APPEAL NO. 011597
FILED SEPTEMBER 7, 2001

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 December 12, 2000, with the record closing on February 14, 2001. The issues were the impairment rating (IR) of respondent/cross-appellant (claimant); claimant's date of maximum medical improvement (MMI); and the average weekly wage (AWW). The AWW issue was resolved by agreement at the hearing. The hearing officer determined that the claimant reached MMI on January 23, 1997, and that a second designated doctor needed to be appointed in order to resolve the dispute regarding the claimant's IR. Appellant/cross-respondent (carrier) appealed, contending that (1) claimant waited too long to raise the problems with the designated doctor's report; and (2) the hearing officer erred in failing to give presumptive weight to the designated doctor's report. Claimant responded that the hearing officer did not err in rejecting the designated doctor's report, but that he should have adopted the IR of another doctor. Claimant filed a cross-appeal asserting that (1) the hearing officer erred in giving presumptive weight to the designated doctor's MMI date; (2) the hearing officer should not have ordered that a second designated doctor be selected; and (3) the hearing officer erred in failing to find that claimant's MMI date was the statutory MMI date. Carrier responded that the MMI date found by the hearing officer was correct.

In Texas Workers' Compensation Commission Appeal No. 010481, decided April 18, 2001, the Appeals Panel reversed the hearing officer's determination relating to MMI and remanded the case for a second designated doctor to be appointed to determine MMI and IR. At the hearing on remand, and with the consent of the parties, the hearing officer agreed to combine the remanded issues with the additional issue of whether claimant's compensable injury extends to and includes a lower thoracic spine injury and/or mental depression with anxiety. The hearing officer determined in his decision on remand that claimant reached MMI on May 27, 1997; that claimant's IR is 15%; and that the compensable injury extends to and includes an injury to the upper, middle, and lower thoracic spine, but does not extend to mental depression and/or anxiety.

Carrier requests review of the hearing officer's decision on remand and asserts the following points of error:

> (1) the hearing officer exceeded his jurisdictional authority in finding that the second designated doctor improperly combined the IR percentages;
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> (2) the hearing officer exceeded his jurisdictional authority in determining that the compensable injury extends to the middle thoracic spine;
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> (3) the hearing officer erred in refusing to allow the testimony of the first designated doctor;

(4) the hearing officer erred in finding that opinions of the second designated doctor should be afforded presumptive weight;

(5) the hearing officer and Appeals Panel erred in determining that it was proper to appoint a new designated doctor;

(6) the hearing officer erred in finding that claimant's compensable injury extends to and includes the lower thoracic spine; and

(7) the Appeals Panel erred in its determination that carrier waived the argument that claimant waited too long to dispute the first designated doctor's findings because the issue was subsumed in the issues of MMI/IR.

The file does not contain a response from claimant. In her cross-appeal, the claimant asserts that the Texas Workers' Compensation Commission did not have jurisdiction to adjudicate the extent-of-injury issue, and, additionally, that the hearing officer erred in determining the following:

(1) claimant's dysphoric mood is not causally connected to her injury;

(2) claimant did not have a permanent impairment from her dysphoric mood or depression;

(3) the 5% impairment for depression assigned by the second designated doctor is not part of claimant's whole person IR because she does not have a mental disorder or emotional disturbance;

(4) the great weight of the medical evidence is contrary to the second designated doctor's determination that claimant had a permanent emotional disturbance;

(5) the compensable injury does not extend to and include depression with anxiety;

(6) the correct IR is 15%; and

(7) the second designated doctor's mathematical calculation of IR should not be afforded presumptive weight.

The carrier responds to claimant's cross-appeal, urging affirmance with respect to the determination that the compensable injury does not include mental depression with anxiety and, therefore, should not be considered in assessing the IR.

DECISION

We affirm the hearing officer's decision on remand.

The pertinent background facts of the case are outlined in Appeal No. 010481, *supra*.

