impairment rating (IR) "is not ripe," thus, a second designated doctor should be appointed to resolve that issue, and that the respondent (carrier) timely disputed the designated doctor's IR. In her appeal, the claimant argues that the hearing officer erred in determining that Dr. B, the designated doctor, has been unable or unwilling to properly rate the claimant's compensable injury such that a second designated doctor should be appointed to resolve the issue of the claimant's IR. The claimant asks that we reverse the hearing officer's decision and order and render a new decision that the claimant's IR is 48% as certified by Dr. B. In its response to the claimant's appeal, the respondent (carrier) urges affirmance. The claimant did not appeal the hearing officer's determination that the carrier timely disputed Dr. B's rating and that determination has become final pursuant to Section 410.169.

### DECISION

Reversed and a new decision rendered that the claimant's IR is 48% as certified by Dr. B, the designated doctor.

Because only the issue of the claimant's IR is before us on appeal, our factual recitation will be limited to those facts most germane to that issue. The parties stipulated that the claimant sustained a compensable injury on April 10, 1996, and that she reached maximum medical improvement (MMI) in accordance with Section 401.011(30)(B) on August 12, 1998. On November 8, 1999, the parties executed a Benefit Dispute Agreement (TWCC-24) where they agreed that the claimant's compensable injury did not extend to her cervical spine. The hearing officer determined, and the carrier did not challenge the determination on appeal, that the claimant's compensable injury includes her right upper extremity and a psychological injury.

On November 5, 1996, Dr. M, a doctor who examined the claimant at the request of the carrier, certified that the claimant reached MMI on November 1, 1996, with an impairment rating (IR) of eight percent, which was assigned exclusively for loss of range of motion (ROM) in the claimant's right shoulder. It is unclear from the record what transpired after Dr. M certified MMI and IR; however the next certification was given by Dr. W, another carrier-selected doctor, on February 2, 1998. In his Report of Medical Evaluation (TWCC-69), Dr. W certified that the claimant reached MMI on January 27, 1998, with an IR of eight percent. Dr. W's TWCC-69 does not state the basis of his rating and it is not accompanied by a narrative report. Apparently, Dr. W's certification was disputed and the Texas Workers' Compensation Commission (Commission) selected Dr. F to serve as the designated doctor. In a TWCC-69 dated April 28, 1998, Dr. F certified that the claimant had reached MMI as of that date with a 22% IR.

For reasons that are unclear from the record, it became necessary to replace Dr. F as the designated doctor. Therefore, the Commission selected Dr. B as a second designated doctor. On December 17, 1999, Dr. B examined the claimant. In a TWCC-69 of December 20, 1999, Dr. B certified that the claimant reached MMI on December 17, 1999<sup>1</sup>, with an IR of 48%. In the narrative report accompanying his TWCC-69, Dr. B stated that he had assigned a 30% whole body rating for mild to moderate emotional disturbance under ordinary stress. He referenced page 97 in Chapter 4 of the Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association (AMA Guides), which concerns rating impairment of emotional disturbances resulting from organic brain damage. In addition, Dr. B assigned a 25% IR for impairment on loss of use of the right upper extremity, the claimant's preferred extremity. Dr. B explained that in assigning his rating for the right upper extremity, he had consulted page 99 of Chapter 4 of the AMA Guides, which deals with impairment for loss of use of an upper extremity due to a spinal cord injury. The Commission sent a letter of clarification to Dr. B, which was not included in the record. On February 10, 2000, Dr. B responded to the Commission's letter but did not change his IR. Dr. D explained his reference to Chapter 4 to rate both the claimant's psychological and right upper extremity injuries, as follows:

As you note, I have used page 97 of the [AMA Guides] to rate her emotional disturbances. The [AMA Guides], as you know, [are] used as a [g]uide, not as a complete direction of impairment. The patient fits into this category as it is the closest related to her overall condition. The [AMA Guides] states "emotional disturbances may be one of the results of organic brain syndrome. The patient does not exhibit other symptoms of organic brain syndrome and, again, this is the most accurate description of her overall condition and she is rated at 30% with a range of 20% to 45%.

