

APPEAL NO. 002764

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 October 16, 2000. With respect to the single issue before him, the hearing officer determined that the great weight of the other medical evidence is contrary to the report of the designated doctor selected by the Texas Workers' Compensation Commission (Commission) and that the appellant's (claimant) impairment rating (IR) is 13% as certified by his treating doctor. In his appeal, the claimant contends that the hearing officer erred in determining that the great weight of the other evidence is contrary to the report of the designated doctor and asks that we render a new decision that his IR is 33% as certified by the designated doctor. In the alternative, the claimant asks that we remand to seek clarification from the designated doctor or for a reexamination by the designated doctor. In its response to the claimant's appeal, the respondent (carrier) urges affirmance.

DECISION

Reversed and remanded.

It is undisputed that the claimant sustained a compensable injury to his right knee, low back, and neck on _____. In addition, although the parties did not stipulate as to the date of maximum medical improvement (MMI), they appear to agree that the claimant's date of MMI is November 1, 1999, as has been certified by each of the doctors certifying MMI and assigning an IR to the claimant. In a Report of Medical Evaluation (TWCC-69) dated November 2, 1999, Dr. I, the claimant's then treating doctor, assigned an IR of 13%, which is comprised of 11% for loss of cervical range of motion (ROM) and 2% for loss of lumbar ROM. On November 17, 1999, Dr. S, the carrier's required medical examination doctor, assessed an IR of 0%. In his narrative report, Dr. S noted that the claimant's diagnostic testing of his cervical and lumbar spine and right knee was normal, except for degenerative changes in the lumbar spine; thus, Dr. S concluded that the claimant's compensable injury did not result in permanent impairment.

The carrier disputed Dr. I's 13% IR and the Commission selected Dr. H as the designated doctor. In a TWCC-69 dated January 18, 2000, Dr. H assigned a 33% IR, which is comprised of 5% for a specific disorder of the lumbar spine, 4% for loss of lumbar ROM, 4% for a specific disorder of the cervical spine, 19% for loss of cervical ROM, and 6% whole person (14% lower extremity impairment) for loss of ROM in the right knee. In his narrative report, the designated doctor stated:

These [ROM] measurements were not made at the time of the patient's best evaluation. There is evidence in the record of his [ROM] being better at the 11/1/99 examination. I am mandated to use the numbers of my personal [ROM] measurement. However, I think the better and more reflective set of measurements was done on that day.

* * * *

The 33% is the [IR] based on today's measurements, but I would be happy to amend that to the numbers that I think correctly reflect his impairment and [claimant's] date of true improvement on 11/1/99 if asked by the [Commission].

On March 29, 2000, Dr. H responded to a peer review report prepared by Dr. C and did not change his 33% IR. However, Dr. H again noted that "[i]t is left to the [Commission's] court system to decide whether the 33% should stand as mandated by the system or whether the maximally improved [ROM] should be substituted."

On August 9, 2000, the initial hearing in this case was convened by the hearing officer. At that hearing, the hearing officer granted a continuance to obtain the cervical and lumbar ROM worksheets from the designated doctor. On August 10, 2000, the hearing officer sent a letter to the designated doctor asking him to forward the ROM worksheets to the Commission. On October 16, 2000, the hearing was reconvened despite the fact that those worksheets had not yet been provided. The nature of the follow-up efforts of the Commission to ensure the designated doctor's compliance with the hearing officer's request for the worksheets is unclear from the record. However, there is also no indication that the designated doctor refused to provide the worksheets or that they are unavailable. Accordingly, the problem that prevented the hearing from going forward on August 9, 2000, had not been resolved by the time the hearing was reset on October 16, 2000, yet the hearing proceeded. The need for the worksheets did not disappear based upon the passage of time and although the delay is indeed unfortunate, the IR issue in this case was improperly resolved without obtaining clarification from the designated doctor. Thus, we remand the case for further proceedings.

On remand, the hearing officer should contact the designated doctor concerning his rating and propose three options. The designated doctor should be told that he can forward his ROM worksheets to the Commission, if he stands by the 33% IR. If the designated doctor provides the worksheets, they must be provided to the parties for their review so they may present arguments concerning whether the designated doctor's 33% IR is entitled to presumptive weight. We note, as did the hearing officer, that in his narrative report and his response to the peer review report, Dr. H stated that the ROM measurements of the treating doctor, not his own measurements, more accurately reflected the claimant's true impairment. However, Dr. H indicated that he did not use those figures to calculate the claimant's IR because he believed he was limited to using his own measurements. The designated doctor's understanding in that regard is incorrect. We have previously recognized that a designated doctor can rely on tests, exams, and reports done by others provided the IR ultimately assigned is a result of his independent professional judgment. Texas Workers' Compensation Commission Appeal No. 001703, decided September 6, 2000; Texas Workers' Compensation Commission Appeal No. 001526, decided August 23, 2000; Texas Workers' Compensation Commission Appeal No. 960406, decided April 15, 1996; and Texas Workers' Compensation Commission Appeal

No. 93095, decided March 19, 1993. Accordingly, Dr. H should also be advised that he may amend his IR to incorporate Dr. I's ROM rating in place of his own, if he believes, in the exercise of his professional judgment, that the resulting IR would more accurately represent the claimant's impairment if he did so. See Texas Workers' Compensation Commission Appeal No. 94617, decided July 1, 1994, and Texas Workers' Compensation Commission Appeal No. 972481, decided January 7, 1998 (Unpublished), for examples of cases where we have affirmed a decision giving presumptive weight to a designated doctor's IR where the designated doctor used another doctor's ROM figures to calculate the claimant's IR. As a third alternative, the designated doctor should be given the option of reexamining the claimant, if he believes it is necessary to do so.

We reverse the hearing officer's determination that the claimant's IR is 13% and remand the case for further proceedings consistent with 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.

Elaine M. Chaney
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Judy L. Stephens
Appeals Judge