Appealed Issues Relating to Extent of Injury

Claimant argues that the hearing officer did not have jurisdiction to decide the extent-of-injury issue along with the remanded issues of MMI and IR. Carrier argues that the hearing officer exceeded his jurisdictional authority in determining that the compensable injury extends to and includes the *middle* thoracic spine when the issue that was forwarded from the benefit review conference for resolution at the hearing was whether claimant's "compensable injury extend to and includes a *lower* thoracic spine injury and/or mental depression with anxiety." The evidence reflects that carrier accepted an injury to the upper thoracic spine only. However, medical records in evidence refer to all areas of the thoracic spine and the designated doctor considered the thoracic spine as a whole when he assessed a rating for loss of range of motion (ROM).

In numerous cases, the Appeals Panel has addressed the question of whether the existence and extent of a compensable injury were "threshold" determinations that had to be made in order to arrive at a determination of the correct IR. This approach was predicated on the concept that a permanent compensable injury had to be established or at least known or agreed upon before it could be given an IR. In Texas Workers' Compensation Commission Appeal No. 961337, decided August 12, 1996, the Appeals Panel considered it proper and necessary to resolve an extent of injury question when an issue of IR is raised. This case and others, *e.g.*, Texas Workers' Compensation Commission Appeal No. 950330, decided April 17, 1995, and Texas Workers' Compensation Commission Appeal No. 961191, decided August 5, 1996, when considered together, point out the difficulties in ignoring questions about the extent-of-injury when confronting an issue of the correct IR.

In the present case, the evidence confirms that an extent of injury determination was critical to resolving the issue of claimant's correct IR, as well as determining the portions of the thoracic spine to be included in the injury. Accordingly, we cannot agree that the hearing officer exceeded his jurisdictional authority by deciding to resolve the extent-of-injury issue along with the particular issues to be determined on remand.

Claimant asserts on appeal that the hearing officer erred in determining that the compensable injury does not extend to and include depression with anxiety and that she did not have permanent impairment stemming from her dysphoric mood. Carrier asserts

that the hearing officer erred in determining that the compensable injury extends to and includes the lower thoracic spine. Extent of injury is a question of fact. Texas Workers' Compensation Commission Appeal No. 93613, decided August 24, 1993. Section 410.165(a) provides that the contested case hearing officer, as finder of fact, is the sole judge of the relevance and materiality of the evidence as well as of the weight and credibility that is to be given the evidence. It was for the hearing officer, as trier of fact, to resolve the inconsistencies and conflicts in the evidence. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701, 702 (Tex. Civ. App.-Amarillo 1974, no writ). The trier of fact may believe all, part, or none of the testimony of any witness. Taylor v. Lewis, 553 S.W.2d 153, 161 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.); Aetna Insurance Co. v. English, 204 S.W.2d 850 (Tex. Civ. App.-Fort Worth 1947, no writ). When reviewing a hearing officer's decision for factual sufficiency of the evidence we should reverse such decision only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986). We are satisfied that the disputed findings relating to the extent-of-injury issue are sufficiently supported by the evidence.

Appealed Issues Relating to Waiver and Appointment of Second Designated Doctor

The carrier argues that, with respect to Appeal No. 010481, the Appeals Panel erred in its determination that carrier waived the argument that the claimant waited too long to dispute the first designated doctor's findings because the issue was subsumed in the issues of MMI and IR. Furthermore, carrier argues that it was improper for the Appeals Panel to determine that a second designated doctor should be appointed to determine MMI and IR. These matters are discussed in Appeal No. 010481, and will not be addressed again in this decision.

Appealed Issues Related to Second Designated Doctor's Findings

We briefly address carrier's contention that the great weight of other medical evidence did not overcome the opinions of the first designated doctor with regard to MMI and IR and that the opinion of the second designated doctor should not be afforded presumptive weight. For the reasons stated in Appeal No. 010481, we affirmed the hearing officer's determination that the first designated doctor's opinion should not be afforded presumptive weight and recommended that a second designated doctor be appointed to determine the date of MMI and assess an IR. Accordingly, we perceive no error in the hearing officer's refusal to afford presumptive weight to the opinions of the first designated doctor. In this same regard, therefore, the hearing officer did not err in according presumptive weight to the report of the second designated doctor instead of that of the first designated doctor.

