APPEAL NO. 020345
FILED MARCH 29, 2002

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 January 16, 2002. The hearing officer determined that the respondent's (claimant) impairment rating (IR) was 42% as assessed by the treating doctor and that the designated doctor's 14% IR was contrary to the great weight of the other medical evidence.

The appellant (carrier) appeals the hearing officer's determinations regarding the IR and the hearing officer's evidentiary ruling on the admissibility of the claimant's exhibits and ruling allowing Dr. T to testify. The claimant responds, urging affirmance.

DECISION

Reversed and remanded.

The claimant was a maintenance man and the parties stipulated that he sustained a compensable (cervical) injury on _____. The parties further stipulated that the claimant underwent cervical spinal surgery (a five-level decompressive laminectomy at C3 through C7) on June 15, 2000; that the claimant reached maximum medical improvement (MMI) on June 5, 2001; that Dr. T was the treating doctor and had assigned a 42% IR; and that Dr. G was the designated doctor and had assigned a 14% IR.

The claimant had been referred to Dr. T by another doctor and Dr. T's 42% IR was based on a 13% impairment from Table 49 of the Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association (AMA Guides), 16% impairment for loss of range of motion (ROM), and 20% impairment from Chapter 4 (Section 4.16 using station and gait criteria) combined to arrive at the 42% IR. The claimant was examined by Dr. RG who, in a report dated July 3, 2001, commented that the claimant "has residual signs of myelopathy." Dr. G was subsequently appointed as the designated doctor and on a Report of Medical Evaluation (TWCC-69) and narrative both dated July 22, 2001, assessed a 14% IR based on Table 49, Section (II)(E) for 9% impairment "plus 5 operative levels at 1% which equals 5%" for a total 14% IR. Attached to Dr. G's report was a partially completed Figure 83a Cervical ROM worksheet.

In a letter dated September 13, 2001, a Texas Workers' Compensation Commission (Commission) disability resolution officer (DRO) wrote Dr. G saying:

> Some questions were raised concerning your report. Will you please respond to the following: Please review the enclosed letter submitted by [claimant] and advise if it changes your prior findings as to his [IR].

The referenced letter from the claimant was not in the file or exhibits and therefore we have no way of knowing what was asked. Dr. G replied by letter dated September 18, 2001, stating:

> I have reviewed all of these documents including my own notes, and I do not wish to change my evaluation.

A benefit review conference (BRC) was held on November 15, 2001. The claimant attended and was assisted by an ombudsman, however, he apparently announced his intention of retaining an attorney. The claimant was apparently advised of the necessity of a timely exchange of documents. The claimant testified "The ombudsman told me to get a lawyer, and the next day I went and got a lawyer. I had plenty of time [to exchange the documents]." When the conversation with the ombudsman took place and when the claimant actually retained an attorney is not clear. The carrier exchanged an Employer's First Report of Injury or Illness (TWCC-1), Dr. G's report, the clarification letter, response, and a witness list which included Dr. T on November 30, 2001. In a letter dated December 6, 2001, the claimant's attorney advised the Commission that they had "been retained this day" to represent the claimant and requested, and were given, Subpoenas Duces Tecum for various health care providers. Attached was a letter of representation dated December 6, 2001. The claimant's exchange letter, together with the witness list (which included Dr. T) is also dated December 6, 2001. Subsequently, at the CCH, the claimant offered 11 exhibits and requested Dr. T be called as a witness. Many, if not most, of the exhibits offered by the claimant were the medical reports obtained by subpoena to the carrier. The carrier objected on the basis that the claimant had not timely exchanged the exhibits and witness list pursuant to Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 142.13 (Rule 142.13) which requires exchange "no later than 15 days after the [BRC]" and thereafter "as it becomes available." Rule 142.13(c)(3) has a provision that the hearing officer may make "a determination whether good cause exists for a party" not previously having exchanged documents. The hearing officer in this case admitted the claimant's exhibits, and allowed Dr. T to testify, over the carrier's objections of lack of timely exchange. The hearing officer ruled that the claimant need not make a cross-exchange with documents and the witness list previously having been exchanged by the carrier, citing Appeals Panel decisions on such cross-exchange. We believe such ruling is tenuous, given that the carrier had only exchanged a very abbreviated exhibit list. However, we also believe that the hearing officer could have made a finding of good cause based on the claimant's attorney's representation that she had not been retained until December 6, 2001, and had immediately instituted the exchange process. We will uphold the hearing officer's ruling if it can be sustained on any reasonable basis supported by the evidence. Daylin, Inc. v. Juarez, 766 S.W.2d 347, 352 (Tex. App.-El Paso 1989, writ denied).

