

## APPEAL NO. 002738

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On November 6, 2000, a hearing was held. The hearing officer decided that the appellant's (claimant) impairment rating (IR) was 7%, as determined by the designated doctor. The claimant appealed. There is no response in the file from the respondent (self-insured).

### DECISION

Reversed and remanded.

The claimant sustained a compensable injury on \_\_\_\_\_. On October 16, 1998, he was evaluated by a psychologist and was determined to be suffering from depression, a condition that was ultimately accepted as part of the compensable injury on August 26, 1999. On January 4, 1999, the claimant's treating doctor, Dr. F, referred the claimant to another doctor, Dr. M, for an IR evaluation. Dr. M certified that the claimant had reached maximum medical improvement (MMI) on January 4, 1999, with a 13% IR. Dr. F agreed with Dr. M's MMI date and IR. On April 12, 1999, the psychologist treating the claimant's depression, Dr. Ma, a psychologist, issued a report stating that the claimant had a 5% IR for psychological problems. On September 10, 1999, the claimant returned to the designated doctor, Dr. N, and Dr. N certified that the claimant had reached MMI on September 10, 1999, with a 7% IR.<sup>1</sup>

In order to warrant inclusion in an IR, the condition for which the rating is provided must be reasonably presumed to be permanent. Section 401.011(23) and (24). The claimant testified that he had not received any treatment for his depression since sometime in 1999 and that he was not taking any medications for the depression. Dr. Ma had stated on October 16, 1998, that the claimant was expected to make a good response to treatment and the last date of treatment by Dr. Ma reflected in the record was on April 19, 1999. It is clear from the evidence presented that the claimant had been diagnosed with depression and that the depression had been accepted as a part of the compensable injury before Dr. N determined the claimant's IR in September 1999.

The claimant had the burden to prove by a preponderance of the credible evidence that the designated doctor failed to consider the entire injury in assigning the IR. Texas Workers' Compensation Commission Appeal No. 960352, decided April 8, 1996. There is no indication that either party requested clarification from Dr. N to explain the absence of a reference to the claimant's depression in his report. The claimant's position, that Dr. N's failure to award any impairment for the depression was improper, is based on surmise and speculation. It is equally speculative to assume that Dr. N did not give a rating for depression because that rating would have been zero.

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<sup>1</sup> After an earlier examination, Dr. N had determined that the claimant had not reached MMI.

Under the circumstances presented, the hearing officer erred in not questioning the designated doctor about the absence of any reference to the claimant's depression in the IR report. We reverse the hearing officer's decision and remand the case to the hearing officer to seek clarification of the absence of a discussion of whether the claimant should or should not receive a rating for depression. On remand, the hearing officer should contact Dr. N, the designated doctor, and request clarification of whether the depression was considered, whether it was ratable, and whether an additional IR should be granted for the claimant's depression, advising Dr. N that the depression was part of the compensable injury.

We reverse the decision and order of the hearing officer and remand for further proceedings as indicated herein.

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 Texas Workers' Compensation Commission's Division of Hearings, pursuant to Section 410.202. See Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

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Kenneth A. Huchton  
Appeals Judge

CONCUR:

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Thomas A. Knapp  
Appeals Judge

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Robert W. Potts  
Appeals Judge