In evaluating the use of her upper extremity, I used page 99 where it indicates under Spinal Cord Conditions [sic]. As you know, reflex sympathetic dystrophy [RSD] can often simulate spinal cord conditions with sensory disturbances and other autonomic disorders as well as active psychological states. Again, using the [AMA Guides] as a [g]uide for the upper extremity, the patient can do self care but has poor digital dexterity. The range of this is 15% to 25% and I have given the patient the maximum of 25%. [Emphasis in original.]

The carrier called Dr. C to testify by telephone at the hearing. Dr. C testified that Dr. B did not properly follow the AMA Guides in assigning the claimant's IR. Specifically, Dr. C stated that Dr. B improperly rated the claimant's upper extremity as if the claimant

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<sup>1</sup>Under Section 401.011(30)(B), Dr. B could not certify MMI past the date of statutory MMI, that is more than 104 weeks after income benefits began to accrue. On May 2, 2000, apparently after having determined that Dr. B's certification of a date of MMI past statutory MMI was tantamount to his having certified statutory MMI, the parties executed a second TWCC-24, agreeing that the claimant reached MMI on August 12, 1998, the date of statutory MMI.

had sustained a spinal cord injury, when in fact she did not sustain a spinal cord injury. In addition, Dr. C testified that Dr. B improperly rated the claimant's emotional disturbance under Chapter 4, which concerns emotional disturbance resulting from organic brain injuries. Dr. C maintains that Dr. B's reference to Chapter 4 was misplaced because the claimant did not sustain an organic brain injury as part of her compensable injury. Dr. C maintained that the psychological component of the claimant's injury should be rated under Chapter 14 of the AMA Guides which addresses mental and behavioral disorders.

As noted above, the hearing officer determined that the issue of the claimant's IR was not "ripe" and that another designated doctor should be appointed to address the issue of the claimant's IR. We have previously recognized that selection of another designated doctor may be made where the designated doctor becomes unavailable. Texas Workers' Compensation Commission Appeal No. 992104, decided November 10, 1999; Texas Workers' Compensation Commission Appeal No. 93852, decided November 4, 1993. Selection of another designated doctor may also be upheld where the first doctor refuses to cooperate or to render a report consistent with the 1989 Act, which in accordance with Section 408.124, requires proper use of the AMA Guides. Texas Workers' Compensation Commission Appeal No. 961228, decided August 8, 1996

In this instance, the hearing officer determined that another designated doctor should be appointed because Dr. B "has been unable or unwilling to properly rate the Claimant's compensable injury." Specifically, the hearing officer determined that Dr. B "has rated the Claimant's neck area, which is not part of the compensable injury, and has rated the Claimant's psychological component using the wrong part of the [AMA Guides]." Initially, we will address Dr. B's reliance on the emotional disturbances section of Chapter 4 to rate the psychological component of the claimant's compensable injury. The hearing officer credited Dr. C's testimony that Dr. B's actions in this regard were not in accordance with the AMA Guides because the claimant did not sustain an organic brain injury in this case to warrant the application of Chapter 4. However, in Texas Workers' Compensation Commission Appeal No. 951447, decided October 9, 1995, we considered and rejected a similar argument. The carrier in that case argued that the designated doctor "contaminated" his rating by improperly looking to Chapter 4 for guidance in determining the rating for the claimant's psychological rating and that in the process the designated doctor "converted a Chapter 14 rating into a Chapter 4 rating." Appeal No. 951447 stated:

We are unwilling to place such constraints on the professional, clinical judgment of a physician. To the contrary, we believe that an experienced practitioner may seek help and guidance from sources deemed relevant and appropriate in his or her professional opinion. In looking to Chapter 4 for guidance, [the designated doctor] did not thereby turn the claimant's injury into an organic instead of a psychiatric injury. Rather, by his own explanation, he looked to how Chapter 4 rated the effects of an organic condition as reflected in the conduct of a claimant and that claimant's ability to function in the ordinary circumstances of life. Chapter 14 takes a not dissimilar approach and addresses impairment in terms of a claimant's ability

to function in daily living and with its associated stresses. We thus cannot conclude that [the designated doctor] did not follow the AMA Guides when he referred to Chapter 4 for whatever information he deemed useful, nor that in doing so he transformed a Chapter 14 rating into a Chapter 4 rating.

