APPEAL NO. 002692

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 3, 2000. The issues at the CCH were the date that the appellant (claimant) reached maximum medical improvement (MMI) and the impairment rating (IR) to be assigned for impairment from her compensable injury. The hearing officer gave presumptive weight to the amended report of the designated doctor and determined that the claimant reached MMI on December 27, 1999, with a 6% IR. He found that the great weight of the contrary medical evidence was against the first report of the designated doctor, but not against his second report.

The claimant has appealed, arguing that the revision of the designated doctor's report, based upon comments of a peer review doctor, were inappropriate. The claimant speculates about a possible personal or business relationship between the designated doctor and the peer review doctor. The claimant argues that it would be appropriate to schedule an examination with a second designated doctor. The respondent (self-insured) responds that the hearing officer correctly decided the case with reference to the applicable law.

DECISION

Affirmed.

The claimant, who was employed as a bus attendant for the self-insured, was injured on _____, primarily along her right side, when a special needs student fell on her knocking her down. Her treating doctor was Dr. G. Medical records indicate diagnoses of lumbar and cervical strain, note intermittent swelling in the right hip area, and a right wrist injury and cyst. She had surgery on the right wrist in July 1999, which also found a bone fragment. On December 27, 1999, Dr. G certified that the claimant reached MMI on that date, with a 0% IR. He said that he could not give credit in an IR for the claimant's pain, and noted that the claimant had normal range of motion (ROM).

The claimant disputed this and was examined by a designated doctor, Dr. B. He examined the claimant on January 25, 2000, and certified that she had reached MMI on January 21, 2000. Dr. B's narrative report shows that he had numerous medical records before him, including cervical MRI results and a referral doctor's notes, as well as a number of records from Dr. G. Dr. B noted that he reviewed both the cervical and the lumbar MRI and found that the lumbar MRI was normal while the cervical MRI showed several bulges. Dr. B invalidated the cervical and lumbar IRs, noting that the ROM was very inconsistent with either the observed ROM or the anatomically possible ROM. However, Dr. B assigned a 16% IR for upper extremity impairment, including limited ROM of the right shoulder. A large percentage was also assigned for limited ROM of the right hip.

The self-insured sent this report to its peer review doctor, Dr. C, who disputed it in several respects. He noted first that if the claimant was observed to have exerted submaximal effort in her spinal measurements (as observed by Dr. B), then it was reasonable to conclude that this was present in other ROM testing as well (although not documented by Dr. B). Dr. C noted that there was no indication in the medical records or in the claimant's history of any underlying pathology to the hip. Dr. C questioned why the date of MMI certified by Dr. G was not used by the designated doctor. As to the upper extremity ROM, Dr. C noted that while some limitations might be expected, Dr. B's findings were at odds with Dr. G's statement that the ROM was normal. He stated that further clinical evaluation was mandated by the Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association (AMA Guides) where findings were not in "substantial accordance" with information of record.

On March 14, 2000, the Texas Workers' Compensation Commission (Commission) forwarded Dr. C's report to Dr. B, and a copy of the forwarding letter was sent to the claimant. Dr. B was asked to review and comment, and, if changes were necessary in his IR, to inform all parties of the reason therefore.

Dr. B responded by lowering his IR and revising his date of MMI to match the treating doctor's date. As to MMI, he agreed that there was no significant change between this MMI date and the date he had used, and he did not have a problem with using the December 27, 1999, date of MMI. He noted that he believed that the limited ROM in the hip and right shoulder was due to pain, but agreed that there was no hip pathology in the medical records and therefore deducted this percentage. As to the shoulder, Dr. B said that it was also related to pain without pathology and should also be disallowed. He left in the IR for decreased ROM of the right wrist, yielding a 6% IR. He refers to Dr. C twice in this letter as "Dr. [First Name]." The claimant testified at the CCH that she was unaware of Dr. C's peer review report until after Dr. B revised his IR.

Initially, we believe the reference to Dr. C as "Dr. [First name]" is an inadvertent mix-up, due in part to the fact that Dr. C's first name could also be a surname. There is no evidence that a prejudicial relationship between Dr. C and Dr. B exists that would impair Dr. B's professional judgment.

An IR is assigned not for an injury, per se, but for "impairment" from that injury. Impairment is defined in Section 401.011(23) as "any anatomic or functional abnormality of loss existing after [MMI] that results from a compensable injury and is reasonably presumed to be permanent." An IR must be based upon "objective clinical or laboratory" findings (Section 408.122(a)) and done in conformity with the AMA Guides. We note that in the AMA Guides on page. 37, it appears that ratable pain for upper extremities is that which emanates from peripheral spinal nerve impairment. This section goes on to note that complaints of pain that cannot be characterized as such are not within the scope of rating under that section. Reference is made to Appendix B, which discusses the difference in opinion existing as to how, or if, to rate chronic pain, which cannot always be

objectively established. However, this appendix does not set out methods by which such pain may be assigned an IR.

Contact with Dr. B in this case followed the process allowed in Section 408.125(f), restricting such communication to staff of the Commission. A designated doctor may choose, or not choose, to reevaluate his IR in light of further information provided or questions posed as to the proper application of the AMA Guides. In reviewing the decision of the hearing officer, we cannot disagree with his application of the "presumptive weight" statutes to each of the designated doctor's reports. In considering all the evidence in the record, we cannot agree that the findings of the hearing officer are so against the great weight and preponderance of the evidence as to be manifestly wrong and unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). We therefore affirm the decision and order.

Susan M. Kelley
Appeals Judge

CONCUR:

Kenneth A. Huchton
Appeals Judge

Gary L. Kilgore
Appeals Judge