Regarding the IR, Dr. T testified at the CCH that using the figures in Dr. G's partially completed ROM worksheet would result in some additional impairment for ROM, which Dr. G had not assessed and does not reflect "an excellent ROM" as noted in Dr. G's narrative report. Dr. T also explained that he had rated the claimant's cervical myelopathy at 20%

impairment from Chapter 4, Section 4.16 of the AMA Guides. Dr. G had not given a rating for cervical myelopathy.

The hearing officer, and the parties, recognize that the report of the designated doctor carries presumptive weight. Section 408.125. If the hearing officer, in rejecting the designated doctor's report, believed that the "great weight of other medical evidence is to the contrary" to that of the designated doctor, the hearing officer must detail the evidence relied upon, and state why it is to the contrary and in what regard the other medical evidence so greatly outweighs the designated doctor's report. Texas Workers' Compensation Commission Appeal No. 011327, decided July 24, 2001. We have further held that a designated doctor's report should not be rejected absent a "substantial basis" for doing so. Texas Workers' Compensation Commission Appeal No. 94075, decided February 28, 1994. The hearing officer, in this case, rejected the designated doctor's report on the IR stating:

> In the instant case, the great weight of the other medical evidence is to the contrary of the designated doctor's report. This is not merely a question of a difference in medical opinion. In the instant case, the designated doctor simply did not rate the entire injury, and chose to ignore his own findings on severely restricted cervical [ROM], and when asked to clarify, still could not explain his failure to rate cervical [ROM].

In this case, the hearing officer held that because the designated doctor did not rate the cervical myelopathy, he did not rate the "entire compensable injury." We disagree. The compensable injury was a neck or cervical injury. Whether that injury included one or five discs or did or did not include cervical myelopathy is a medical question, not an extent-of-injury question. We reverse the hearing officer's finding that Dr. G did not rate the claimant's entire injury. The hearing officer also found that Dr. G did not explain his failure to rate the claimant's "severely restricted cervical [ROM]," or his failure to rate the entire injury, i.e. the cervical myelopathy. To some extent, we agree with the hearing officer, however, as previously noted, we are unable to determine what Dr. G was asked to clarify in the DRO's September 13, 2001, letter. Therefore, we are remanding the case for the hearing officer to seek clarification from the designated doctor on the following specific points:

1) Why did Dr. G submit the incomplete ROM Figure 83a worksheet without completing it or without assessing an impairment on the partial figures.

2) Comment whether, in Dr. G's opinion, the claimant has or does not have cervical myelopathy, particularly in view of Dr. T's testimony that objective testing such as "upper motor neuron" signs and ankle "clonus" show cervical myelopathy which should be rated under Chapter 4, Section 4.16, page 99, Station and Gait of the AMA Guides. Dr. G is also to have available all the other medical records,

including reports of Dr. T and Dr. RG and other reports, including the MRI of April 8, 2000.

When Dr. G's response becomes available, it is to be sent to the parties for comment. No other new evidence is to be considered.

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 which was amended June 17, 2001, to exclude Saturdays and Sundays and holidays listed in Section 662.003 of the Texas Government Code in the computation of the 15-day appeal and response periods. *See* Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

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

CORPORATION SERVICE COMPANY
800 BRAZOS, SUITE 750, COMMODORE 1
AUSTIN, TEXAS 78701.

Thomas A. Knapp
Appeals Judge

CONCUR:

Elaine M. Chaney
Appeals Judge

Gary L. Kilgore
Appeals Judge