We next address claimant's argument that the hearing officer erred in finding that the second designated doctor incorrectly assessed a 5% impairment for mental disorder, behavioral impairment or emotional disorder of a permanent nature. Because we affirm the hearing officer's determinations that the compensable injury does not extend to and

include depression with anxiety and that claimant did not have permanent impairment from her dysphoric mood, we cannot agree that the hearing officer erred in determining that the 5% impairment assessed for mental disorders was not warranted and should not be included in claimant's overall IR.

With respect to carrier's argument that the hearing officer, on his own motion, exceeded his jurisdictional authority in finding that the second designated doctor made a mathematical error in combining the impairment percentages, thereby producing an incorrect IR, we have previously held that a hearing officer may apply a mathematical correction to a certification of IR when doing so simply corrects an obvious mathematical error and does not involve the exercise of judgement as to what the proper figures were. Texas Workers' Compensation Commission Appeal No. 992223, decided November 15, 1999. In this case, the hearing officer was required to take out the 5% impairment for mental disorders, as he had determined that this was not part of the compensable injury. In doing so, he was required to recombine the impairments and arrive at a new IR. In doing so, the hearing officer noted mathematical errors by the designated doctor in combining the various impairments. Under the facts of this case, we perceive no error in this regard.

As the hearing officer correctly points out, page 74 of the Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association provides that, for the region of the spine that is being evaluated, the Combined Values (CV) Chart is to be used to combine the diagnosis-based impairment for that region with the impairment due to limited ROM, and then the same steps are to be repeated for the secondarily impaired spinal regions. In this instance, a 12% impairment of the cervical spine results under the CV Chart when the 6% impairment for specific disorder of the cervical spine is combined with the 6% impairment of the cervical spine due to limited ROM. Combining this 12% with the 2% impairment of the thoracic spine due to limited ROM, yields a 14% impairment, which is then combined with the 1% impairment for sensory deficit, resulting in a 15% whole person IR. Since the impairment values assigned by the second designated doctor can be correctly combined using the CV Chart without resorting to medical judgment, and a correction of the IR involves a mere mathematical calculation, in accordance with our prior decisions on correction of errors of such type, we affirm the hearing officer's decision that claimant's IR is 15%. *See* Texas Workers' Compensation Commission Appeal No. 950472, decided May 8, 1995; Texas Workers' Compensation Commission Appeal No. 941208, decided October 26, 1994; Texas Workers' Compensation Commission Appeal No. 950838, decided July 5, 1995.

Exclusion of First Designated Doctor's Testimony

Carrier appeals the hearing officer's decision to exclude the testimony of the first designated doctor. We review the hearing officer's ruling on an abuse-of-discretion standard. We have held that to obtain reversal of a judgment based upon error in the admission or exclusion of evidence, the complaining party must show the error was reasonably calculated to cause and probably did cause the rendition of an improper

judgment. Hernandez v. Hernandez, 611 S.W.2d 732 (Tex. Civ. App.-San Antonio 1981, no writ). In this case, the hearing officer excluded the testimony of the first designated doctor on the basis that it would not be relevant. In our prior decision, the Appeals Panel determined that the second designated doctor was properly appointed in this case. Carrier sought to have the first designated doctor testify to show that the appointment of the second designated doctor was not appropriate. We will not revisit this issue again, as it has already been addressed. Carrier also contends that the first designated doctor's testimony was relevant to the issue of extent of injury. The report of the first designated doctor was included in the record. There is nothing that was offered to show what the specifics of the first designated doctor's testimony would have been. Given the state of the record, we cannot conclude that there was error shown. We conclude that the exclusion of this testimony was not reasonably calculated to cause, nor did it probably cause, the rendition of an improper decision.

Conclusion

For the foregoing reasons, we affirm the hearing officer's decision and order on remand.

The true corporate name of the insurance carrier is **AMERICAN STATES INSURANCE COMPANY** and the name and address of its registered agent for service of process is

LINDA LEWIS
1600 NORTH COLLINS BLVD., STE. 300
RICHARDSON, TX 75080.

Judy L. S. Barnes
Appeals Judge

CONCUR:

Michael B. McShane
Appeals Judge

Philip F. O'Neill
Appeals Judge