APPEAL NO. 012406
FILED NOVEMBER 30, 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 (CCH) was held on September 14, 2001. With regard to the sole issue before him, the hearing officer determined the appellant (claimant herein) has a 13% impairment rating (IR). The claimant appeals arguing that the only two certifications of IR in evidence based upon a physical examination are a 25% IR certified by the designated doctor and a 26% IR certified by the treating doctor. The claimant argues that the hearing officer has erred in adopting a 13% IR of peer review doctor who did not examine the claimant. The respondent (carrier herein) replies that the hearing officer properly adopted those portions of the designated doctor's IR assessment that the peer review doctors stated were valid.

DECISION

The decision of the hearing officer is reversed and a new decision is rendered that the claimant's IR is 25% based upon the report of the designated doctor.

It was stipulated that the claimant sustained a compensable injury on _____; that the claimant attained maximum medical improvement (MMI) on March 25, 2001; and that Dr. M was the designated doctor selected by the Texas Workers' Compensation Commission (Commission) to assess the claimant's IR and MMI date. Medical records indicate that the claimant injured her back at work lifting boxes and show that she underwent multiple surgeries for this injury, including a three-level posterior interbody fusion. Dr. Y, the claimant's treating doctor, certified on a Report of Medical Evaluation (TWCC-69) dated April 6, 2001, that the claimant attained MMI March 25, 2001, with a 26% IR. The carrier disputed this certification and the Commission selected Dr. M to be the designated doctor. Dr. M certified on a TWCC-69 dated May 2, 2001, that the claimant attained MMI on March 25, 2001, with a 25% IR. Dr. B, the carrier's peer review doctor, in a letter of May 14, 2001, criticizes Dr. M's certification and states that the claimant's IR is 12%. Dr. M responds to Dr. B's criticisms in a letter June 4, 2001, and states that his opinion as to the claimant's IR is unchanged. Dr. Ya, who is employed by the same peer review service as Dr. B, testified at the CCH. In his testimony he renews Dr. B's earlier criticisms of Dr. M's IR and states that the claimant's IR is 13%. It is clear from the record that Dr. B and Dr. Ya never examined the claimant.

Section 408.125(e) provides:

> If the designated doctor is chosen by the commission, the report of the designated doctor shall have presumptive weight, and the commission shall base the impairment rating on that report unless the great weight of the other medical evidence is to the contrary. If the great weight of the medical evidence contradicts the impairment rating contained in the report of the designated doctor chosen by the commission, the commission shall adopt

the impairment rating of one of the other doctors.

We have previously discussed the meaning of "the great weight of the other medical evidence" in numerous cases. We have held that it is not just equally balancing the evidence or a preponderance of the evidence that can overcome the presumptive weight given to the designated doctor's report. Texas Workers' Compensation Commission Appeal No. 92412, decided September 28, 1992. We have also held that no other doctor's report is accorded the special, presumptive status accorded to the report of the designated doctor. Texas Workers' Compensation Commission Appeal No. 92366, decided September 10, 1992; Texas Workers' Compensation Commission Appeal No. 93825, decided October 15, 1993.

The hearing officer found that Dr. M's rating was contrary to the great weight of the medical evidence, apparently based upon the criticisms of Dr. B and Dr. Ya. The hearing officer then proceeds to create a 13% IR by removing the values from Dr. M's IR due to loss of range of motion (ROM), the rating of spinal stenosis and sensory loss. We fail to appreciate how the hearing officer could simultaneously invalidate Dr. M's report and at the same time rely upon it in fashioning an IR. This lends credence, particularly in light of the hearing officer's statement in the discussion portion of his decision, that he found the most persuasive IR opinion to be that of Dr. Ya, to the argument that he is in fact attempting to adopt Dr. Ya's IR. The hearing officer is not permitted to adopt an IR that is not based upon a physical examination of the claimant. Texas Workers' Compensation Commission Appeal No. 94725, decided July 14, 1994; Texas Workers' Compensation Commission Appeal No. 941640, decided January 13, 1995. Dr. Ya did not examine the claimant and therefore his IR may not be adopted by the hearing officer.

Even more significant is that we find no basis for the hearing officer's finding that the great weight of the medical evidence is contrary to Dr. M's IR certification. Dr. M's IR assessment for loss of ROM is valid according the protocols of the Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association (AMA Guides). The criticism by Dr. B and Dr. Ya of Dr. M's assessing IR for loss of ROM is not based upon language in the AMA Guides, but on an article concerning ROM (specifically straight leg testing) written by Dr. Dr. C. Dr. M in his letter of June 4, 2001, points to other articles which take a different view from that of Dr. C. This is clearly a difference of medical opinion, rather than a question of whether or Dr. M's assessment of IR due to loss of ROM met the protocols set out in the AMA Guides.

Dr. B and Dr. Ya also criticize Dr. M for including an assessment for spinal stenosis. The real issue here appears to hinge on whether or not the claimant's spinal stenosis is related, by aggravation or otherwise, to the claimant's injury. Dr. M obviously believes that it is; Dr. B and Dr. Ya believe that it is not. Again this is a mere difference of medical opinion. Finally, Dr. B and Dr. Ya criticize Dr. M for assessing IR due to sensory loss without documenting a loss of function. Dr. Ya's description of the meaning of this criticism appears to boil down to an opinion that before sensory loss can be rated it must be shown

to interfere with a claimant's ability to perform his or her preinjury job. This would harken back to the law prior to the 1989 Act where compensation was determined by loss of wage earning capacity and not to the physical impairments as provided for by the 1989 Act. Neither Dr. Ya nor Dr. B provide any explanation as to why the AMA Guides, which provide for impairment assessment for sensory loss, would preclude such an assessment. The mere differences of medical opinions concerning the application of the AMA Guides in the present case do not constitute the great weight of medical evidence necessary to overcome the presumptive weight attached by the 1989 Act to the IR assessment of the designated doctor. We, therefore, reverse the hearing officer's decision and render a new decision that the claimant's IR is 25% based upon the report of the designated doctor. We order the carrier to pay income benefits, including interest for any accrued unpaid benefits, consistent with this decision.

The true corporate name of the insurance carrier is **TEXAS HOSPITAL INSURANCE EXCHANGE** and the name and address of its registered agent for service of process is

ROBERT DION LAWRENCE
6300 LACALMA, SUTIE 500
AUSTIN, TEXAS 78752.

Gary L. Kilgore
Appeals Judge

CONCUR:

Elaine M. Chaney
Appeals Judge

Susan M. Kelley
Appeals Judge