See *also* Texas Workers' Compensation Commission Appeal No. 991913, decided October 15, 1999. Under the guidance of Appeal Nos. 951447 and 991913, we cannot agree that Dr. B improperly applied the AMA Guides in this instance by looking to Chapter 4 to assess the claimant's IR for her psychological injury. Rather, his decision to do so was a matter within his professional clinical judgment. Accordingly, Dr. B's action in that regard does not demonstrate noncompliance with the AMA Guides and it does not provide support for the hearing officer's determination that another designated doctor should be appointed in this case.

The hearing officer also determined that Dr. B did not properly rate the claimant's injury because he assigned a rating for a cervical injury and the parties agreed that the claimant's compensable injury does not include the cervical spine. However, Dr. B did not give a rating for a cervical injury in this case. Dr. B's narrative report and his response to the Commission's request for clarification indicate that Dr. B rated a right upper extremity injury using the portion of Chapter 4 that concerns rating loss of use of an upper extremity due to a spinal cord injury. The record does not support the hearing officer's determination that in assigning the 25% IR Dr. B was rating a cervical injury. At the hearing, Dr. C argued that Dr. B had improperly applied the AMA Guides because he could not use the portion of Chapter 4 he used in the absence of a spinal cord injury. As with the decision to refer to Chapter 4 to rate emotional disturbances, Dr. B's use of Chapter 4 to rate the claimant's upper extremity injury, which he characterized as RSD, was a matter within his professional, clinical judgment that RSD "can often simulate spinal cord conditions with sensory disturbances and other autonomic disorders. . . ." In Texas Workers' Compensation Commission Appeal No. 001120, decided July 5, 2000, the Appeals Panel affirmed a hearing officer's decision giving presumptive weight to a designated doctor's IR. In that case, the designated doctor had rated the claimant's RSD using Chapter 4 and the carrier argued, as the carrier argues here, that the designated doctor had improperly applied the AMA Guides in doing so because the claimant did not sustain a spinal cord injury. Appeal No. 001120 noted that the AMA Guides do not specifically provide a basis for rating RSD and that the designated doctor and the carrier's doctor used different approaches in an attempt to rate the claimant's compensable injury. The hearing officer in Appeal No. 001120 gave presumptive weight to the method used by the designated doctor to rate the claimant's RSD because he did not determine that the method proposed by the carrier's doctor constituted the great weight of the other medical evidence contrary to the designated doctor's report. Dr. B used the same approach that the designated doctor used in Appeal No. 001120. His decision to do so does not, as the hearing officer found, reflect an improper use of the AMA Guides; rather, it reflects an exercise of Dr. B's professional medical judgment to select an approach to determine the most appropriate rating for the claimant's RSD, a condition not specifically provided for in the AMA Guides. The hearing officer erred in determining that Dr. B had not properly applied the AMA

Guides in assigning his upper extremity rating such that the appointment of another designated doctor was appropriate.

It is important to note that the carrier did not argue that Dr. B's rating should not be given presumptive weight because it included ratings for a psychological component and for RSD, which were not part of the compensable injury. Instead, they relied on the contention that Dr. B did not properly apply the AMA Guides in assessing the claimant's IR. Having reversed the hearing officer's determination that Dr. B misapplied the AMA Guides in determining the claimant's IR, we likewise reverse his determinations that the issue of the claimant's IR is not ripe and that another designated doctor should be appointed and render a new decision that the claimant's IR is 48% as certified by Dr. B, the designated doctor.

The hearing officer's decision and order are reversed and a new decision rendered that the claimant's IR is 48% as certified by the designated doctor.

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Elaine M. Chaney  
Appeals Judge

CONCUR:

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Robert E. Lang  
Appeals Panel  
Judge/Manager

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Kenneth A. Huchton  
Appeals Judge